COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: December 1, 2021

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met at the Administrative Office in Washington, D.C., on November 5, 2021. The Committee reviewed the proposed amendments to Rules 106, 615, and 702 that are out for public comment. It also tentatively agreed upon possible amendments to Rules 611, 613, 801(d)(2), 804(b)(3), and 1006. These proposals will be reviewed by the Committee at the Spring, 2022 meeting, to determine whether they will be recommended for release for public comment. Finally, the Committee rejected possible amendments to Rules 407 and 806.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Proposed Amendments Released for Public Comment

The Evidence Rules Committee has three proposed amendments out for public comment. At this point, only a few comments have been received, but of course most comments are received toward the end of the comment period, and the Committee expects to receive a large number of comments especially on Rule 702. The Committee has also scheduled a hearing for January. This section reports on the individual proposals and the Committee's discussion of them at the Fall meeting.

1. Rule 106

The Committee proposes two amendments to Rule 106, the Rule of Completeness. First, if the strict standards for completion are met, the rule would provide that the statement that is necessary to complete would be admissible over a hearsay objection. Second, unrecorded oral statements would be covered by Rule 106.

At the meeting, the Committee considered an informal comment that the amendment's reference to "written or oral" statements should be changed to add coverage of statements made through conduct or otherwise without words. The Committee tentatively agreed to delete the term "written or oral" so the amended rule would cover all "statements" that meet the standard for completion. The Committee also reviewed the proposed Committee Note to assure that the citations to cases in the note are helpful to understanding the amendment. The Committee determined that all of the citations were useful.

2. Rule 615

The proposed amendment to Rule 615 would clarify that an order invoking the Rule operates only to exclude witnesses from the courtroom --- but that the court may in its discretion provide additional restrictions to prevent excluded witnesses from obtaining trial testimony.

At the meeting, the Committee considered several questions that were raised about the proposal at the Standing Committee meeting. After discussion, the Committee determined that the rule should not require an order extending outside the courtroom to be in writing (because, among other reasons, there is no order referred to in the Evidence Rules that must be in writing); that the amendment should not set forth the criteria necessary for an order that extends outside the courtroom; and that the existing proposal adequately indicates that the court can combine an order excluding witnesses and an order extending outside the courtroom.

3. Rule 702

The proposed amendment to Rule 702 makes two changes to the existing rule: 1) It emphasizes that the court must determine that the reliability-based requirements for expert testimony are established by a preponderance of the evidence; and 2) It provides that the trial court must evaluate whether the expert's conclusion is properly derived from the basis and methodology that the expert has employed.

The Committee has received a handful of public comments on Rule 702. All are supportive of the change, but some suggest that the rule explicitly state that it is the *court* that must determine that the admissibility requirements are established by a preponderance of the evidence. The Committee discussed that suggested change at the meeting and has determined for now not to implement it, but rather to await further public comment. Other comments suggest that the Committee Note be toughened up, to state that the amendment has "rejected" contrary authority and to single out some offending cases. At the meeting the Committee concluded that it is unnecessary and probably counterproductive to single out offending cases. As to a statement explicitly rejecting prior authority, the Committee decided to wait for further public comment.

B. Rule 611 --- Illustrative Aids

The Committee is unanimously in favor of adding a provision to Rule 611 that would regulate the use of illustrative aids at trial. Illustrative aids are used in almost every trial, and one of the biggest problems seen in the cases is that courts and litigants have trouble distinguishing between illustrative aids and demonstrative evidence offered to prove a fact. The Committee has tentatively approved an amendment that would provide standards for allowing the use of illustrative aids, along with a Committee Note that would emphasize the distinction between illustrative aids and demonstrative evidence. The text tentatively agreed upon is as follows:

Illustrative Aids. The court may allow a party to present an illustrative aid to assist the factfinder in understanding evidence or argument if:

(1) its utility in helping the jury to understand the evidence or argument is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time;[1]

(2) all parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use;

(3) it is not provided to the jury during deliberations over a party's objection unless the court, for good cause, orders otherwise; and

(4) it is entered into the record.

The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

C. Rule 1006

Evidence Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. The Committee has found that courts have frequently misapplied Rule 1006, and most of these errors arise from the failure to distinguish between summaries of evidence under Rule 1006 and summaries of evidence that are illustrative aids (and not evidence themselves). The most common errors under Rule 1006 are: 1) requiring limiting instructions that Rule 1006 summaries are "not evidence" (when in fact they are an admissible substitute of the underlying voluminous records); 2) requiring all underlying voluminous materials to be admitted into evidence; 3) refusing to allow resort to a Rule 1006 summary if any underlying materials have been admitted into evidence; 4) allowing Rule 1006 summaries to include argument and inference not contained in the underlying materials; and 5) allowing testifying witnesses to convey oral summaries of evidence and argument not within Rule 1006 requirements.

At the meeting, the Committee unanimously determined that Rule 1006 should be amended to address the mistaken applications in the courts, and that an amendment would be especially useful in tandem with the amendment to Rule 611 to govern illustrative aids. After extensive discussion, the Committee tentatively approved the following text:

[1] Rule 403 also refers to "needlessly presenting cumulative evidence" but that phrase would be confusing here, because what is being offered is not evidence.

RULE 1006. SUMMARIES TO PROVE CONTENT

(a) The ~~proponent~~ court may admit as substantive evidence ~~use~~ a non-argumentative written summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court whether or not they have been introduced into evidence. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(b) An illustrative aid that summarizes evidence or argument is governed by Rule 611(d/e).

The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

C. Rule 611 --- Safeguards to Apply When Jurors are Allowed to Pose Questions to Witnesses

The practice of allowing jurors to ask questions of witnesses is a controversial one, but all courts agree that if the practice is allowed, safeguards must be in place to protect the parties against prejudice. The Committee has unanimously determined that it would be helpful to courts and parties to amend Rule 611 to set forth safeguards that must be employed when the court has determined that jurors will be allowed to pose questions to witnesses. While another alternative might be proposing some best practices outside the rulemaking process, the Committee concluded that a new Evidence Rule would have a stronger impact, and it would be user-friendly as it would collect in one place the necessary safeguards that are currently strewn through the case law.

The Committee tentatively approved the following language for a new provision to be added to Rule 611:

(d) Juror Questions of Witnesses.

(1) Instructions to Jurors if Questions are Allowed. If the court allows jurors to ask questions of witnesses during trial, then before any witnesses are called, the court must instruct the jury that:

(A) any question must be submitted to the court in writing;

(B) a juror must not disclose a question's content to any other juror;

(C) the court may rephrase or decline to ask a question posed by a juror;

(D) if a juror's question is rephrased or not asked, the juror should not draw any negative inferences;

(E) an answer to a juror's question should not be given any greater weight than an answer to any other question; and

(F) the jurors are factfinders, not advocates.

(2) Procedure When a Question is Submitted. When a question is submitted by a juror, the court must, outside the jury's hearing:

(A) review the question with counsel to determine whether it is appropriate under these rules; and

(B) allow a party to object to the question.

(3) Reading the Question to a Witness, When the court determines that a juror's question may be asked, the question must be read to the witness by the court.

It is important to note that the Committee does not to take any position on whether jurors should be permitted to pose questions to witnesses --- and the Committee Note will emphasize that the rule is neutral on the practice. The goal of the amendment is to provide a structure for the court to follow if it decides to allow jurors to pose questions to witnesses. The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

D. Rule 801(d)(2) --- Hearsay Statements by Predecessors

Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent. The Committee has analyzed this conflict in the courts and has determined that it is an important one to rectify, and that the

proper solution is that if a party stands in the shoes of the declarant, then the statement should be admissible because it would be admissible against the declarant.

The Committee has tentatively approved an addition to Rule 801(d)(2) that would provide as follows:

> A statement that would be admissible under this rule if the declarant or the declarant's principal were a party, is admissible when offered against a party whose claim or defense is directly derived from the rights or obligations of the declarant or the declarant's principal.

The Committee Note to the proposed change would emphasis that to be admissible, the declarant must have made the statement before the transfer of the claim or defense. The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

E. Rule 804(b)(3) and the Corroborating Circumstances Requirement

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate the trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. Most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest and independent evidence corroborating the accuracy of the statement. But some courts do not permit inquiry into independent evidence --- limiting judges to consideration of the inherent guarantees of trustworthiness surrounding the statement. This latter view --- denying consideration of corroborative evidence --- is inconsistent with the 2019 amendment to Rule 807, the residual exception, which requires courts to look at corroborative evidence in determining whether a hearsay statement is sufficiently trustworthy under that exception. That rationale is that corroborative evidence can shore up concerns about the potential unreliability of a statement --- a rationale that is applied in many other contexts, such as admissibility of co-conspirator hearsay, and tips from informants in determining probable cause.

The Committee tentatively approved an amendment to Rule 804(b)(3) that would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist. The proposed language for the amendment is as follows:

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it ~~is~~ supported by corroborating circumstances that clearly indicate trustworthiness --- after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement. ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability.~~

The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

F. Prior Inconsistent Statements ---- Rule 613(b)

Rule 613(b) permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. But the courts are in dispute about the timing of that opportunity. Rule 613(b) by its terms permits a witness's opportunity to explain or deny a prior inconsistent statement to happen *even after* extrinsic evidence is admitted. But presenting extrinsic evidence of a witness's prior inconsistent statement *before* giving him an opportunity to explain or deny it may cause problems if the witness has been excused or has become unavailable. And it also is inefficient because if the witness is given a prior opportunity, she may just admit that she made the statement, rendering extrinsic proof unnecessary. For these reasons, many federal courts reject the flexible timing afforded by Rule 613(b) and *require* that a witness be given an opportunity to explain or deny *first* during cross-examination before extrinsic evidence of the statement may be offered.

The Committee unanimously determined that the better rule is to require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity (for example, when the prior inconsistent statement is not discovered until after the witness testifies). The practice of the judges on the Committee is to require an opportunity to confront the statement

before extrinsic evidence is introduced, and the Committee concluded this is a superior procedure. Accordingly, the Committee tentatively approved the following change to Rule 613(b):

Extrinsic Evidence of a Prior Inconsistent Statement.

Extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted unless the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about ~~it~~ the statement before extrinsic evidence is introduced, ~~or if justice so requires~~ unless the court orders otherwise. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

The Committee hopes to finalize the language of the text and Committee Note at the next meeting, so that it can be submitted to the Standing Committee with the recommendation that it be released for public comment.

G. Rule 407 --- Subsequent Remedial Measures

The Committee considered proposed amendments to Rule 407, the rule providing protection from admission of subsequent remedial measures. The proposal was addressed to two separate conflicts in the courts. First, courts are in dispute about whether the rule applies only when there is some causative relationship between the injury and the subsequent measure. Because the policy of the rule is that without it, some defendants will not make improvements, some courts accordingly do not apply the rule unless the measure was a response to the plaintiff's injury. Other courts, applying the text of the rule, hold that subsequent measures are excluded whether or not in response to the plaintiff's injury. Second, some federal courts have extended Rule 407 protection to contracts cases when a subsequent change in a contract provision is offered to show the meaning of a predecessor provision. Other courts find Rule 407 wholly inapplicable in contracts disputes.

After extensive discussion, the Committee decided to table the proposed amendments. Most of the discussion was about the proposal to require a cause and effect relationship between the plaintiff's injury and the defendant's change. Committee members concluded that such a rule would require difficult factual determinations, and extensive hearings. It would also require an expenditure of substantial resources in discovery. And it would probably lead to many claims of privilege, and review by the courts of those claims. On the other hand, Committee members were not in favor of an amendment that would preclude a court from requiring a showing of a cause and effect relationship between the plaintiff's injury and the defendant's change. Many courts are imposing such a requirement and the Committee saw no reason to preclude courts from doing so.

As to application of the rule to contracts, while many members believe that the rule is based on weak policy grounds that should not be extended to contract cases, the Committee was concerned that it would be difficult to craft language that would preserve protection in breach of warranty, products-type cases, while excluding the contract actions that should not be covered. Because there are very few cases that apply Rule 407 to contract situations, the Committee determined that the best course was to drop the proposal from the agenda, and to continue to monitor the case law under the rule.

H. Rule 806 --- Impeachment of Hearsay Declarants

Rule 806 allows the impeachment of hearsay declarants as if they were trial witnesses and seeks to equate hearsay declarant impeachment with traditional impeachment of witnesses. The challenge for the rule is that one form of impeachment essentially requires the declarant to be present at trial --- that is impeachment for bad acts offered to show character for untruthfulness under Rule 608(b). Under that rule, a witness can be asked about a bad act pertinent to a character for untruthfulness, but no evidence of that act can be introduced; if the witness denies the act, the inquiry is ended. Rule 806 makes no special accommodation for Rule 608(b) impeachment, and while there is not much case law on the subject, there is a dispute in the courts about whether extrinsic evidence of a bad act can be introduced when a hearsay declarant is being impeached under Rule 608(b).

The Committee considered two options: 1) that the impeaching party could introduce extrinsic bad act evidence; and 2) that the bad act could somehow be announced to the jury. The Committee found that the problem with the extrinsic evidence solution was that it would put the impeaching party in a *better* situation than if the declarant were to testify. Moreover, that rule would undermine the policy of Rule 608(b), which is to avoid distracting and complicated minitrials into whether the witness actually committed the bad act. The Committee also found that the remedy of announcing the bad act to the jury would also be problematic. Announcements of a bad act by the court or by the impeaching party would not really be the same as asking the witness about the bad act. Accordingly, after discussion, all Committee members agreed that it was best not to pursue an amendment to Rule 806, and the matter was dropped from the Committee's agenda.

IV. Minutes of the Fall, 2021 Meeting

The draft of the minutes of the Committee's Fall, 2021 meeting is attached to this report. These minutes have not yet been approved by the Committee.