

Advisory Committee on Evidence Rules
Minutes of the Meeting of April 30, 2021
Via Microsoft Teams

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on April 30, 2021 via Microsoft Teams.

The following members of the Committee were present:

Hon. Patrick J. Schiltz, Chair
Hon. James P. Bassett
Hon. Shelly Dick
Hon. Thomas D. Schroeder
Hon. Richard J. Sullivan
Traci L. Lovitt, Esq.
Arun Subramanian, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
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
Timothy Lau, Esq., Federal Judicial Center
Andrew Goldsmith, Esq., Department of Justice
Bridget M. Healy, Counsel, Rules Committee Staff
Shelly Cox, Administrative Analyst, Rules Committee
Brittany Bunting, Rules Committee Staff
Julie Wilson, Administrative Office
Kevin Crenny, Administrative Office, Rules Clerk
Joe Cecil, Fellow, Berkeley Law School
Sri Kuehnlenz, Esq., Cohen & Gresser LLP
Amy Brogioli, Associate General Counsel American Association for Justice
Abigail Dodd, Senior Legal Counsel Shell Oil Company
Alex Dahl, Strategic Policy Counsel
Sam Taylor, Managing Associate, CLS Strategies
John G. McCarthy, Esq., Smith, Gambrell & Russell LLP
Susan Steinman, Senior Director of Policy & Sr. Counsel, American Association for Justice
Lee Mickus, Esq., Evans Fears & Schuttert LLP
Leah Lorber, Assistant General Counsel, GSK
Shawn Meehan, Esq., Guidepoint
Andrea B. Looney, Executive Director, Lawyers for Civil Justice

James Gotz, Esq., Hausfield
Mark Cohen, Esq., Cohen & Gresser LLP
Jessica M. Ochoa, Esq.
John Hawkinson, Freelance Journalist
Sai, Pro se Litigant

I. Opening Business

The Chair opened the meeting by welcoming everyone and by introducing two new members of the Committee, the Honorable Richard J Sullivan and Arun Subramanian, Esq. The Chair also noted that a new Department of Justice representative would soon join the Committee, John Carlin, Esq.

The Minutes of the Fall 2020 meeting of the Evidence Advisory Committee were unanimously approved. Thereafter, the Chair gave a brief report on the January 2021 Standing Committee meeting. He explained that the Evidence Advisory Committee had no action items before the Standing Committee, but that the Committee had provided an update on the ongoing work on FRE 106, 615, and 702. He further noted that work on emergency rules was on track and that he was hopeful that emergency rules would be released for public comment. The Chair also informed the Committee that there was significant support from district judges at the March 2021 meeting of the Judicial Conference for the continued use of virtual platforms for preliminary criminal proceedings, sentencings and other proceedings post-pandemic. The Chair noted that all judges had realized significant savings in time and resources in utilizing virtual platforms for some of these preliminary proceedings.

II. Federal Rule of Evidence 702

The Chair opened the discussion of Federal Rule of Evidence 702 by noting that the Committee had been discussing and studying potential amendments to Rule 702 for many years --- starting when the Committee began investigating the challenges to forensic evidence. The Chair reminded the Committee that two alternative draft amendments to Rule 702 had come from that lengthy consideration: 1) one that would make a modest change to the language of existing Rule 702(d) to focus the trial judge on the opinion expressed by an expert, as well as on the reliability of principles and methods and their application and 2) another that would add a new subsection (e) to the Rule to regulate “overstatement” of conclusions by expert witnesses. Both drafts would add language to the beginning of the Rule alerting trial judges that they must find all requirements of Rule 702 satisfied by a preponderance of the evidence according to Rule 104(a) before admitting an expert opinion over objection --- this language is intended to address the separate concern that many courts have found that the questions of sufficiency of basis and reliability of application are questions of weight and not admissibility.

The Chair noted that Committee sentiment was divided on the draft that would add a new subsection (e) to Rule 702, with some Committee support but also strong opposition, both on the Committee and in the stakeholder population. Given the lack of consensus on the draft that would add an “overstatement” limitation to the Rule, the Chair suggested that the Committee focus its discussion on the draft that would modify the language of existing Rule 702(d) and expressed hope

that some consensus might be achieved on that draft. The Committee unanimously agreed to focus its discussion and efforts on the draft that would alter Rule 702(d), and to reject the addition of a new subsection (e).

The Reporter then suggested that the Committee discuss the text of a proposed amendment to Rule 702 before proceeding to any discussion of the accompanying Committee note. The Reporter also alerted Committee members that prior drafts of the Rule 702(d) amendment had alternated between language “limiting” an expert’s opinion and language requiring that the expert’s opinion “reflect” a reliable application of principles and methods. The Reporter explained that the “limiting” language was considered precisely because it would signal a restriction on the expert’s ultimate opinion. But he noted that the Department of Justice had objected to the “limiting” language and that he had replaced it with the “reflects” language in the discussion draft for the meeting. The Reporter acknowledged that such a change to the Rule would be mild, but suggested that it could be helpful in getting courts to focus on the opinion ultimately expressed by the expert. He further noted that there had been questions prior to the meeting about amendment language requiring judicial findings by a preponderance “of the evidence.” Of course, he acknowledged, trial judges are not limited to admissible “evidence” in making Rule 104(a) preliminary findings, and there was some concern expressed that including the term “evidence” in rule text could undermine the well-settled judicial flexibility to utilize whatever information is appropriate under Rule 104(a). The Reporter suggested that the “preponderance of the evidence” language would not cause any confusion because it is a term of art well understood by all and because trial judges do consider “evidence” in a *Daubert* hearing – even if it need not be otherwise “admissible” evidence. He stated that a passage was added to the draft Advisory Committee to clarify that the amended language “preponderance of the evidence” did not mean admissible evidence. With that introduction, the Reporter invited comments on the text of the draft amendment.

Judge Bates inquired as to why the draft amendment provided that expert opinion testimony could be admitted if “the court finds that” the requirements of Rule 702 are satisfied by a preponderance of the evidence. He inquired whether it was purposely added to emphasize gatekeeping or whether it was superfluous language that could be eliminated. The Reporter explained that the language as added to emphasize the gatekeeper function because some courts were delegating matters to the jury that the court must resolve itself. The Reporter opined that the amendment could function well without those four words requiring the court to “find” the requirements met. The Chair concurred, noting that the problem of punting to jurors was addressed in the draft Committee note. One Committee member inquired whether the language requiring the court to make findings could be problematic in circumstances in which expert opinion is admitted without objection. Could trial judges read the amendment to require findings on the record even in the absence of objection? The Reporter responded that none of the admissibility requirements in the Evidence Rules are triggered without objection and that Rule 702 would not require findings by the trial judge to admit expert opinion testimony without an objection by the opponent. Still, the Reporter suggested that the amendment could serve its purpose without the “finding” language, and that he would delete it as a friendly amendment if Committee members were in agreement. The Committee agreed to delete the words “the court finds that” from the draft amendment.

The Reporter then explained modifications made to the draft Committee note prior to the meeting. Both changes were made to the paragraph regarding application of the amendment to

forensic expert testimony. The first was a minor style change to make “forensic expert” the subject of a sentence in place of the ambiguous word “such.” The other was a suggestion by Judge Kuhl to include a sentence in the note acknowledging that substantive state law sometimes requires opinions to be stated to a “reasonable degree of certainty” and clarifying that the note language disapproving opinions stated to a “reasonable degree of certainty” would not affect cases in which state law governs and requires such opinion testimony. The Reporter noted that prior versions of the note had included such language and that he had added it back in to the draft Committee note.

Another concern expressed prior to the meeting was that the opening paragraphs of the note came down too hard on federal judges by suggesting that they had “failed” to apply certain requirements or “ignored” them. The Reporter explained that it was important to emphasize that the courts that sent Rule 702 admissibility questions, such as the sufficiency of an expert’s basis, to the jury were incorrectly applying the Rule. It was those incorrect applications that led to a draft amendment emphasizing the Rule 104(a) standard that already governed the Rule. He further noted that there was no intention to come down too hard on federal judges and that suggestions from stakeholders to include more aggressive disapproval of specific federal opinions in the Committee note had been rejected for that very reason.

Finally, the Reporter stated that the Department of Justice had objected to a sentence in the eighth paragraph of the draft Committee note suggesting that jurors are “unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion and lack a basis for assessing critically the conclusions of an expert that go beyond what the expert’s basis and methodology may reliably support.” The Reporter suggested that the sentence needed to remain in the Committee note because jurors’ inability to spot overstatement by experts was the reason for the proposed amendment and because Committee notes must explain the rationale for any change. The Reporter then invited discussion on the draft Committee note.

Ms. Shapiro explained that the Department felt that jurors *are able to* evaluate expert testimony once it clears gatekeeping and is admitted by the trial judge and are frequently called upon to do so. The Reporter responded that this is true so long as the trial judge has first performed appropriate gatekeeping --- but that jurors are not able to make a meaningful evaluation of expert testimony without real gatekeeping. The Chair suggested that changing the language in the note to “may” could help, suggesting that jurors “may lack a basis” for evaluating expert opinion testimony rather than that they “are unable to evaluate” expert opinion testimony. Mr. Goldsmith agreed that the change to the word “may” would be helpful but argued that the paragraph would still go too far. He noted that the Reporter had emphasized that jurors may be unable to evaluate expert opinion without adequate gatekeeping and that this qualifier should also be added. The Reporter agreed that the whole point was to tie gatekeeping to the concern about jurors’ inability to evaluate expert opinion testimony. Mr. Goldsmith suggested adding language, such as: “Judicial gatekeeping is critical because jurors may be unable....” Committee members agreed that language emphasizing the connection to gatekeeping was helpful and the language “Judicial gatekeeping is essential” was added to the eighth paragraph of the note along with the change to “may”.

Another Committee member suggested that the first sentence of the same paragraph -- “Testimony that mischaracterizes the conclusion that an expert’s basis and methods can reliably

support undermines the purposes of the Rule and requires intervention by the judge” -- was superfluous. The Committee agreed to delete that sentence and to bring the revised remaining sentence up into the preceding paragraph. Ms. Nester suggested that the sentence about expert mischaracterization of conclusions was important in order to articulate the concern about expert overstatement addressed by the amendment. She noted that the draft amendment adding a new subsection (e) prohibiting “overstatement” explicitly in rule text had been dropped and that retaining this crucial limit in the Advisory Committee note was important. The Chair suggested that other language in the note emphasized that experts must stay “in bounds” with their expressed conclusions and that judicial gatekeeping is “essential” --- offering strong support for regulation of overstatement. The Reporter suggested that the word “should” could be changed to “must” in the sentence that read: “A testifying expert’s opinion should stay within the bounds of what can be concluded by a reliable application of the expert’s basis and methodology.” This would provide an even stronger admonition regarding unsupported conclusions by experts. Committee members agreed to delete the first sentence of the eighth paragraph, to move the revised second sentence of the eighth paragraph up into the seventh, and to replace “should” with “must” in the sentence regarding experts staying “within bounds” in expressing an opinion.

Another Committee member expressed concern about the example given in the fourth paragraph of the Committee note regarding matters that may continue to go to the weight, rather than the admissibility, of expert testimony. The draft note stated: “For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility.” The Committee member suggested that this particular example could be capable of mischief and noted the recurring situation in which there are 20 studies on a particular matter, only four of which an expert has consulted and which reach conclusions unsupported by the other 16. The Committee member suggested that such a circumstance could go to the admissibility of the expert’s opinion under Rule 104(a) and not just to the weight of the opinion, and that the example in the Committee note could be utilized to suggest otherwise. The Committee member recommended finding another example to avoid affecting this common scenario. The Reporter explained that the note needed to provide some example to illustrate that there still may be matters of weight even after proper application of the Rule 104(a) preponderance standard by the trial judge. After some Committee discussion of this example, the Chair suggested revised language stating: “For example, if the court finds by a preponderance of the evidence that an expert has a *sufficient basis* to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility.” This language would avoid study counting and would emphasize the need for the trial judge to first find a “sufficient basis” for an opinion before passing it on to the jury to resolve remaining questions of weight. The Committee member who raised the concern agreed that this revised language would be less troubling. Committee members were generally in agreement that the Chair’s modification should be adopted.

Judge Bates raised the first paragraph of the draft Committee note that may treat federal judges too harshly in connection with their application of Rule 702. He suggested that the final six words of the first paragraph “and are rejected by this amendment” could be eliminated to soften the note without effecting a substantive change. The Reporter noted that it is not uncommon to explain in a Committee note that an amendment is designed “to reject” a certain application of the Rule.

Judge Kuhl also highlighted language in the second paragraph of the draft note suggesting that judges have “ignored” the Rule 104(a) standard in applying Rule 702. She suggested that the proper standard might not have been briefed and that judges may not have actively ignored the controlling standard. Another Committee member noted that trial judges may have improperly deferred to the adversarial process due to language in *Daubert* emphasizing matters that should be left to the jury, rather than ignoring the Rule 104(a) standard. The Chair suggested that the note might state that judges “have incorrectly applied” the standard, rather than stating that judges have ignored the standard. The Reporter explained that it’s not that some judges have applied Rule 104(a) “incorrectly” – rather, they have not applied the Rule 104(a) standard at all. Committee members then discussed appropriate modifications to the note language, ultimately determining that it would be most accurate to note that judges have “failed to correctly apply” Rule 104(a) to the admissibility requirements of Rule 702. Thus, the Committee agreed to remove the “and are rejected by this amendment” language from the first paragraph of the note and to replace the “ignored” language with “failed to correctly apply.”

Another Committee member queried whether a litigant would still be permitted to allow her opponent’s “mickey mouse” expert to take the stand notwithstanding a failure to satisfy Rule 702, in the hopes of exposing the inadequacy of the expert’s opinion on cross-examination before the jury. A Committee member asked whether the amendment should be qualified with language, such as “upon invocation” or “in the event of an objection” to preserve a litigant’s ability to make this strategic choice. The Reporter reiterated that *all* the Federal Rules of Evidence assume an objection that triggers the trial judge’s obligation to apply the admissibility limits, and that nothing in the proposed amendment to Rule 702 would require a trial judge to make *sua sponte* findings of admissibility in the absence of an objection to an expert’s opinion. The Chair agreed, noting that there might be negative implications for other rules if such a proviso were added. The Chair suggested publication of the proposed amendment without such language and that the Committee could revisit the issue if the concern were to be raised in public comment.

Thereafter, the Advisory Committee unanimously approved publication of the proposed amendment to Rule 702 and accompanying Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.

The Chair remarked on the unique difficulty in achieving consensus on a rule as important as Rule 702, and commended the Committee, the former Chair Judge Livingston, and the Reporter on remarkable work. The Reporter thanked Ms. Shapiro from the Department of Justice for all of her work prior to the meeting to help bring the Department on board. Another Committee member noted the important contributions made by Judge Collins before he left the Committee as well. The Chair opined that the proposal would make real improvements to Rule 702 practice.

The proposed amendment to Rule 702 and the Committee Note are attached to these Minutes.

III. Rule 106

The Reporter introduced the discussion of Rule 106, the rule of completeness, noting that the Committee had been exploring potential amendments to the rule for several years. He explained that the draft amendment included in the agenda addressed two concerns. First, the amendment

would allow completion over a hearsay objection to the completing portion of a statement. The Advisory Committee note would leave it up to the trial judge whether to allow the completing statement to be used for its truth or only for context, as may be appropriate in the particular circumstance. But the amendment would prevent a party who had presented a statement in a misleading manner from foreclosing completion with a hearsay objection. Second, the amendment would permit completion of oral statements under Rule 106. The Reporter reminded the Committee that the majority of federal courts already permit completion of oral statements under their Rule 611(a) discretion or through the remaining common law of completion. The Reporter highlighted the benefits of avoiding a hodgepodge approach to completion of oral statements and noted that the Committee generally favored adding oral statements to Rule 106 to create a streamlined and more trial-friendly approach.

The Reporter noted that the proposed text of the amendment to Rule 106 had not changed since the circulation of the Agenda and invited discussion of the text of proposed Rule 106. Hearing no discussion of the proposed text, the Reporter turned to discussion of the draft Committee note. The Reporter highlighted two changes to the Committee note suggested prior to the meeting. First, he explained that a short paragraph had been added at the end of the note explaining that the amendment to Rule 106 would serve to displace the remaining common law of completeness. Second, the Reporter explained that the original draft Advisory Committee note had a paragraph at the end cautioning courts that the amendment would not affect the narrow fairness trigger that permits completion only if the proponent of a partial statement creates a misleading impression of the statement. The Reporter informed the Committee that the Department of Justice had asked that this cautionary paragraph be moved to the beginning of the draft Advisory Committee note. The Reporter opined that he would prefer to keep the cautionary paragraph concerning the fairness trigger at the conclusion of the note and explained that there is precedent for such a placement. For example, the Reporter explained that there was concern about expansive application of amended Rule 801(d)(1)(B) in 2014 that might have permitted admission of an avalanche of prior consistent statements. The Committee placed a cautionary paragraph at the conclusion of the Committee note to address that concern, after fully describing the operation of the amendment.

The Chair stated that it did not make sense to place the limiting paragraph at the beginning of the Committee note – such a placement would tell the reader what the amendment does *not* do before advising her of what the amendment *does* do. The Chair further opined that a judge or lawyer who consults the brief Committee note for guidance is likely to read all the way to the end and to encounter the cautionary paragraph. Ms. Nester suggested that the language in the cautionary paragraph noting that the amendment “does not change the basic rule” was ambiguous and that a reader might be confused about which “basic rule” the note refers to. The Chair suggested that the sentence might be redrafted to state that the amendment “does not change the rule of completeness, which applies only...”

Ms. Shapiro expressed the Department of Justice concern that trial judges do not always adhere to the narrow fairness trigger in Rule 106 in practice. She suggested that it could be considered easier to allow the defense to “complete” to avoid an issue on appeal than to enforce the strict fairness limit in the Rule. The Department suggested moving the cautionary paragraph to the beginning of the note to allay concerns that an amendment could raise the profile of Rule 106 and exacerbate this problem in practice. But Ms. Shapiro offered that the cautionary paragraph could

serve that important function if it were placed at the very end of the Committee note as well. All agreed that the cautionary paragraph would serve its purpose and be most powerful at the very end of the Committee note.

Ms. Shapiro also noted that the Reporter had removed the word “extreme” from the Committee note’s discussion of Rule 403 at the Department’s suggestion. Finally, she noted that the Department has suggested adding a sentence to the note emphasizing that a party who wants to complete with an oral statement must have admissible evidence that the completing oral remainder was made.

Another Committee member noted that placing the cautionary paragraph at the very end of the Committee note would make the paragraph on *Beech Aircraft* and the displacement of the common law the penultimate paragraph. This Committee member suggested a mechanism for a smooth transition into that penultimate paragraph which was generally accepted by the Committee. Another Committee member noted with approval that a citation to the *Williams* case out of the Second Circuit had been added to the final cautionary paragraph to highlight the much more common circumstance in which completion is *not* required.

Another Committee member noted that the current Rule 106 text refers to “writings” but that the amended Rule 106 would speak of “written or oral statements.” The Committee member pointed out that litigants frequently seek to complete with portions of documents – like contracts – that might not be thought of as “statements” per se and queried whether removing the term “writings” from Rule 106 could improperly signal that completion of documents is no longer permissible. The Committee member suggested that the amended rule retain the nomenclature “writings or oral statements” to ensure that litigants know that they can seek to complete documents like tax records or a deed of sale. The Reporter responded that documents do qualify as “written statements” that would be subject to completion under the amended rule and that there was absolutely no intent to make a substantive change with respect to the completion of documents. Nonetheless, the Reporter thought the amendment could refer to “writings or oral statements” if that would avoid confusion. That would mean simply eliminating the word “recorded” in rule text and replacing it with the word “oral.” The Reporter suggested that the Committee could await public comment to ascertain whether there would be any confusion regarding writings. The Chair opined that the concern could also be handled in the Committee note by clarifying that the amendment “covers any writing.”

Ms. Shapiro inquired about the elimination of the word “recorded” from the amended rule, asking whether a recorded statement would now be treated as an “oral statement” for purposes of completion. The Chair suggested that it may be important for the Committee note to provide that the amendment covers everything – documents, recorded statements, oral statements, etc. Another Committee member suggested that the text of the amended rule should be altered to reflect its coverage, opining that Rule 106 could continue to cover “writings” and “recorded statements” and that the amendment could simply add the modifier “oral” to statements as well to indicate added coverage and that nothing has been taken away.

Committee members ultimately determined that, with respect to “writings,” it would be best to leave the text of the proposed amendment unchanged and to add a sentence to the draft Committee

note clarifying that the completion right applies to all forms of writings and statements – whether written, recorded or oral.

The Chair then asked for a vote on publication of the proposed amendment to Rule 106 with the accompanying Advisory Committee note, as modified. The Committee unanimously approved the amendment and Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.

The proposed amendment to Rule 106 and the Committee Note are attached to these Minutes.

IV. Rule 615

The Reporter introduced the proposal to amend Rule 615 on witness sequestration. He explained that the existing Rule language covers only the physical exclusion of witnesses from the courtroom and does not address witness access to trial testimony outside the courtroom. The Reporter noted that a circuit split had arisen over the Rule. Some courts interpret Rule 615 according to its plain language and hold that an order entered under the Rule operates only to exclude witnesses physically from the courtroom. Although these courts recognize trial judges' discretion to enter additional orders extending protections outside the courtroom, they hold that no such protections apply in the absence of an express, additional order. Conversely, other federal courts hold that even a basic Rule 615 order extends automatically beyond the courtroom, reasoning that sequestration fails to serve its purpose if witnesses may freely access trial testimony from outside the courtroom.

The Reporter explained that the draft amendment would specify that an order of exclusion would apply only to exclude witnesses from the courtroom; but the amended rule would state that the trial judge could enter additional orders extending protections beyond the courtroom on a discretionary basis. The Reporter explained that the draft of proposed Rule 615(b) regarding additional discretionary orders breaks down the distinct ways in which a witness might access trial testimony from outside the courtroom – either by accessing it themselves or having it provided to them by another. The Reporter then solicited Committee feedback on the proposed text of an amended Rule 615.

One Committee member noted that it is subsection (a) of the draft Rule that mandates physical exclusion from the courtroom, but that it is the first sentence of subsection (b) governing “additional orders” that explains the effect of orders entered under subsection (a), providing that “An order under (a) operates only to exclude witnesses from the courtroom.” The Committee member contended that it is unusual to have rule text devoted to what a provision does not do. The Chair explained that the problem in the existing caselaw is that courts are applying Rule 615 orders more expansively than they are written, and that a draft amendment needs to specify its effect in order to address that problem. The rule needs to be written to assist neophytes, and a specific statement about the limits of the first provision would be useful to those unfamiliar with the basic rule. The Committee member queried whether it would be better to place the sentence regarding the effect of an amended Rule 615(a) in subsection (a) rather than as the opening sentence of subsection (b). The Chair suggested that the first sentence of the draft of subsection (b) might be removed from rule text entirely with the issue of the effect of a basic Rule 615(a) order addressed

in the Committee note. Ms. Nester remarked that she would be concerned about removing the limiting first sentence of subsection (b) from rule text. She explained that lawyers assume they have taken care of witness sequestration issues when they simply “invoke” Rule 615. If that simple invocation does not include extra-tribunal protections and lawyers need to seek “additional orders” to obtain those protections, the rule needs to spell that out clearly. Otherwise it becomes a trap for the unwary. The Chair acknowledged that Rule 615 is a courtroom rule and not an office rule and needs to be drafted very clearly for use on the fly in court.

The Committee member who raised the issue suggested that, in light of the concerns raised, it might be best to retain the limiting first sentence in the draft of subsection (b). Judge Bates inquired what the outcome would be if a lawyer using the rule on the fly in court as is commonly done “invokes” both subsections (a) and (b) of an amended Rule 615. If the court grants the request, does that lawyer now enjoy extra-tribunal protections to prevent witnesses from accessing testimony outside the courtroom? The Chair suggested that the lawyer would not enjoy any such protection as the draft currently stands; additional orders extending protection beyond the courtroom would need to be written to provide proper notice.

A Committee member again suggested moving the limiting first sentence of subsection (b) up into subsection (a) which it limits. He suggested it could be placed at the end of subsection (a). The Reporter noted that placing the sentence at the end of subsection (a) would create a hanging paragraph, which presents a style problem. The Reporter suggested that public comment might provide helpful feedback on the limiting first sentence currently in subsection (b). The Committee concluded that it would be best to leave the text of the draft amendment unchanged and to evaluate any feedback on the first sentence of subsection (b) from public comment and from stylists.

Ms. Shapiro turned the discussion to the witnesses exempted from sequestration under subsection (a)(1)-(4) of the draft amendment, noting that the exception for designated entity representatives was limited to “one” in the draft amendment. Ms. Shapiro suggested that there was no strong reason to limit entity parties to a single designated representative, that there was not a true “circuit split” on the issue, and that in certain situations individual parties are allowed multiple representatives. She offered the example of a class action suit against the government, in which each individual class member would have a right to be in the courtroom, while the government would be entitled to only a single representative.

The Reporter responded that the purpose of the automatic exemptions for parties was to offer one representative per party and that limiting entities to a single representative, in the way that individual persons are limited to one, is consistent with the purpose of the existing Rule. He further explained that the party exemptions from sequestration operate “automatically” and that there is no basis or methodology for a trial judge to utilize in deciding to permit more than one entity representative to be “designated.” Another Committee member inquired as to how an entity exemption limited to one designated representative would operate in the context of an eight-week trial during which no single corporate representative could remain for the entire trial. The Committee member suggested that there ought to be an escape clause allowing a trial judge to permit entities to “swap out” designated representatives in such a circumstance. Another Committee member echoed that concern, noting that it is often impossible to have one designated representative in lengthy corporate trials. The Reporter explained that the draft Committee note

contained two bracketed options addressing swapping out – one permitting it and one prohibiting it under the automatic exemption for designated entity representatives. He agreed that the note would have to address the issue of swapping out representatives were the Committee to propose a limit of “one” designated entity representative. Ms. Nester emphasized the importance of sequestration for effective cross-examination and noted that meaningful cross-examination is severely undermined when the government is permitted to have all five case agents in the courtroom listening to all the testimony during trial.

In response to this discussion, the Reporter asked the Committee whether an amendment to the text of Rule 615 specifically limiting entity parties to “one” designated representative would cause more trouble than it was worth. He noted that most of the caselaw limits entities to a single representative and suggested that the Committee could rely on caselaw to regulate the issue. One Committee member responded that amending the entity representative exemption to limit it to “one” would be fair and appropriate given that it is a provision that operates as of right. The Committee member further noted that Rule 615 allows parties to make a showing of “essentiality” to exempt additional witnesses beyond those automatically exempt from sequestration. The Committee member opined that a party could make the necessary essential showing even to justify swapping out representatives during a lengthy trial. Another Committee member agreed that “one” designated representative made sense, with the option to “pitch” for more under the essentiality exemption. Two additional Committee members promptly agreed that a limit to one designated entity representative would be optimal, with the option of seeking the ability to swap out representatives in appropriate circumstances. The Chair noted that a majority of the Committee favored limiting entities to one designated representative with a swap-out option. There was some discussion of whether “swapping” representatives would occur under Rule 615(a)(2) or whether an entity would have to make the “essential” showing required by (a)(3) to swap designated representatives throughout a trial. Though all agreed that the trial judge would need to approve swapping out, the consensus was that trial judge discretion to do so should exist under Rule 615(a)(2). The draft Committee note was modified slightly to reflect this consensus.

Ms. Shapiro stated that the Department of Justice would not object to the change but that it did not feel that the change was necessary or justified. She suggested that the sentence in the draft Committee note stating that the change would “provide parity” for individual and entity parties should be removed because the exemptions would be capable of operating unfairly as her class action example showed. The Reporter responded that it would be inappropriate to remove that sentence because it explains the reason for the amendment. The Chair also responded that the “parity” described by the draft note is parity *per party* and not parity across the “v” – as drafted, the amended rule would treat all parties alike by giving each a single representative in the courtroom as of right. The Reporter suggested that the sentence in the note could be softened to state that limiting entity parties to one designated representative “generally provides parity” to address the Department’s concern.

The Chair next called the Committee’s attention to a slight change in the draft Committee note concerning the application of the amended Rule to counsel. The draft note previously stated that the amendment did not “address” admonitions to counsel about providing witnesses access to trial testimony. Although the amendment does not dictate to trial judges how to handle counsel, the amendment technically could apply to counsel by allowing additional orders preventing witness

access to testimony outside the courtroom. To better capture the import of the amendment as to counsel, the Chair proposed revised language for the Committee note, stating: “Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness.” The amended Rule does not tell trial judges to apply protections to counsel, but nor does it prohibit such action. Rather, it leaves the matter to judges on a case-by-case basis considering the ethical and constitutional implications unique to each case.

A Committee member queried whether the Committee should reconsider the language of Rule 615(a) that mandates exclusion from a physical “courtroom” in light of the increase in virtual trials in which there is no physical courtroom from which to be excluded. Another Committee member suggested that the term “courtroom” in Rule 615(a) could be changed to “proceedings” to eliminate a physical component to exclusion. The Reporter explained that the issue of a virtual proceeding was addressed by language in the draft Committee note directing trial judges to utilize their discretion to enter “additional orders” under subsection (b) to tailor exclusion from virtual proceedings. The Chair suggested that trial judges should not have to enter an “additional order” under subsection (b) to keep testifying witnesses out of virtual proceedings and that a basic sequestration order under subsection (a) should operate automatically to exclude testifying witnesses from the virtual proceedings just as they would be excluded physically from courtroom proceedings. Committee members agreed that a Rule 615(a) order should operate automatically to prevent testifying witnesses from accessing virtual proceedings. The Committee agreed that the text of Rule 615(a) did not need to be changed to address virtual proceedings; instead, the Committee note would be altered to clarify that Rule 615(a) orders block witnesses from trial proceedings – whether in a physical courtroom or on a virtual platform.

The Chair then asked for Committee members to vote on approving Rule 615 and the accompanying Advisory Committee note, as modified at the meeting, for publication. **The Committee unanimously approved the amendment and Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.**

The proposed amendment to Rule 615 and the Committee Note are attached to these Minutes.

V. The Best Evidence Rule and Foreign Language Recordings

The Chair next turned the Committee’s attention to the possibility of pursuing an amendment to Article X of the Federal Rules of Evidence to exempt foreign-language recordings from the Best Evidence rule. Professor Richter introduced the issue concerning the application of the Best Evidence Rule, found in FRE 1002, to writings and recordings made in a language other than English. She noted that the application of the Best Evidence Rule to English language writings and recordings is well-settled and requires a party seeking to prove the content of such writings or recordings to offer an “original” or “duplicate” into evidence. Although transcripts are often used to assist jurors in deciphering a conversation originally recorded in English, transcripts are only an aid to understanding and jurors are instructed that the original recording is the primary evidence upon which they should rely in determining content.

Foreign-language recordings present a unique problem in the federal court system because proceedings are conducted in English and because jurors cannot decipher content from original recordings for themselves. In the case of foreign-language recordings, two questions arise: 1) whether the original foreign-language recordings must be admitted into evidence and presented to the jury and 2) whether an English translation transcript may be offered as substantive evidence of content rather than merely as an aid to understanding. Professor Richter explained that the majority in the recent Tenth Circuit opinion in *United States v. Chavez* performed a plain language interpretation of Rule 1002 and held that the Best Evidence rule applies to foreign-language recordings in the same way that it applies to English language recordings, requiring admission of the original recording as primary evidence with an English transcript offered only as an aid to understanding. The majority reversed a drug distribution conviction where the trial court permitted the prosecution to admit an English transcript of a mostly Spanish recording as substantive evidence without admitting the original recording itself.

Professor Richter noted that there was a lengthy dissent in *Chavez*. The dissent pointed out the common-sense impossibility of requiring English-speaking jurors to rely upon a foreign-language recording as primary evidence. It further noted that, while an original foreign-language recording might be relevant and helpful in resolving disputes about the identity of speakers or the general tenor of a conversation in some cases, foreign-language recordings might be excluded as irrelevant or as unduly prejudicial in others. The dissent further pointed out that an English translation may nonetheless be admitted as substantive evidence because it qualifies as an expert opinion grounded in specialized knowledge of the foreign language at issue. The fact that the original recording might be excluded would not prevent the expert translator from relying upon it as basis because Rule 703 permits an expert to rely on inadmissible information so long as other experts in the field would reasonably rely on the information. Finally, the dissent pointed out that the Advisory Committee's note to Rule 1002 acknowledges an expert's ability to rely upon an original writing, recording or photograph without violating the Best Evidence rule. In this way, the dissent argued that an English transcript could be offered as substantive evidence of the content of the conversation captured on the recording without running afoul of the Best Evidence rule.

Professor Richter explained that the majority and dissent in *Chavez* also disagreed sharply over the treatment of foreign-language recordings by the federal courts. She stated that she had researched federal cases on the admissibility of foreign-language recordings and English translation transcripts and had discerned several patterns: 1) there are many federal opinions regarding the admissibility of foreign-language recordings, suggesting that this issue arises at trial with some frequency; 2) there is very little discussion or analysis of the Best Evidence rule in the federal cases dealing with foreign-language recordings; 3) most federal courts acknowledge the distinction between English and foreign-language recordings and permit English transcripts of foreign-language recordings to be admitted as substantive evidence, rather than as aids to understanding only; 4) most federal cases involve the admission of *both* the original foreign-language recordings *and* the English transcripts into evidence; very few cases involve the *Chavez* scenario in which the English transcripts are admitted *in lieu of* the original foreign-language recordings; and 5) some federal cases have suggested that original foreign-language recordings may be "admitted" into evidence but withheld from the jury.

Based upon this research, Professor Richter opined that the Committee could refrain from any amendment to Article X. The federal courts seem to be handling the admissibility of foreign-language recordings appropriately and the dissent in *Chavez* set out a detailed path to the substantive admissibility of English transcripts that does not run afoul of Rule 1002. On the other hand, Professor Richter noted that the Committee could explore the addition of a new Rule 1009 to Article X that would exempt foreign-language writings and recordings from the ambit of the Best Evidence Rule if it were so inclined. She noted that such an amendment would be a narrow one. It would simply mean that a party (most often the government in a criminal case) seeking to prove the content of a foreign-language recording would not *be required* to admit the original recording as evidence of that content under Rule 1002. The parties could still seek admission of the original recording under Rule 402 to the extent that the recording might assist the fact-finder in resolving issues other than content, such as the identity of speakers, the tone of a conversation, or the timing of a recorded conversation. Thus, an amendment to Rule 1002 to remove foreign-language recordings would make their admission *discretionary* rather than *mandatory*. Professor Richter observed that an exemption for foreign-language recordings would be consistent with other exemptions from the Best Evidence Rule. Rule 1004 permits alternate proof of content where an original has been lost or destroyed and Rule 1006 permits summary proof of records too voluminous to be examined in court. An exemption for foreign-language recordings would be based upon similar pragmatic concerns – the inability of jurors to discern content from the original.

Professor Richter closed by emphasizing that *many* evidentiary problems remain with the admission of English translation transcripts that would *not* be addressed by an amendment to the Best Evidence rule. These issues include the admissibility of an expert translation, as well as issues of hearsay and confrontation where a transcript itself is offered as evidence of the expert's translation. She suggested that an Advisory Committee note would need to acknowledge the many remaining issues surrounding the admissibility of English language transcripts that are simply not addressed under Article X of the Evidence Rule were the Committee ultimately to proceed with a proposal to amend the Best Evidence rule.

The Chair began the discussion by noting that the issue of foreign-language recordings comes up most commonly in criminal cases and that the prosecutor and defense counsel typically work together to stipulate to an agreed transcript. He remarked that he had never had a translator qualified as an expert and that he would not wish to inject any requirement that translators be treated as Rule 702 experts into the Rules. Another judge on the Committee noted that he had not run into this issue either and that he was not persuaded of the overall need for an amendment. He opined that an original foreign-language recording should not go to the jury because jurors could try to translate it for themselves; the evidence should be the translation. Another judge on the Committee stated that he had encountered the issue frequently in connection with the translation of wiretap evidence and text messages in foreign languages. He explained that if there is no Rule 702 objection to the translator or to the accuracy of the translation, an English transcript comes in as evidence and there is no Best Evidence problem. The Chair added that if there is a dispute about the translation, both prosecution and defense translators testify and the jury resolves the dispute. He noted that there were no expert reports or *Daubert* motions connected with the translation evidence. Another judge agreed, but noted that lawyers just do not object to translators under Rule 702. He suggested that there would need to be expert disclosures and other *Daubert* protections granted if an objection were to be raised. Judge Bates noted that many recordings are in multiple

languages – portions in English and portions in other languages. He observed that any amendment would need to deal with the issue of mixed recordings. Another Committee member counseled caution, noting that lawyers and federal courts are generally handling foreign-language recordings capably and that the admissibility of the recordings and the transcripts touched on many issues that an amendment would not want to address. Another Committee member agreed, suggesting that the *Chavez* opinion was an outlier and that the Committee might benefit from letting the issue percolate in the courts longer.

Ms. Nester suggested that federal defenders often litigate the accuracy of foreign-language recordings and that they do object to an English transcript being sent to the jury where there is a dispute as to its accuracy. That said, she noted that federal defenders attempt to reach an agreement with the government as to the translation where possible and try to get the original recording sent to the jury for its consideration. The Reporter commented that an amendment removing foreign-language recordings from the ambit of the Best Evidence rule would not prohibit admitting those recordings and sending them to the jury under Rule 402 in appropriate cases. It would just make their admission discretionary rather than mandatory. Ms. Nester suggested that she would like to check with her litigation team to ascertain whether there is a problem with admissibility of foreign-language recordings that might be addressed through an amendment.

Thereafter, the Committee agreed unanimously to table the issue of amending Article X to exempt foreign-language writings and recordings, pending some request by the Federal Public Defender to reconsider the issue.

VI. Rule 611(a)

The Reporter turned the Committee's attention to Rule 611 and the Agenda memoranda describing possible amendments to that provision. He explained that there were three separate issues under Rule 611 to discuss: 1) the wide variety of actions trial judges take in reliance on Rule 611(a) and the possibility of amending the broad provision to better reflect practice under the Rule; 2) the possibility of adding some safeguards for federal judges to utilize when exercising their discretion to allow jurors to ask questions of witnesses; and 3) the possibility of providing guidance about the proper use of illustrative aids at trial.

First, the Reporter informed the Committee that trial judges rely upon Rule 611(a) to justify a wide variety of rulings, some of which do not fit neatly within the existing language of the Rule. He reminded the Committee that Rule 611(a) addresses things that a trial judge may regulate (e.g., the mode and order of examining witnesses) as well as the purposes for which a trial judge may act (e.g., to avoid wasting time). He observed that some actions -- such as authorizing a virtual trial as a result of covid to protect public health and safety -- might not fit neatly within the described justifications. He explained that the Agenda memo on Rule 611(a) was prepared to help the Committee think about whether to amend Rule 611(a) to add actions or purposes to the enumerated list to better capture what trial judges are already doing. The Reporter explained that he had prepared a draft amendment, in the agenda materials, to expand the list of actions and purposes authorized by Rule 611(a) for the Committee's consideration.

After conducting significant research, the Reporter opined that he was not persuaded that an amendment was necessary, because the trial court always possesses inherent authority regardless of the precise language of Rule 611(a). Further, he observed that Rule 611(a) does not appear to be causing any difficulties in practice, except potentially in rare areas where trial judges are using Rule 611(a) to countermand other evidence rules (e.g., Rule 613(b)). Finally, the Reporter expressed concern that trial judges might interpret an amendment further enumerating authorized actions as actually *limiting* their discretion when the purpose of an amendment would be exactly the opposite. One Committee member remarked that it was troubling for judges to rely upon Rule 611(a) to countermand other specific provisions, but agreed that amending Rule 611(a) would be opening a Pandora's box.

Ultimately the Committee decided not to proceed with an amendment to Rule 611(a).

The Committee next discussed the possibility of amending Rule 611 to add safeguards that trial judges could utilize if they were inclined to allow jurors to pose questions for witnesses. The Chair emphasized that an amendment would take no position on whether a trial judge should allow juror questions but would simply provide safeguards for judges who opt to do so. The Reporter agreed, noting that it would be inappropriate for the Committee to take a position on the controversial and political issue of jury questions, but that a new subsection (d) to Rule 611 could at least offer protections when jury questions are permitted. The Chair noted that many of his colleagues do permit jurors to pose questions and that the Committee might create some consistency and uniformity surrounding the practice with an amendment. Another Committee member stated her interest in placing the issue on the Committee's agenda, noting that trial judges might be more willing to consider allowing juror questions if there were some accepted safeguards surrounding the practice. Another Committee member suggested that the language of the tentative draft amendment that referenced "the" safeguards should be altered because it sounds as if the identified safeguards are exhaustive. He opined that any safeguards placed in an amended rule should be would establish a minimum protection, but trial judges would be allowed to exercise their discretion to add additional safeguards.

Judge Kuhl noted that there had been a long-standing push in the state courts to allow jurors to ask questions and that many state court judges permit juror questions. She explained that jurors were allowed to submit written questions to court personnel and that they were cautioned that questions ultimately might not be asked for many good reasons, and that jurors should draw no negative inferences from the fact that a juror question did not get asked of a witness. The Reporter inquired whether jurors are allowed to question parties or only witnesses. Judge Kuhl replied that juror questions were limited to witnesses and that the practice was about 90% jury management and about 10% evidence. Judge Kuhl also explained that she had been allowing juror questions for approximately 15 years and that she could count on one hand the number of times that jurors posed questions. She suggested that the practice was more about keeping jurors engaged in the trial than about eliciting important questions. Judge Lioi remarked that she, too, allowed juror questions in civil cases and that her experience was largely positive. She noted that jurors sometimes do come up with outstanding questions. The Chair concluded the discussion by promising the Committee that the Reporter would include a draft Rule 611(d) on jury questions, with an accompanying Advisory Committee note for the Fall meeting.

The Chair turned the discussion to the final Rule 611 issue – the proper use of illustrative aids at trial. He noted that illustrative aids are used in almost every federal trial and that they create a host of issues, such as: 1) is a particular exhibit illustrative only or does it qualify as “substantive” evidence; 2) is notice to the opposing party required before an illustrative aid may be used; 3) must the trial judge give a limiting instruction when an illustrative aid is used; 4) may illustrative aids go to the jury room; and 4) are illustrative aids part of the record on appeal? The Chair noted that illustrative aids are often prepared the night before they are used in court and that there are no Federal Rules of Evidence governing their use. He observed that trial judges often have different philosophies regarding illustrative aids and that a Federal Rule of Evidence providing guidance about their use might be helpful.

The Reporter explained that Maine has a specific provision -- Evidence Rule 616 -- that governs illustrative aids. He noted that the Maine rule was utilized as a starting point for crafting a potential federal rule. He explained that Maine Rule 616 distinguishes between illustrative aids and demonstrative evidence that can be offered as proof of a fact. He noted that the Maine Rule also offers significant instruction on the use of illustrative aids during trial proceedings.

The Committee agreed unanimously to keep the possibility of an amendment to govern illustrative aids on the agenda for the fall. All noted that the issue comes up routinely and that there is little uniform guidance on the treatment of illustrative aids. The Reporter promised to work up a draft amendment and Advisory Committee note for the next meeting.

VII. Rule 1006 Summaries

The Chair next raised the related issue of Rule 1006 summaries and interpretive difficulties surrounding them, in order to gauge the Committee’s interest in exploring a possible amendment to that provision. Professor Richter, who had prepared the report for the Agenda materials, reminded the Committee that Rule 1006 is an exception to the Best Evidence Rule that permits a party to use “a summary, chart, or calculation” to prove the content of writings, recordings, or photographs that are too “voluminous” to be conveniently examined in court. She noted that the Rule requires that the underlying records be admissible, though they need not be admitted into evidence – the idea behind Rule 1006 is to permit alternate proof of the content of voluminous records. The underlying records must be made available to the opponent and the trial court has the discretion to order that they be produced in court.

Professor Richter pointed out several interpretive issues that plague Rule 1006 --- many of which arise due to the confusion of summaries offered under Rule 1006 and illustrative charts and summaries offered through Rule 611(a). The Rule 1006 interpretive issues include: 1) some federal courts erroneously hold that the summary itself is “not evidence” and that the trial judge must give a limiting instruction cautioning the jury against its substantive use; 2) some federal courts have held that the underlying voluminous records must be admitted into evidence before a Rule 1006 summary may be used; 3) other federal courts have held that a Rule 1006 summary may *not* be used if any of the underlying records have been admitted into evidence; 4) some federal courts have held that a Rule 1006 summary may contain argument and inferences and need not simply replicate or summarize underlying data; and 5) federal courts have authorized an oral “testimonial” summary of voluminous records by a testifying witness under Rule 1006. Professor

Richter pointed out that many of these holdings conflict with the letter or underlying purpose of Rule 1006 to permit proof of an accurate summary *in lieu of* proving voluminous writings, recordings, or photographs. Professor Richter directed the Committee's attention to a tentative draft of an amendment to Rule 1006 in the Agenda materials that would aim to correct and clarify the precedent under Rule 1006. She further noted that Rule 1006 speaks of records too voluminous to examine "in court" and of production of records "in court." Although this language has not caused any confusion in the reported federal cases to date, Professor Richter highlighted the locational nature of this language. She suggested that the Committee might consider altering the language in favor of something like "during court proceedings" to accommodate the possibility of virtual trial proceedings that do not take place "in court" if it were inclined to pursue other amendments to the Rule.

The Chair opened the Committee discussion by suggesting that a potential amendment to Rule 1006 could be a nice project to pair with consideration of Rule 611(a) illustrative aids given that much of the confusion in the federal courts stems from conflation of the two distinct types of summaries. He explained that the question before the Committee was whether to keep Rule 1006 on the Agenda for the fall. One Committee member suggested that this is an issue that causes confusion in practice, particularly with respect to how much inferential material can be added to a Rule 1006 summary. This Committee member opined that an amendment and Committee note that would help in drawing appropriate lines would be beneficial. Another Committee member stated that the use of overview witnesses is problematic in criminal cases and that clarifying whether and to what extent a Rule 1006 summary may be purely testimonial (as opposed to written or recorded) could help alleviate that concern. The Chair agreed, noting that it might be difficult to address line-drawing issues in rule text but that guidance could be offered in a Committee note. Thereafter, the Committee unanimously agreed that Rule 1006 should remain on the Agenda for consideration together with illustrative aids under Rule 611(a).

VIII. Party-Opponent Statements and Predecessors/Successors in Interest

The Reporter next called the Committee's attention to a circuit split regarding Rule 801(d)(2) and statements made by a party's predecessor or successor in interest. The Chair explained that if the estate of deceased declarant were to bring suit against a defendant, some circuits would permit the statements made by the decedent to be offered against the estate as party-opponent statements under Rule 801(d)(2)(A), while others would foreclose access to those statements because they are not statements of "the estate" that is the technically the party-opponent in the case. He suggested that this issue rarely comes up, but that it has the potential to cause significant unfairness when access to highly relevant statements is foreclosed by a death or by something more intentional like assignment of a claim to another. With both federal and state courts in disarray on this point, the Chair suggested that the Committee might consider a potential amendment to Rule 801(d)(2) to address the question.

The Reporter agreed with the Chair, noting that the rule should be that the statement of a predecessor in interest, like the decedent in the Chair's example, should be admissible against a successor like the estate. In considering whether to amend Rule 801(d)(2) to resolve the circuit split in that way, the Reporter suggested that the Committee would need to consider a few issues, including: 1) whether the issue arises with sufficient frequency to justify an amendment to Rule

801(d)(2); 2) how to choose appropriate amendment language or labels to cover all types of successorship relationships; and 3) how to apply the rule to all of the exceptions for party opponent statements under Rule 801(d)(2). The Chair agreed, noting that there is a clear circuit split and also a clear answer; the only question for the Committee is whether the issue merits consideration. The Reporter stated that he felt that the rule was probably worth fixing given that the issue is capable of occurring in many contexts. The Committee members all agreed that it was worthy of consideration because a small tweak to the Rule could prevent an injustice. The Chair stated that the issue would remain on the Agenda for the fall.

IX. Circuit Splits

The Chair reminded the Committee that the Reporter had prepared an extensive memorandum on all remaining circuit splits involving the Federal Rules of Evidence for the Committee's consideration. The purpose of the memorandum was to allow the Committee to identify splits, if any, that merit further consideration and placement on the Agenda. Because the memorandum addressed so many issues, the Chair requested that each Committee member make a note of all the splits that the Committee member would favor putting on the Agenda. Committee members expressed interest in the following circuit splits:

- Rule 407 --- does it exclude subsequent changes in contract cases?
- Rule 407 --- does it apply when the remedial measure occurs after the injury but not in response to the injury?
- Rule 613(b) --- to rectify the dispute in the courts on whether a witness must be provided an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence is admitted;
- Rule 701 --- clarifying the line between lay and expert testimony;
- Rule 804(b)(3) --- to specify that corroborating evidence may be considered in determining whether the proponent has established corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest in a criminal case;
- Rule 806 --- to rectify the dispute over whether bad acts that could be inquired into to impeach a witness under Rule 608(b) can be offered to impeach a hearsay declarant.

In addition, the Committee listed as “maybes” an inquiry into whether Rule 803(3) should be amended to limit state of mind statements to those that are spontaneous, and whether to prohibit admissibility of state of mind statements offered to prove the conduct of a third party; and a possible amendment to regulate admissibility of grand jury testimony being offered against the government under Rule 804(b)(1).

The Reporter noted that the Committee may want to hold off on placing Rule 701, involving the distinction between lay and expert opinion testimony, on the Agenda. He explained that prior Committees had worked to resolve this issue and that it may be simply impossible to articulate the line between lay and expert testimony in rule text --- any better than it had already been done in 2000. He suggested that continuing to monitor the cases while pursuing other issues might be the best course. The Chair and Committee agreed to hold off on Rule 701. The other items, referred to above, remain on the agenda.

X. Closing Matters

The Chair thanked everyone for their contributions and noted that the fall meeting of the Committee will be held on Friday, November 5, 2021 in San Diego, with a Committee dinner to be held the night before. Both the Chair and Reporter commented on the remarkable accomplishment of the Committee in approving unanimously three amendments for publication, and thanked all involved in the lengthy and thorough process. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra
Liesa L. Richter