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

MEMORANDUM

TO: David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Debra A. Livingston, Chair
Advisory Committee on Evidence Rules

DATE: June 1, 2020

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") did not hold a Spring 2020 meeting.

II. Action Items

No action items.

III. Information Items

A. Possible Amendment to Rule 106

At the suggestion of Hon. Paul Grimm, the Committee has been considering whether Rule 106 — the rule of completeness — should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. Judge Grimm suggests that Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Committee is continuing to consider various alternatives for an amendment to Rule 106. One option is to clarify that the completing statement should be admissible for the non-hearsay purpose of providing context to the initially proffered statement. Another option is to state that completion, where necessary, is admissible over a hearsay objection, because the proponent of the misleading portion forfeits the right to object to the necessary completion. The final consideration will be whether to allow unrecorded oral statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

One of the complicating factors for the Committee is to consider and work out the relationship between Rule 106 and the common law rule of completeness. The Supreme Court has stated that Rule 106 is a "partial" codification of the common law — leaving lawyers and judges to determine where the common law rule ends and Rule 106 begins. This is not a user-friendly system and the Committee is considering what if anything can be done to clarify the relationship between Rule 106 and the common law.

The Committee plans to consider the issues raised by Rule 106 again at its Fall meeting.

B. Possible Amendment to Rule 615

The Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony?

Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself could be helpful. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that

the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts.

At this point, the Committee has resolved that if a change is to be made to Rule 615, it should provide that a court order that extends beyond courtroom exclusion would be discretionary, not mandatory. The Committee has also considered whether any amendment to Rule 615 should address whether trial counsel can be prohibited from preparing prospective witnesses with trial testimony. The Committee tentatively resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules.

The Committee plans to consider the issues raised by Rule 615 again at its Fall meeting.

C. Forensic Expert Testimony, Rule 702, and *Daubert*

The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its Symposium on forensics and *Daubert* held at Boston College School of Law in October 2017. A subcommittee on Rule 702 was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. The subcommittee, after extensive discussion, recommended against certain courses of action. The subcommittee found that: 1) it would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; 2) it would not be advisable to set forth detailed requirements for forensic evidence either in text or committee note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and 3) it would not be advisable to publish a "best practices manual" for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same science-based controversy of what standards are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony — the problem of overstating results (for example, by stating an opinion as having a "zero error rate", where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the efforts it is now employing to regulate the testimony of its forensic experts. The Committee continues to consider a possible amendment on overstatement of expert opinions, especially directed toward forensic experts. The current draft being considered provides that "if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results." This language is intended to avoid wordsmithing the testimony of experts who testify to a conclusion that is not grounded in a numerical probability — such as an electrician testifying that "the house was not properly wired."

Finally, the Committee is considering how to respond to the fact that many courts have declared that the reliability requirements set forth in Rule 702(b) and (d) — that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology — are questions of weight and not admissibility. These statements can be read to misstate Rule 702, because all its admissibility requirements must be met by a preponderance of the evidence. The Committee has determined that many of these broad statements made by courts, while unfortunate, have not led to rulings in which the requirements of Rule 702 have been undermined. But the Committee has also concluded that in a number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence.

So far, the Committee has been reluctant to propose a change to the text of Rule 702 to address these mistakes as to the proper standard of admissibility, in part because the preponderance of the evidence standard applies to almost all evidentiary determinations, and specifying that standard in one rule might raise negative inferences as to other rules. Also, the Committee is wary about changing a rule in a way that essentially says, "apply the rule the way it was written."

While a textual change to Rule 702 to emphasize the preponderance of the evidence remains under consideration, the Committee is also considering an alternative: language in the committee note addressing the issue, if the text of the rule is to be amended to address the problem of overstatement, discussed above.

The Committee plans to consider the issues raised by Rule 702 again at its Fall meeting.

D. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration — as it did previously with the 2013 amendment to Rule 803(10).