Advisory Committee on Evidence Rules
Minutes of the Meeting of November 13, 2020
Via Microsoft Teams

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 13, 2020 via Microsoft Teams.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly Dick
Hon. Thomas D. Schroeder
Traci L. Lovitt, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Hon. Richard Donoghue, Esq., Principal Associate Deputy Attorney General, Department of Justice
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Elizabeth Shapiro, Department of Justice
Ted Hunt, Esq., Department of Justice
Timothy Lau, Esq., Federal Judicial Center
Andrew Goldsmith, Esq., Department of Justice
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Brittany Bunting, Rules Committee Staff

Members of the public attending were:

Brian J. Kargus, OTJAG Criminal Law Division
Sri Kuehnlenz, Esq., American College of Trial Lawyers
Mark S. Cohen, Esq., American College of Trial Lawyers
Amy Brogioli, American Association for Justice
Abigail Dodd, Shell Oil Company
Alex Dahl, Lawyers for Civil Justice
Caitlin Gullickson, CLS Strategies
Sam Taylor, CLS Strategies
Julia Sutherland, CLS Strategies

John G. McCarthy, Federal Bar Association
Susan Steinman, American Association for Justice
Alex Biedermann, Associate Professor University of Lausanne
Lee Mickus, Esq., Evans Fears & Schuttert LLP
John Hawkinson, Freelance Journalist
Jakub Madej
Leah Lorber, GSK
Aaron Wolf, FJC AAAS Fellow
Kathleen Foley, FJC Fellow
Habib Nasrullah, Esq., Wheeler Trigg O'Donnell LLP
Gabby Gannon, Student, University at Buffalo
Heather Abraham, Student, University at Buffalo

I. Opening Business

The new Chair of the Evidence Advisory Committee, the Honorable Patrick J. Schiltz, opened the meeting by welcoming everyone and introducing himself. All Committee members and liaisons introduced themselves as well. The Chair then acknowledged and thanked the previous Committee Chair, the Honorable Debra A. Livingston, for her service on the Committee, noting that her new role as Chief Judge of the Second Circuit Court of Appeals had prevented her from continuing as Chair. The Chair then read a letter to the Committee from Judge Livingston in which she thanked committee members for their thorough, thoughtful, and collegial exchange. She gave special thanks to Judge Schroeder for chairing a subcommittee on FRE 702 and to Dan Capra for his excellent stewardship as Reporter. She closed by noting her pride in the important rulemaking work accomplished during her tenure as a committee member and as Chair.

Professor Capra then gave a special thanks and farewell to Judge Tom Marten, who is concluding his service as a member of the Committee. Professor Capra noted Judge Marten's profound contributions to the work of the Committee and the wealth of information and effort he provided during his tenure. Judge Marten thanked the Reporter for his kind words, and stated that he was grateful to have worked with a group of such brilliant people. Judge Marten noted the extraordinary thought and effort that goes into the rulemaking process, with attention given to every single word considered.

The Chair advised the Committee that two new members would be joining the Committee for the next meeting: Judge Richard J. Sullivan of the Second Circuit Court of Appeals and Arun Subramanian, Esq. of Susman Godfrey L.L.P.

II. Approval of Minutes

Due to the covid-19 pandemic during the spring of 2020, the Advisory Committee on Evidence Rules did not hold a spring meeting. Therefore, the Chair moved approval of the Minutes of the Advisory Committee meeting from the Fall of 2019. The Minutes of the Fall 2019 meeting were approved by acclamation.

III. Report on June 2020 Standing Committee Meeting

The Reporter gave a report on the June 2020 meeting of the Standing Committee. He reminded the Committee that the Evidence Advisory Committee presented no action items at the June meeting. The Reporter and Judge Livingston informed the Standing Committee on the Committee's continuing work on Rules 106, 615, and 702. They also reported on the potential need for an "emergency" evidence rule pursuant to the CARES Act that would enable the suspension of certain evidence rules during an emergency (such as the covid-19 pandemic). Based upon their careful research and review, they reported that there was no need for an emergency evidence rule. The Reporter noted that he had included a memorandum regarding the emergency rule issue in the Agenda materials and that the Committee would be given an opportunity to provide input on the issue later in the meeting.

IV. Potential Amendment to FRE 702

The Chair opened the substantive agenda with a discussion of FRE 702. He noted that the Committee had been considering two potential amendments to FRE 702 for the past few years: 1) an amendment that would clarify the application of the FRE 104(a) preponderance standard of admissibility to FRE 702 inquiries and 2) an amendment that would prevent an expert from "overstating" her conclusions. The Chair proposed to discuss each potential amendment in turn, noting that no votes would be taken at the meeting. He explained that the goal of the discussion would be to narrow amendment alternatives and to have a proposal that could be voted upon at the Spring 2021 meeting.

A. Amending FRE 702 to Clarify the Application of FRE 104(a)

The Reporter reminded the Committee that the FRE 104(a) issue came to the Committee's attention through a law review article by David Bernstein & Eric Lasker. The Reporter's research --- as well as research provided by a number of parties who had submitted comments to the Committee --- reveals a number of federal cases in which judges did not apply the preponderance standard of admissibility to the requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury. In other cases, the Reporter noted wayward language by federal courts suggesting that FRE 702 inquiries were ones of weight, even where the judge appeared to apply the appropriate FRE 104(a) standard. The Reporter noted that based on the discussion at previous meetings, all Committee members were in agreement that the FRE 104(a) preponderance standard applies to a trial judge's admissibility findings under FRE 702, and that courts should state that they are applying that standard.

The Committee has been considering an amendment to FRE 702 to expressly provide that the trial judge must find the requirements of the Rule satisfied by a preponderance of the evidence. The Reporter noted that one concern about such an amendment might be that FRE 104(a) already applies to FRE 702 under existing rules. Indeed, he noted that express preponderance language likely would have been rejected in 2000 when Rule 702 was amended to reflect the *Daubert* opinion *because* the preponderance standard was already baked into the existing Rule. Twenty

years later -- when it is clear that federal judges are not uniformly finding and following the preponderance standard -- the justification for a clarifying amendment exists. He emphasized that the FRE 104(a) standard is not expressly stated in FRE 702. Litigants and judges need to look to a footnote in *Daubert* providing that FRE 104(a) governs Rule 702 determinations and then to FRE 104(a) (which does not actually explicitly set out a preponderance of the evidence standard) and then to the Supreme Court's decision in *Bourjaily* (which interprets Rule 104(a) as requiring a preponderance) to learn that such findings are to be made by the trial judge by a preponderance of the evidence. The Reporter explained that this circuitous route to the preponderance standard is a subtle one that has been missed by many courts and that an amendment to Rule 702 could improve decision making by expressly stating the applicable standard of proof. He further noted that the *Daubert* opinion included some language about "shaky" expert testimony being a question for the jury, further exacerbating confusion.

Should the Committee favor an amendment, the Reporter noted that the next issue to be discussed is the placement of the preponderance requirement. There are two possibilities. First, it could be added to the opening paragraph of the Rule, and the expert qualification requirement could be moved out of the opening paragraph to the end of the Rule in a new subsection (e). The Reporter explained that a draft of this potential amendment could be found on page 154 of the Agenda materials. The principal benefit of this approach is that the preponderance standard would expressly cover *all* Rule 702 requirements, including the expert's qualifications. The downside of that approach is that it would significantly disrupt the structure of the existing Rule and would place an expert's qualifications (typically the first question) as the last requirement. The second approach would add preponderance of the evidence language to the Rule 702 introductory paragraph after the existing and well-known language regarding an expert's qualifications. This would clarify its application to the Rule 702(b)-(d) requirements, which many courts are currently missing. Although the new language would not specifically apply to the finding of an expert's qualification, Rule 104(a) still governs that determination and courts uniformly understand that the issue of an expert's qualifications is for the judge and not the jury. Any potential negative inference that might be drawn could be addressed in a Committee note. The Reporter alerted the Committee that this second drafting option appeared on page 152 of the Agenda. He explained that it would be helpful to get the Committee's thoughts on whether to propose a 104(a) amendment and, if so, which draft is preferred.

Committee members expressed substantial support for a preponderance amendment. All agreed that the existing circuitous path through *Daubert*, Rule 104(a), and *Bourjaily* to get to the preponderance standard for Rule 702 was challenging for lawyers and judges. Committee members opined that a trial judge ought to be able to open the Federal Rules of Evidence and understand the rule to be applied from the text. One Committee member observed that the federal cases and comments from members of the public had revealed a pervasive problem with courts discussing expert admissibility requirements as matters of weight. Another Committee member agreed that trial courts can be tempted to kick difficult Rule 702 questions to the jury. Committee members noted that courts routinely conduct a preponderance of the evidence inquiry with respect to admissibility requirements in other evidence rules, but that such a methodical analysis is rare in applying Rule 702. Committee members expressed confidence that adding an express preponderance requirement to the language of Rule 702 would provide a clear signal to judges that would improve consideration of expert opinion testimony. Another Committee member noted that

more methodical consideration of Rule 702 by trial judges would aid courts reviewing the admissibility of expert testimony on appeal.

With respect to the form of a potential amendment to Rule 702, Committee members were in agreement that the draft amendment on page 152 of the Agenda that would add the preponderance requirement after the existing language regarding an expert's qualifications would be superior, because it would address the problem found in the cases and yet would retain the existing structure of Rule 702. The Department of Justice agreed that a preponderance amendment would be a helpful clarification to the Rule and expressed support for the draft amendment on page 152. The Department suggested that it may favor some modifications to the proposed Advisory Committee note and reiterated its strong opposition to any amendment to Rule 702 to regulate overstatement of expert testimony. The Federal Public Defender also expressed support for an amendment to add a preponderance standard as reflected in the draft on page 152 of the Agenda, noting that such an amendment would make it clear that the trial judge is supposed to act as the gatekeeper with respect to expert opinion testimony.

One Committee member inquired whether adding a preponderance standard would impose an obligation upon a trial judge to police Rule 702 requirements *sua sponte*. The Reporter explained that the amendment would not impose such an obligation – as with other rules, a trial judge operating under an amended Rule 702 could act *sua sponte* if she so chose, but would not need to act without objection. The Chair agreed with the Reporter's interpretation of the potential amended language. The Federal Defender inquired about whether a preponderance amendment would affect a litigant's ability to attempt to elicit a new expert opinion during cross examination and whether the court would have to pause the trial to conduct a preponderance inquiry anew. The Reporter explained that the amendment would not affect the procedure trial judges already follow when this happens at trial. The Chair noted that this issue is unlikely to arise in civil cases due to pretrial discovery obligations and the exclusion of undisclosed opinions. If it comes up in the criminal arena where there are currently fewer discovery obligations, the trial judge has to have a recess or hearing to resolve *Daubert* questions. An amendment to add a preponderance requirement would not alter that process.

The Chair rounded out the discussion, thanking the Committee for its thoughtful comments and noting his desire to have the Committee focus on the preponderance issue closely, because prior discussions had focused largely on the issue of overstatement. He described his initial disinclination to amend Rule 702 to add an express preponderance requirement. He confessed trepidation about sending an unusual amendment clarifying an existing rule to the Supreme Court and expressed sympathy for complaints about constant amendments to the Federal Rules. But the Chair explained that despite initial reservations, he had come to favor the proposal. The Chair stated that Circuit court language at odds with the language of Rule 702 presents a serious concern. He further noted being struck by Judge Campbell's comment at a prior meeting that attorneys and trial judges often do not discuss Rule 702 issues in Rule 104(a) preponderance terms. Because the Rule lacks an express reference to the preponderance standard, the Chair observed that the Rule may indeed be a part of the problem. He further stated that unintended consequences seemed unlikely for an amendment adding an express preponderance standard to the Rule.

Hearing unanimous approval from the Committee to move forward with a preponderance amendment akin to the one on page 152 of the Agenda materials, the Chair asked the Reporter to prepare that draft for the spring meeting, along with a draft Advisory Committee note. The Chair explained that the Committee could discuss the details of the note at the spring meeting, but emphasized that an Advisory Committee note would need to state that a preponderance amendment in the text of Rule 702 was not intended to create a negative inference about applying the standard to other rules.

Judge Bates commented that the Standing Committee shared the Chair's reluctance to advance unnecessary amendments, but opined that a preponderance amendment sounded like a needed clarification that would aid practice. Accordingly, Judge Bates anticipated no resistance from the Standing Committee to such a proposal.

The Reporter notified the Committee that some federal courts have also added an intensifier to the Rule 702(a) requirement that an expert's opinion "will help" the trier of fact. These courts have required that an expert's opinion will "appreciably help." The Reporter explained that this misstatement of the Rule 702 standard by some courts did not by itself justify an amendment to the Rule, but noted that he had included language in brackets in the draft Advisory Committee note to the proposed preponderance amendment to emphasize that expert opinion testimony need only "help" and need not "appreciably help" under Rule 702. The Chair asked the Reporter to leave that bracketed language in the draft note to be taken up and considered by the Advisory Committee at its spring meeting.

B. Regulating Overstatement of Expert Opinions

The Chair then turned the Committee's discussion to a potential amendment to Rule 702 that would prevent an expert from "overstating" the conclusions that may reasonably be drawn from a reliable application of the expert's principles and methods. The Chair noted that the overstatement proposal originated from concerns regarding forensic testimony in criminal cases. Because the Department of Justice had filed a letter with the Committee opposing an overstatement amendment, the Chair first recognized the Department of Justice to describe its opposition.

Elizabeth Shapiro summarized the Department's objections to an overstatement amendment. She argued that the PCAST Report, which launched the Committee's review of Rule 702, was obsolete already due to the rapidly evolving nature of forensic examination. She highlighted the Department of Justice's work developing uniform language governing the testimony of forensic experts in numerous disciplines to control the risk of overstatement. She opined that the DOJ's uniform language was a healthier and more nimble response to concerns about forensic testimony than a rule change. She also noted that national organizations with expertise in forensics have been examining and adopting the Department's uniform language. She described recent opinions by district courts in the District of Columbia and the Western District of Oklahoma referencing the Department's uniform language in ruling on *Daubert* motions. Finally, she opined that the Committee should not propose an amendment to Rule 702 to regulate expert overstatement because the existing requirements of the Rule already permit such regulation, and that such an amendment could be thought to be an excuse for a lengthy Advisory Committee note on forensic evidence --- that would be obsolete before it could take effect.

Ted Hunt, the Department's expert on forensic testimony, next argued that existing Rule 702 is being applied effectively by federal courts to police forensic testimony, and that no rule change should be made. He described tremendous change in the forensics community since 2009. In particular, he noted studies completed since the PCAST Report revealing false positive error rates of less than 1% in forensic disciplines such as fingerprint identification and ballistics. He noted that even these low rates of error failed to account for the fact that a second reviewing examiner required by protocols in forensic laboratories would catch even these few errors (though he did not mention whether those second reviewers knew the results of the original test). He emphasized that pattern comparison testimony is a skill-based, experience-based method and that courts are appropriately treating it as such. He acknowledged the difficulty in extrapolating error rates to all forensic examiners in all disciplines, making the identification of general error rates challenging. Still, he highlighted the Department's work in developing and publishing uniform language for 16 forensic disciplines. This language prohibits overstatement by experts and eliminates problematic legacy language (such as "zero error rate" or "infallible"). He emphasized that concessions of fallibility are now routinely made by forensic experts. He suggested that the federal caselaw may not have entirely caught up with this rapid progress, but that courts were starting to reference and utilize the uniform language appropriately. In sum, he opined that existing Rule 702 is working optimally with respect to forensic testimony and should not be amended.

One Committee member asked whether the uniform language adopted by the Department applies to forensic examiners from state laboratories who testify in federal cases. The Department acknowledged that the uniform language is not binding on state witnesses, but described movement in national organizations to adopt the Department's uniform language, leading to the hope that state and local labs will not make claims at odds with that uniform language going forward.

Next, the Federal Defender voiced her strong support for an overstatement amendment to Rule 702. She reminded the Committee that erroneous forensic testimony could lead and has led to false convictions. She called attention to the voluminous digest of federal cases collected by the Reporter in the Agenda materials, illustrating the many times that forensic (and other) experts had been permitted to make clear overstatements about the conclusions that may reliably be drawn from their methods. She acknowledged the Department's frustration with the PCAST Report but pointed out that the Department may make the same arguments it is making about the reliability of its forensic testimony in court before a trial judge to overcome an objection based upon overstatement. She further noted that forensic testimony in state courts is particularly problematic and that even perfect adherence by the Department to its uniform language would be inadequate to fix the problem in state courts --- a problem that might be solved by the promulgation of a federal model. She noted the importance of adding a specific prohibition on overstatement to Rule 702 to alert courts to focus on that point. An amendment to Rule 702 would prevent the issue of overstatement from being ignored or overlooked and would signal to courts that they have a gatekeeping responsibility with respect to an expert's ultimate conclusions on the stand. In sum, she opined that an amendment would not prevent the government from presenting and defending reliable forensic testimony, but would prevent egregious overstatements by testifying experts.

The Chair asked the Federal Defender whether the problem with overstated expert testimony was really a "Rules" problem or whether it represents more of a lawyering problem. He expressed skepticism that trial judges don't realize they have power to regulate expert conclusions and suggested that an amendment to Rule 702 will not solve the problem if defense lawyers fail to challenge expert testimony and bring concerns to the attention of the trial judge. The Federal Defender responded that a Rule change would put everyone – trial judges and defense attorneys alike – on notice that expert testimony overpromising on conclusions that can be drawn from a forensic examination should be challenged and regulated. She stated that nothing in the current Rule signals the need for an inquiry into the form or extent of the expert's conclusions and urged the need for an amendment to make such an inquiry express and mandatory.

Rich Donoghue, Principal Associate Attorney General for the Department of Justice, argued that the problem with forensic expert testimony, if any, was more of a lawyering issue and not so widespread as to warrant an amendment. Elizabeth Shapiro argued that an amendment to the Federal Rules of Evidence would not fix a problem largely existing in state courts, and that national forensic organizations were working to resolve issues at both the federal and state level. Judge Kuhl noted that California courts do not use *Daubert* but that it has nonetheless had a significant effect on state court handling of expert testimony. She suggested that an amendment to Federal Rule of Evidence 702 would be looked to in the state courts. The Reporter agreed, explaining that the Federal Rules are a model for state evidence rules and are even adopted automatically in some states.

The Federal Defender suggested that the issue was a simple and clear cost/benefit analysis. She urged that the benefit of an amendment would be to protect people from going to prison unnecessarily by signaling an important inquiry into forensic testimony, and that the only cost associated with the amendment might be to require prosecutors to do the work of defending their forensic experts in the face of an objection armed with the arguments and information that the Department has presented to the Committee. She suggested that human liberty balanced against additional work for prosecutors was a clear "no-brainer."

Judge Schroeder, Chair of the Subcommittee on Rule 702, agreed that the problems with forensic testimony are greatest in state courts, but emphasized that state courts aren't the exclusive source of problematic testimony. He commended the Department for its work on uniform language, but opined that such language ought to apply to a state forensic examiner presented as a witness by a federal prosecutor. Lastly, he noted that the problem of "overstatement" is a multifaceted one that can mean different things. An expert's conclusion of a "match" might be an overstatement of her conclusion, whereas a statement about her degree of confidence in a conclusion might be a slightly different problem. The overarching concern is to prevent a witness, once qualified as an expert, from having free reign to testify to anything. He inquired as to how the Committee could draft an amendment to Rule 702 to capture the multifaceted issue of overstatement without exceeding the problem and causing unintended consequences.

Ted Hunt responded that forensic experts do not testify to a "match" in court. The modern approach is to admit fallibility as is done in the Department's uniform language. He opined that dated cases are problematic and that there has been a paradigm shift to more tempered and qualified forensic testimony. He challenged the assumption that a forensic expert's "identification" is an

overstatement. According to Mr. Hunt, "source identifications" can be done with a high degree of reliability, according to the forensic literature. He further opined that jurors largely *undervalue* forensic evidence due to high profile exonerations and advocacy, and that good lawyering can and does address any issues that exist.

The Chair asked the Reporter about his case digest, inquiring how often courts allow overstatement because courts think they lack authority to regulate it and how often they allow overstatement due to lawyering oversights. The Reporter responded that the federal cases overwhelmingly rely upon precedent to admit forensic testimony in a particular discipline. For example, federal courts admit ballistics opinions because ballistics opinions have always been allowed in prior cases. The Chair suggested that federal courts do not state that they lack authority to regulate a conclusion per Rule 702. The Reporter replied that the issue of regulating an expert's conclusions is much like the preponderance issue discussed earlier – even if Rule 702 already authorizes it, that authority is embedded and hidden in the Rule and it is overlooked by courts.

The Chair then turned to the many drafting alternatives of an overstatement amendment presented for the Committee's review and suggested that the draft on page 142 of the Agenda book --- modifying existing subsection (d) slightly to provide that an expert's opinion should be "limited to" or should "reflect" a reliable application of the principles and methods to the facts of the case--- could resolve any issues without adding a new subsection (e) regulating "overstatement" per se. The Chair asked the Department of Justice what harm could be done by adopting such a minimalist change to subsection (d) (assuming an accompanying Advisory Committee note that would not seek to provide guidelines on forensic testimony). Elizabeth Shapiro responded that the draft change to subsection (d) would rearrange words as a "Trojan horse" to justify an expansive Committee note on forensic evidence, which would be inappropriate. The Chair reiterated that any concerns about the language of the Committee note could be addressed later, and that the question was whether the minor, clarifying changes to subsection (d) in keeping with the proposal on page 142 of the Agenda would cause particular harms or unintended consequences. The Reporter noted that the slight change to subsection (d) would not be simply rearranging words as a "Trojan horse" – instead, the modification would be one of emphasis designed to focus the judge on the expert's conclusions --- in keeping with the Supreme Court's decision in *Joiner*.

Elizabeth Shapiro expressed concern that a slight change in emphasis in the text would signal some change to courts, but not exactly what degree of change is intended. The Federal Defender disagreed, arguing that there could be no negative consequence to alerting the trial judge to focus on the expert's reported conclusions to ensure that they are not exaggerated. She emphasized that overstated expert opinions can be devastating to a criminal defendant and disagreed with the Department's earlier suggestion that jurors undervalue forensic testimony. Instead, she noted longstanding studies from the Innocence Project and others showing that jurors assume the trial judge approves of things an expert is permitted to testify to.

Judge Kuhl, who originally suggested a change to subsection (d) (instead of the addition of a new subsection (e) on overstatement) explained that she proposed a minimalist change to the requirements already in the Rule to shift the emphasis slightly without creating the unintended consequences that might exist with an entirely new subsection. The Reporter noted that the cases reveal a lack of focus on whether an expert's particular trial testimony is allowable once the

decision is made that the expert's methodology is reliable, and that the amendment to subsection (d) could help to rectify that problem.

The Chair once again asked the Department of Justice what harm there could be in a focus-clarifying amendment to subsection (d) if it were accompanied by a scaled-down Advisory Committee note. Rich Donaghue suggested that the Department was concerned about any amendment and the signal that would send. Nonetheless, he stated that the Department did not object to the proposal to amend the language of subsection (d) to clarify that courts must regulate the expert's conclusion as well as the methodology. He concluded that the proposed language in (d) could be useful to courts and litigants. He explained that the content of any Advisory Committee note would be of much greater concern to the Department. The Chair then asked the Reporter to prepare a working draft amendment to Rule 702 for the spring meeting that combines the addition of a preponderance standard with an amendment to subsection (d) akin to the draft on page 142 of the Agenda, with a scaled down draft Committee note explaining the emphasis on an expert's testimonial conclusions, with a reference to concerns about conclusions by forensic experts.

Another Committee member asked the Reporter about the effect of prior amendments designed to clarify existing requirements. In particular, he queried whether such modest amendments were effective in combatting prior inaccurate precedent. The Reporter acknowledged that some federal courts getting Rule 702 wrong were relying on pre-*Daubert* precedent that should be superseded. He noted that clarifying amendments are often important in toning up a provision that is operating sub-optimally, and that they have usually worked. He listed as an example the 2003 amendment to Rule 404(a) emphasizing the pre-existing rule that circumstantial evidence of character was inadmissible in civil cases.

Another Committee member opined that a modest amendment to subsection (d) of Rule 702 would not go far enough in correcting the problem with existing federal precedent. She suggested that such a minimalist approach would not get to the heart of the issue -- that trial judges may not know they have the authority to police an expert's expressed conclusions. She opined that trial judges should be able to open the Federal Rules of Evidence on the bench during trial and have the Rules expressly direct them where to focus. She suggested that an amendment adding a new subsection (e) to Rule 702 that tells a trial judge to regulate "overstatement" would be far more effective. The Reporter noted his agreement that a subsection (e) amendment would be more effective. Still he acknowledged that optimal amendments, like recent proposals to amend Rule 404(b) significantly, may not garner enough support to get passed. In the case of Rule 404(b), an amended notice provision was a fallback compromise. The question with respect to Rule 702 is whether there is support for a new subsection (e) and, if not, whether a modified subsection (d) is a helpful fallback alternative.

The Chair then took a non-binding, informal straw poll to see which approach to amending Rule 702 to address the issue of overstatement Committee members would favor. The Chair noted three options: 1) no amendment directed to overstatement; 2) the modest modification to the language of subsection (d); or 3) the more substantial addition of a new subsection (e). One Committee member expressed a desire to hear from the Department of Justice with respect to the addition of a new subsection (e). The Chair stated that the Department clearly prefers no

amendment to Rule 702 to address overstatement, draws a red line at an amendment that would add express "overstatement" regulation in a new subsection (e), and could live with the modest modification to subsection (d) depending on the content of the accompanying Committee note. The Department agreed with the Chair's characterization of its views.

One Committee member stated definite support for an amendment to subsection (d) and confessed to being "on the fence" about the addition of a subsection (e). That Committee member expressed an inclination to support (e) as well due to the problems in the existing Rule 702 precedent, but expressed concerns about adding a subsection (e) on overstatement to civil cases.

Another Committee member expressed clear support for a new subsection (e), but stated support for a modification to (d) as a compromise, if necessary. Another Committee member agreed with those preferences and priorities. The Federal Defender agreed with the position that a new (e) is critical to address the testimony that comes out of an expert's mouth on the stand, but noted that modifications to subsection (d) would be better than nothing.

Another Committee member stated a preference for the modification to subsection (d) only, expressing doubt that a new subsection (e) would fix the problems that do exist in the precedent and concerns about drafting in a manner that would avoid unintended consequences. That Committee member noted pending amendments to criminal discovery requirements in Fed. R. Crim Proc. 16 that will give more notice to criminal defendants about expert testimony and will allow them to challenge and exclude undisclosed testimony. Another Committee member stated opposition to the addition of a new subsection (e), arguing that it would represent too dramatic a change and that it was not needed to address what is essentially a lawyering issue in light of evolving forensic standards. This Committee member was also concerned about adding complexity to already extensive *Daubert* proceedings in civil cases, but had no objection to the language proposed to alter existing subsection (d). The Committee member confessed to being somewhere between "doing nothing" and modifying subsection (d) depending on the content of an accompanying Committee note.

The Chair rounded out the straw poll by expressing agreement with those Committee members who opposed a new subsection (e), articulating concerns that it was too substantial a change that could have unintended collateral effects. He suggested that the real problem in the expert testimony arena is not caused by Rule 702 and may not be solved by an amendment to Rule 702. He opined that the new criminal discovery rules would help fix problems with expert testimony, as would the Department of Justice's efforts to craft uniform testimonial language. In closing, the Chair said he would not vote for (e), could support (d), but could live with doing nothing with respect to overstatement.

Judge Bates commended the Reporter and the Committee for a very thoughtful dialogue and encouraged them to present all sides of the issue and the conflicting opinions of Committee members to the Standing Committee to obtain useful input. Judge Bates also inquired about the effect of a modification to subsection (d) to focus on the expert's actual "opinion" on expert testimony *not* in the form of opinion. The Reporter explained that Rule 702 allows an expert to testify in the form of an opinion "or otherwise" to allow for expert testimony on background information, such as the operation of a human heart. He explained that Rule 702(d) was always

focused on opinion testimony more than such background testimony. Still, he noted that an amendment to subsection (d) might focus on an expert's "testimony" rather than an expert's "opinion" to clearly accommodate expert testimony not in the form of an opinion.

In closing, the Chair asked the Reporter to prepare two draft alternatives of Rule 702 for the Committee's consideration at its spring meeting:

1) A draft including preponderance language in the opening paragraph of Rule 702 and a slightly modified subsection (d). This draft should be accompanied by a "skinny" Advisory Committee note that includes some brief reference to forensic evidence and the PCAST Report in brackets.

2) A draft including preponderance language in the opening paragraph of Rule 702 and a new subsection (e) regulating overstatement. This draft should be accompanied by a more comprehensive Advisory Committee note.

The Chair asked whether the incoming Committee members could listen to the discussion of Rule 702 from today's meeting before the Spring meeting. Both the Administrative Office and the Reporter promised to have new Committee members apprised of preceding discussions.

V. Proposed Amendment to Federal Rule of Evidence 106

The Reporter reminded the Committee that a potential amendment to Rule 106, the rule of completeness, had been before the Committee for several years. He noted that the Rule permits a party to insist upon the presentation of a remainder of a written or recorded statement if its opponent has presented a part of that statement in a fashion that has unfairly distorted its true meaning. The Reporter emphasized that the narrowly applied fairness trigger for the Rule was not being changed by any of the amendment proposals before the Committee. Instead, two potential amendments were being considered.

First, the Committee has been exploring an amendment that would permit a completing remainder to be admitted "over a hearsay objection." The Reporter noted that the Committee had wrestled with the purpose for which such a remainder might be admitted over a hearsay objection – either for its truth or for the limited non-hearsay purpose of providing context. The Reporter noted problems with an amendment limiting the use of a completing remainder to non-hearsay context alone, due to the need for confusing limiting instructions, and suggested the possibility of allowing the trial judge to decide on a case-by-case basis the purpose for which the remainder may be used once it is admitted to complete. Second, the Reporter reminded the Committee that it has been exploring an amendment that would extend completion rights in Rule 106 to oral unrecorded statements, which are not currently covered by the text of Rule 106. He explained that many circuits currently admit oral statements when necessary to prevent unfair distortion, but that they do so under a confusing combination of residual common law evidence principles and the broad power of the trial court to control the mode and order of interrogation under Rule 611(a). He further noted that a few circuits appear to reject completion of oral statements altogether, simply because they are omitted from Rule 106's coverage. He explained that it could be helpful to bring oral statements under the Rule 106 umbrella, so that all aspects of completeness are covered in one

place. And it would also be very useful to provide in a Committee note that there is no more common law of completion, once a comprehensive Rule 106 has been adopted. The Reporter noted that the Agenda materials contained several draft proposals for amending Rule 106 and solicited Committee input as to its Rule 106 preferences, explaining that the goal of the discussion was to narrow the drafting alternatives for consideration at the spring meeting.

One Committee member expressed support for an amendment that would allow a completing remainder over a hearsay objection and that would add oral statements akin to the one on page 588 of the Agenda materials. The Committee member opined that the trial judge should decide on a case-by-case basis whether to admit the remainder for its truth or for context only and that an amendment should not limit the use to non-hearsay context. The Chair also expressed support for the amendment proposal on page 588 of the Agenda Book. He reasoned that some evidence rules are *in limine* rules, while some are "on the fly" rules that come up in the heat of trial. He noted that Rule 106 is an "on the fly" rule that often comes up in the heat of trial action, and that trial judges do not have time to research the common law or Rule 611(a). He stated that it is very unusual for a Federal Rule of Evidence not to supersede the common law and that he would favor a Committee note expressly providing that the common law is superseded by the amendment. The Chair expressed support for the inclusion of oral statements, seeing no conceptual distinction between oral and recorded statements and the need for completion. He acknowledged disagreement that a remainder would have to be admitted for its truth to repair distortion but thinks the draft amendment elegantly elides the purpose for which a remainder is admitted by providing only that it is admissible "over a hearsay objection." Such an amendment would take no position on the use to which a completing remainder could be put.

Justice Bassett agreed that the amendment covering both oral statements and allowing remainders over a hearsay objection would be optimal. He noted that New Hampshire had long allowed oral statements to be completed and had recently amended its evidence rule to reflect that practice. He reported no problems with the amendment of the New Hampshire rule to replace the common law and supported a similar amendment for Federal Rule 106. Judge Kuhl noted that California does not distinguish between recorded and oral statements for purposes of completion, and similarly has experienced no difficulties with oral statements. She also opined that the fairness concerns addressed by Rule 106 overcome any hearsay concerns about the remainder, and that the trial judge should have discretion to admit the remainder with or without a limiting instruction.

The Department of Justice expressed opposition to the draft proposal on page 588 of the Agenda materials, arguing that completion was not as rarely applied as suggested in the appellate opinions. The Department suggested that prosecutors are routinely interrupted at trial with requests to complete, particularly when playing a recording. The Department suggested that trial judges do not apply the Rule 106 standard narrowly and are inclined to allow completion liberally to avoid an appellate issue. The Department expressed a preference for an amendment to Rule 106 that would allow remainders only for their non-hearsay value in providing context and that would continue to omit oral statements. The Department emphasized that the Advisory Committee that originally drafted Rule 106 in 1973 omitted oral statements purposely and that including them now would make Rule 106 more susceptible to abuse by criminal defendants trying to admit unreliable exculpatory statements. The Chair noted that the Department's criticisms of Rule 106 were of the "fairness" trigger for applying it, and no change to that standard is under consideration. He further

noted that opposition to oral statements is misplaced, because most federal courts *already allow* completion with oral statements -- they just do it under a confusing combination of common law and Rule 611(a). Another Committee member similarly inquired of the Department how adding oral statements to Rule 106 would "open Pandora's box" if most courts already admit them. The Reporter noted that a few federal courts end their analysis with Rule 106 and do *not* admit oral statements, probably because counsel does not think of Rule 611(a) or common law. So the current state of affairs regarding oral statements creates a conflict in the courts and results in a trap for the unwary.

Another Committee member disagreed with the draft Committee note suggesting that a completing remainder should be admitted for its truth and suggested that an amendment would undermine the hearsay rule if unreliable oral statements could be admitted for their truth. The Chair agreed that a completing remainder need not necessarily be true to complete, but expressed concern about a context-only amendment, because that would require a limiting instruction impossible for jurors to follow. Another Department of Justice representative contended if Rule 106 is amended, criminal defendants would be limited only by their imagination in crafting exculpatory oral statements, and that a recording requirement would at least limit defendants to requesting additional portions of an authenticated recording to be played in court. The Reporter noted that there is no difference between oral statements admitted to complete and all the other oral, unrecorded statements found admissible under the evidence rules. He queried why a government witness is permitted in the first place to testify about an unrecorded oral statement allegedly made by a defendant given the concern expressed about manufactured oral statements. He reiterated that most circuits already permit completion with oral statements, so an amendment confirming that existing practice would not open the floodgates to new evidence. Another Committee member opined that anxiety about adding oral statements to Rule 106 was overblown and larger in anticipation than in reality. That Committee member suggested that oral statements were very rare in criminal cases and that most statements were recorded, and that an amended Rule 106 should cover both recorded and unrecorded statements.

Rich Donaghue expressed concern that including oral statements in the Rule would create a "wild west" approach to completion and that trial judges would be even more inclined to allow completion with unreliable oral statements by defendants after seeing an expansive amendment to Rule 106. The Chair again expressed confusion about the Department's opposition to adding oral statements given that most circuits already allow completion of unfairly presented oral statements. He queried why the Department would oppose a uniform rule on point. Mr. Donaghue responded that adding oral statements to Rule 106 would suggest an expansive approach to the Rule. The Reporter commented that leaving oral statements out of the Rule would simply take advantage of litigants who don't know about the common law and Rule 611(a), and would treat litigants differently depending on the quality and experience of counsel. He further reiterated that most courts already allow completion with oral statements and that there is no "wild west" culture in completion practice. The Reporter also addressed expressed concerns about the reliability of a completing remainder allowed in for its truth. He explained that completion is allowed to level the playing field after an unfair partial presentation of a statement, so reliability is a red herring. He observed that party opponent statements of defendants, which are the most common targets of completion, are not admitted because they are reliable --- so why should the completion have to be reliable?

The Chair closed the discussion of Rule 106 by asking for an informal, non-binding straw vote about an amendment to Rule 106 to help narrow alternatives to be discussed at the spring meeting. The Chair noted four alternatives: 1) no amendment to Rule 106; 2) an amendment to allow completion over a hearsay objection only (leaving out oral statements); 3) an amendment to add oral statements only (leaving out the hearsay fix); and (4) an amendment that adds oral statements and allows completion over a hearsay objection.

Five Committee members and the Chair expressed a preference for the fourth option that would add oral statements and allow completion over a hearsay objection. One Committee member expressed a preference for an amendment that would add oral statements and admit completing statements for their non-hearsay context only. The Department of Justice voiced opposition to any amendment.

The Chair asked the Reporter to prepare a draft amendment that would add oral statements and allow completion over a hearsay objection for the spring meeting.

VI. Federal Rule of Evidence 615 and Witness Sequestration

The Reporter reminded the Committee that it had been discussing potential amendments to Rule 615 governing witness sequestration to clarify the scope of a district court's Rule 615 order. He explained that it is very clear that a district court may extend sequestration protections beyond the courtroom, but that the circuits are split on the manner in which a trial judge must extend protection. Some circuits hold that a trial judge's order of sequestration per Rule 615 *automatically* extends beyond the courtroom and prevents sequestered witnesses from obtaining or being provided trial testimony. These courts find that Rule 615 orders must extend outside the courtroom to provide the protection against testimonial tailoring the Rule is designed to provide --- if witnesses can simply step outside the courtroom doors and share their testimony with prospective witnesses, Rule 615 provides little meaningful protection. Other circuits hold that a Rule 615 order operates only to physically exclude testifying witnesses from the courtroom, and that a trial judge must enter a further order if there is an intent to prevent access by excluded witnesses to trial testimony. According to these circuits, a Rule 615 order can do no more than exclude witnesses physically because that is all the plain language of the Rule provides. Further, these circuits highlight problems of notice if a terse Rule 615 order is automatically extended beyond the courtroom doors, leaving witnesses and litigants subject to sanction for extra-tribunal conduct not expressly prohibited by the court's sequestration order. The question for the Committee is how to amend Rule 615 to reconcile this conflict and reach the best result for the trial process.

The Reporter explained that the Committee had previously discussed a purely discretionary approach to protection beyond the courtroom, with an amended Rule 615 continuing to mandate physical exclusion from the courtroom only, but expressly authorizing the trial judge to extend or not extend protection further at the judge's discretion. A draft of such a discretionary amendment was included in the Agenda materials at page 660. The Reporter noted that another amendment alternative requiring extension beyond the courtroom at a party's request had been included in the Agenda materials at page 662, at Liesa Richter's suggestion. The Reporter explained that physical sequestration currently in Rule 615 was made *mandatory* upon request both because sequestration

is crucial to accurate testimony and because the trial judge lacks information about potential tailoring risks upon which to exercise discretion. As noted by the many circuits that already extend sequestration protection beyond the courtroom automatically, the right to sequestration is meaningless without some extra-tribunal protection. Therefore, it can be argued that a party should have a right to demand some protection beyond the courtroom doors upon request (as they do with physical sequestration currently). Under this version of an amended Rule 615, the trial judge would not have discretion to deny completely protections outside the courtroom if a party asked for them. Importantly, such an amendment would leave the details and extent of protections afforded outside the courtroom to the trial judge's discretion based upon the needs of the particular case.

The Reporter noted additional issues raised by sequestration that the Committee should consider in its review of Rule 615. First, he noted the question of whether sequestration prohibitions on conveying testimony to witnesses should be binding on counsel --- a question that has been discussed previously by the Committee. He reminded the Committee that this issue of counsel regulation raised complicated constitutional issues concerning the right to counsel, as well as issues of professional responsibility, beyond the typical ken of evidence rules. For that reason, the Committee had previously discussed potential amendments to Rule 615 that would not seek to control counsel, leaving any such issues that arise to trial judges in individual cases. Finally, the Reporter noted a possible dispute in the courts about the exception to sequestration in Rule 615(b) for representatives of entity parties. The Reporter explained that the purpose of the entity representative exception was to place entity parties on equal footing with individual parties who are permitted to remain in the courtroom. Accordingly, it would seem that an entity party would be entitled to a single representative in the courtroom to create parity with individual parties. Some courts, however, have suggested that trial judges have discretion to permit *more than one* agent or representative of an entity to remain in the courtroom under Rule 615(b) – particularly in criminal cases where the government seeks to have more than one agent remain in the courtroom. The Reporter noted that Judge Weinstein has suggested that trial courts have discretion to allow more than one entity representative under Rule 615(b); but the Reporter questioned what basis exists for exercising such discretion when the exception in (b) is as of right. He suggested that the superior approach would be to allow a single entity representative to remain in the courtroom under Rule 615(b) as of right, and for the trial judge to exercise discretion under Rule 615(c) to allow additional representatives to remain if a party bears the burden of demonstrating that they are "essential to presenting the party's claim or defense." The Reporter noted that such a result could easily be accomplished with a minor amendment to Rule 615(b). He emphasized that the Rule 615(b) issue was not important enough to justify an amendment to the Rule in its own right, but that it could be a useful clarification if the Committee were to propose other amendments to the Rule.

One Committee member suggested that counsel do not always invoke Rule 615 and may not want sequestration protection at all or at least none beyond the courtroom. For that reason, the Committee member expressed a preference for the purely discretionary amendment proposal on page 660 of the Agenda book, as it would not require protections beyond the courtroom. He agreed that the issue of regulating counsel was a "can of worms" beyond the scope of evidentiary considerations, so the Committee should not address it. As to the entity representative issue, he noted that entity parties often have only one representative remain in the courtroom under Rule 615(b) at any one time, but sometimes swap out representatives throughout the trial, particularly

in long trials. He suggested that such swapping out of representatives should be sanctioned in an Advisory Committee note should the Committee clarify that Rule 615(b) is limited to a single representative.

The Chair also noted that parties may not want sequestration orders to extend beyond the courtroom and that the Rule should not require something the parties do not want. The Reporter noted that sequestration protection is essentially pointless without some extended protection and that a mandatory amendment would extend protection beyond the courtroom only "at a party's request." Still, the Chair expressed a preference for a discretionary amendment such as the one on page 660 of the Agenda book, that would permit "additional orders" adding extra-tribunal protection but would not require a court to issue such protections upon request. To clarify the scope of a succinct order that simply invokes "Rule 615", the Chair suggested adding language to subsection (a) of the draft discretionary amendment on page 660 of the Agenda materials stating that an order affirmatively *does not* extend any protection beyond the courtroom unless it expressly states otherwise. He noted that this would be important to avoid punishing parties for extra-tribunal sequestration violations without adequate notice.

The Department of Justice expressed support for a discretionary approach to Rule 615, but questioned the proposal to limit entity representatives to just one under Rule 615(b). The Department queried why it should not be permitted to have two case agents sit in the courtroom notwithstanding sequestration. The Reporter again noted the purpose of Rule 615(b) was to put entity parties on par with individuals --- not to give entities an advantage. Therefore, the government should get a single representative under Rule 615(b) as of right without showing any justification, and could qualify additional agents under Rule 615(c) if they can show them to be "essential." The Department asked whether there would be a limit on the number of agents it could qualify as "essential" under Rule 615(c), expressing concern that an amendment could be read to limit the judge's discretion with respect to subsection (c). The Reporter replied in the negative, affirming that subsection (c) would permit as many persons to remain in the courtroom as were shown to be "essential." He suggested that an Advisory Committee note could clarify that point should the Committee advance an amendment limiting the number of representatives permitted under subsection (b), as well as acknowledging the propriety of swapping out representatives under subsection (b).

The Chair noted that the Rules are amended very infrequently and that there are limited opportunities to clarify issues. He asked that the Reporter retain a proposed amendment to Rule 615(b) in the draft for the spring meeting to afford the Committee more time to consider it.

The Federal Public Defender noted the expanding opportunities for witness-tailoring outside the courtroom in light of technological advances and the covid-19 pandemic. She noted that trials are being conducted on Zoom or streamed from one courtroom into another to allow for social distancing. Because such measures increase concerns about witness access to testimony, she suggested that an amended rule should be proactive about regulating access to trial testimony by witnesses who have been sequestered. Another Committee member suggested that a draft allowing, but not requiring, protections beyond the courtroom would suffice and noted the counsel issue potentially raised by protections beyond the courtroom. That Committee member also thought a clarification to Rule 615(b) would be helpful.

The Chair closed the discussion of Rule 615 by requesting that the Reporter prepare the discretionary draft of an amendment to the Rule akin to the one on page 660 of the Agenda materials, with an express addition to subsection (a) providing that a Rule 615 order does not extend beyond the courtroom doors unless it says so expressly. He also asked the Reporter to include a clarification of Rule 615(b) allowing only one entity representative at a time, with a Committee note explaining that swapping of representatives under (b) is permissible and that subsection (c) allowing exceptions for "essential" persons is not changed by the amendment and is not numerically limited.

VII. CARES Act and an Emergency Evidence Rule

Pursuant to the CARES Act, all of the federal rulemaking committees have been considering the need for the addition of an "emergency rule" that would allow the suspension of federal rules to account for emergency situations such as the covid-19 pandemic. The Judicial Conference asked the Reporter and the former Chair, Judge Livingston, to evaluate the need for an emergency rule of evidence to suspend the regular rules in times of crisis. After careful consideration, the Reporter and Judge Livingston agreed that there is no need for an emergency rule of evidence because the existing Evidence Rules are sufficiently flexible to accommodate emergency circumstances.

First, the Reporter documented his exhaustive examination of the Rules of Evidence to ascertain whether any of them demand that "testimony" occur in court (as opposed to virtually as has been done during the pandemic). He reported that none of the Rules require that testimony be given in a courtroom. He further explained that Rule 611(a) gives trial judges broad discretion to control the "mode of examination" and that many federal judges have utilized that authority during the pandemic to authorize virtual testimony. He acknowledged that remote testimony raised important issues of confrontation in the criminal context, but observed that it is the Sixth Amendment – and not the Evidence Rules – that control confrontation. Accordingly, an emergency evidence rule would not resolve confrontation concerns. In sum, the Reporter and Judge Livingston concluded that there was no need for an emergency evidence rule. The Reporter solicited thoughts and comments from Committee members as to the need for an emergency evidence rule. Committee members thanked the Reporter for his exhaustive work on the topic and concurred with the conclusion that there is no need for an emergency rule of evidence.

VIII. Future Agenda Items

The Reporter reminded Committee members that he had included a memorandum on a number of existing circuit splits with respect to the application of the Federal Rules of Evidence in the Agenda materials. He explained that his goal was to acquaint the Committee with potential problems that may lend themselves to rulemaking solutions and to solicit the Committee's feedback as to whether it would like to see any of the identified splits prepared for consideration at a future meeting. The Chair suggested that Committee members could email the Reporter or the Chair if they wished to discuss any of the circuit splits further. One Committee member commended the Reporter for his thorough work in identifying so many circuit splits.

The Chair then explained that there were a number of evidentiary issues he had asked the Reporter to place on the Agenda for the Committee's consideration, noting that two of them had been considered by the Committee within the last 5-7 years.

First, the Chair suggested that it is not clear why a witness's prior statement should be considered hearsay when the witness testifies at trial subject to cross-examination. He noted that some states do not include a testifying witness's prior statements in their definitions of hearsay. The Chair explained that he would like the Committee to consider whether to amend FRE 801 to permit witness statements to be admissible for their truth when the witness testifies at trial subject to cross-examination. He suggested that there was no justification for the existing rule and that a change would save much needless inquiry and analysis. The Chair acknowledged the Committee's past consideration of the issue, and that such a project could wind up allowing only prior *inconsistent* witness statements to be admissible for truth, but expressed his desire for the Committee to consider the issue anew.

The Chair next discussed the potential for a rule of evidence governing the admissibility of illustrative and demonstrative evidence. He noted that such evidence is presented in virtually every case tried in federal court and yet there is no rule of evidence that even mentions the subject. Courts and litigants must look to the common law with cases all over the map in their regulation of demonstrative evidence and illustrative aids. The Chair noted that the cases do not agree about: 1) the nomenclature used to describe such evidence; 2) when it may be used; 3) whether it may go to the jury room during deliberations; or 4) how to create a record of it for appeal. The Chair noted that he had asked the Reporter to prepare materials on the topic for the Committee's consideration.

The Chair next noted an issue regarding the use of English language transcripts of foreign language recordings in federal court. Here again, he noted that the Rules are silent, and that case law appears divided. The Chair noted a recent drug prosecution in which there were relevant Spanish language recordings. Both the government and the defense agreed that English transcripts of the recordings were accurate, and the government admitted only the transcripts without admitting the underlying Spanish language recordings (presumably because the jury could not have understood them in any event). The Chair explained that the Tenth Circuit – over a dissent -- had reversed the conviction, finding that the Best Evidence rule required the admission of the Spanish recordings. He noted that both the majority and dissent had cited conflicting cases in support of their respective positions and suggested that a clear rule regarding English transcripts of foreign language recordings could be helpful.

The Chair also noted that trial judges utilize their broad discretion in Rule 611(a) to support many different interventions. For example, a trial judge might order all parties to ask their questions of an out-of-town witness on a single day. As the Reporter noted earlier, trial judges have used Rule 611(a) during the pandemic to justify remote trials. The Chair explained that he had asked the Reporter to examine the federal cases to see what types of specific actions trial judges are using Rule 611(a) to support, with the idea being to consider an amendment to Rule 611(a) to list more specific measures that cover what trial judges actually do with the Rule.

The Chair finally suggested that the Committee might consider resolving a circuit split on the use of a decedent's statements against her estate at trial. He noted that some courts allowed such

use, essentially equating the decedent and her estate for hearsay purposes. Other courts have declined to allow such statements against an estate, however, essentially giving the estate a better litigating position than the decedent would have had at trial The Chair noted that there was a useful law review note on the topic in the *N.Y.U Law Review* and suggested that this issue might be a useful component of a package amendments should others be considered.

The Chair closed by emphasizing that Committee members should feel no pressure to agree on any of these matters but expressed his view that they are worthy of discussion and consideration.

IX. Closing Matters

The Chair thanked everyone for their contributions and noted that the spring meeting of the Committee will be held on April 30, 2021 – hopefully in person at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., depending upon the public health situation, with a Committee dinner to be held the night before. The meeting was adjourned.

Respectfully Submitted,

Liesa L. Richter, Academic Consultant