Advisory Committee on Evidence Rules
Minutes of the Meeting of October 19, 2018
University of Denver Sturm College of Law
Denver, Colorado

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 19, 2018 at the University of Denver, Sturm College of Law in Denver, Colorado.

The following members of the Committee were present:

Hon. Debra A. Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly D. Dick
Hon. Thomas D. Schroeder
Daniel P. Collins, Esq.
Traci L. Lovitt, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Jesse M. Furman, Liaison from the Committee on Rules of Practice and Procedure (by phone)
Hon. Sara Lioi, Liaison from the Civil Rules Committee (by phone)
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. James O. Browning

Professor Daniel R. Coquillette, Reporter to the Standing Committee (by phone)
Professor Catherine T. Struve, Associate Reporter to the Standing Committee (by phone)
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee

Timothy Lau, Esq., Federal Judicial Center
Dr. Tim Reagan, Esq., Federal Judicial Center
Paul Shechtman, Esq.
Eric G. Lasker, Esq.
Aimee H. Wagstaff, Esq.
Professor Christopher B. Mueller
Ted Hunt, Esq., Department of Justice
Kira Antell, Esq., Department of Justice

Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Ahmad M. Al Dajani, Esq., Rules Committee Law Clerk

I. Opening Business

Announcements

The Chair opened the meeting by welcoming Kathy Nester, Federal Public Defender for the District of Utah, to the Committee. Judge Livingston noted Kathy Nester's many notable professional accomplishments, including her involvement in important public service and in trying over fifty jury trials. Thereafter, the Committee welcomed Kathy with a round of applause.

The Chair expressed the appreciation of the Committee to Sturm College of Law for hosting the Committee's roundtable discussion (discussed below) and Committee meeting.

Approval of Minutes

A motion was made to approve the minutes of the April 26-27, 2018 Advisory Committee meeting at the Thurgood Marshall Building in Washington D.C. The motion was seconded and approved by the full Committee.

Standing Committee Meeting

The Chair reported on the June 2018 meeting of the Standing Committee. She explained that the proposed amendments to Federal Rules of Evidence 404(b) and 807 are both on track. The Standing Committee unanimously approved the proposed amendment to Federal Rule of Evidence 404(b) for publication and approved Rule 807 for transmission to the Judicial Conference.

Roundtable Discussion

The Chair expressed appreciation to the participants in the roundtable discussion that preceded the Committee meeting. The Committee invited a number of judges, practitioners, and professors to discuss the Committee's agenda items --- possible changes to Rule 702, 106, and 615. The Chair noted that the roundtable discussion raised a number of issues and considerations that would inform the Committee in dealing with these rules.

The roundtable discussion was transcribed and will appear in the Fordham Law Review.

II. Potential Amendments to Rule 702

The Committee is considering two possible amendments to Rule 702. The first is to add language that would prohibit an expert from overstating conclusions. This proposal is primarily prompted by the Committee's consideration of forensic evidence and past instances in which forensic experts have, for example, testified to providing a "scientific" opinion or to an opinion that is "error-free," when the methodology employed does not justify that conclusion. The change

would apply to all experts however, as the problem of overstatement could apply to any expert testimony. The second change being considered is to clarify, in the text of the rule, that questions of sufficiency of basis and application are questions of admissibility to be decided by the judge under Rule 104(a) --- meaning by a preponderance of the evidence.

The Chair opened the discussion of Rule 702 by commenting on the interesting and constructive discussion of issues surrounding Rule 702 during the roundtable discussion that preceded the meeting. She stated that she was interested in hearing the reactions of the Committee members to the discussion and suggested that the Committee identify any additional work that the Subcommittee on Rule 702 could perform in anticipation of the Committee's spring meeting.

The Chair commented that there is strong interest in the possibility of amendments to Rule 702, noting that the Lawyers for Civil Justice had already submitted a letter in support of a textual addition of the Rule 104(a) standard, even though no amendments have yet been formally proposed.

Judge Campbell inquired about the concept of amending Rule 702 to clarify that the requirements of the Rule are admissibility requirements for the trial judge to find by a preponderance before admitting expert testimony. He asked whether a trial judge could utilize inadmissible evidence in determining the admissibility of expert testimony under that standard. The Reporter responded that a judge could indeed utilize inadmissible evidence in finding the Rule 702 requirements satisfied, because under Rule 104(a) the judge is not bound by rules of admissibility (other than privilege) in deciding whether challenged evidence is admissible. Judge Campbell asked whether it would make sense to include that point in an Advisory Committee note in the event that a Rule 702 amendment expressly requiring a finding by a preponderance were proposed. The Reporter agreed that it would be a good idea to include such a clarification in a Committee note.

Another Committee member commented on the roundtable discussion of Rule 702, remarking that he had previously been in favor of amending Rule 702 to correct the courts that are misapplying it by treating its requirements as ones of weight for the jury, and that hypotheticals posed by Judge Campbell during the roundtable discussion concerning the proper inquiry for a trial judge assessing the admissibility of expert testimony --- and the ensuing debate surrounding those hypotheticals --- had convinced him that the Committee might need to act to guide the courts in this area. The Committee member then inquired whether an amendment to Rule 702 directed at preventing experts from overstating their conclusions could also serve to cure the existing problems with the Rule 104(a) preponderance standard by way of an addition to the Committee Note. The Committee member suggested that the two issues were sufficiently related, because both dealt with concerns that expert testimony be valid, reliable, and sufficiently grounded in facts or data. The Reporter explained that Judge Schroeder, the Chair of the Rule 702 Subcommittee, had made the same suggestion before the meeting, and in response the Reporter had prepared a proposal that would amend the language of Rule 702 to prohibit overstatement, but that would offer additional guidance regarding application of the Rule 104(a) preponderance standard in the Committee Note. The Reporter handed out the proposal and stated that it would be further developed at the next meeting.

The Chair commented that both of the potential changes to Rule 702 – a change to clarify the application of the Rule 104(a) preponderance standard and one to prohibit overstatement of expert conclusions – would be designed to serve a signaling function for trial judges and lawyers. She remarked that either change could send a strong signal and that making both changes could have a significant impact. She cautioned that there would need to be a compelling case for making both changes at once. A Committee member commented that the trial judges participating in the roundtable discussion did not seem to favor amendments to Rule 702, while the practicing lawyers seemed more interested in amendments. Another Committee member agreed, noting that the trial judges seemed concerned that an amendment to Rule 702 might signal more change than is intended and that judges seemed more interested in education about admitting expert testimony than in a rule change.

Assuming that the two potential amendments to Rule 702 should be viewed as alternatives, the Chair then inquired which of the two appeared to the Committee to be most helpful. The Reporter suggested that adding the prohibition on overstatement to the language of Rule 702 would be the more meaningful of the two potential amendments given that the Rule 104(a) standard already applies to Rule 702. He noted that the Committee Note could be used to clarify and emphasize the intended operation of Rule 104(a), in addition to explaining the reasons for the overstatement amendment. The Chair agreed, noting that academics are at least in agreement that Rule 104(a) governs the *Daubert* inquiry, while the regulation of expert overstatement is less clear under the existing rule.

The Chair then explored the impact of an amendment that would prohibit expert overstatement on the testimony of forensic experts in criminal cases. She inquired whether such an amendment would prevent forensic experts in disciplines that are not supported by black box testing, whose testimony is routinely admitted under Rule 702 currently, from testifying at all. The Reporter responded that it would not be the intent of an overstatement amendment to exclude those forensic experts. Rather, an overstatement prohibition would be designed to prevent those forensic experts from overpromising and would require accurate testimony as to the limits of their opinions or conclusions. He noted that an overstatement amendment could be phrased in the negative to caution that experts "may not overstate" their conclusions or in the affirmative to require "accurate statements" concerning their results. The Chair then noted that the Department of Justice had already taken steps to correct the problem of overstatement through recent testimonial guidelines and queried what exactly these forensic experts would be permitted to testify to under an amended standard. The DOJ representative to the Committee stated that she was concerned about the vague meaning of "overstatement" in a potential amendment that could generate litigation. Again, the Reporter explained that an overstatement amendment would be designed to curb experts' tendencies to overpromise. He cited examples of expert testimony regarding cell phone location data, explaining that such experts should be permitted to testify concerning the general location of a cell phone, but should not be allowed to opine as to an individual's "precise location" based on cell phone location data because the underlying technology cannot at this time reveal precise locations. Basically, an expert should not be permitted to claim that their expertise shows more than it does. That said, the Reporter noted that it is a reality with any new rule that there will be some need for courts to interpret new language. With a well-drafted Committee Note, the Reporter explained that he did not anticipate rampant and costly litigation over an overstatement limitation.

Another Committee member remarked that limiting language in the proposed overstatement amendment would help to clarify the meaning of the amendment and would make it plain that the trial judge need not agree with an expert to admit her testimony, but must ensure that the expert's testimony is within the realm of reasonable inferences the expert can draw from her methodology. In particular, the potential amendment would prevent an expert from overstating "the conclusions that may reasonably be drawn from the principles and methods used." Judge Campbell asked whether there was terminology for an amendment that might capture the intent better than the word "overstatement." The Reporter noted that the concept of "overstatement" was derived from the PCAST report, but agreed that other language might be effective. Judge Campbell explored the possibility of prohibiting an expert from "exceeding the scope" of his basis. Alternatively, Judge Campbell suggested an amendment to Rule 702 that would provide that an expert may "not state conclusions that cannot reasonably be drawn from the principles and methods used" by the expert. Judge Campbell stated that a trial judge should be applying *Daubert* and evaluating an expert's basis rather than parsing the words chosen by each expert or regulating the vehemence with which an expert expresses conclusions.

Another Committee member noted that the concern over experts using the "reasonable degree of certainty" language could be addressed through Judge Campbell's efforts to avoid having trial judges parse the precise language expert witnesses may use in testifying. Judge Schroeder also noted that the amendment might want to reference the expert's "opinion" rather than the expert's "conclusions" because the existing language of Rule 702 deals with "opinions" rather than "conclusions." The Reporter noted that these suggestions were helpful and promised to incorporate the possible alternative language discussed into the agenda materials concerning Rule 702 for the Spring meeting.

The Committee agreed to continue, at the next meeting, its consideration of amendments to Rule 702 that would 1) prohibit experts from stating an opinion that goes beyond what is supported by the expert's data and methodology, and 2) clarify that the trial judge must find the Rule 702 requirements satisfied by a preponderance of the evidence.

III. Federal Rule of Evidence 106

The Committee next turned its attention to potential amendments to Federal Rule of Evidence 106. In particular, the Committee has been considering the possibility of amending Rule 106 to provide 1) that statements necessary to correct a misleading partial presentation may be admitted even if they would otherwise be inadmissible hearsay and 2) that Rule 106 would cover oral as well as written or recorded statements.

The Federal Public Defender noted that the rule of completion comes up in many criminal cases, in large part as a result of the new technology that the FBI uses to capture conversations. The Chair inquired whether the completion of unrecorded oral statements was ever an issue. The Federal Public Defender noted that she could recall one instance in which her client had made several oral statements in the back of a police cruiser and that the government had tried to admit only part of the statements and she had successfully argued that the entirety of his statements be admitted under Rule 106. She noted that there was no dispute in that case about the content of the defendant's oral statements, however. That last comment was in response to the extensive

discussion among the roundtable participants about how the court should proceed if the proponent denies that the opponent ever made a completing statement.

The Reporter noted that most federal courts, and many state courts, currently permit the completion of partial oral statements under Rule 611(a) and that there does not appear to be a problem with proof of those oral statements or significant disputes regarding their content. Should a dispute about the content of an oral statement arise, the Reporter noted that a trial judge can use Rule 403 to reject completion with a disputed oral statement as too time consuming and not worth the delay and confusion. He stated that an amendment to extend Rule 106 to oral statements would not change the law in the six circuits that already permit it.

Another Committee member inquired whether Rule 403 was sufficient, without any amendment to Rule 106, to deal with potential unfairness caused by partial oral statements. The Reporter stated Rule 403 is a rule of exclusion, so it could not be used directly to require the admission of a remainder of a statement. The trial court could, perhaps, tell the proponent that the initial portion will be excluded under Rule 403 (as misleading) unless the proponent agrees to the admission of the remainder. But even in that case, the court would have to find that the probative value of the initial portion is *substantially* outweighed by its prejudicial effect. The Reporter concluded that the far more direct result was to allow the completing remainder to be admissible under Rule 106, even over a hearsay objection.

Returning to the questions regarding oral statements, the Chair noted that the legislative history of Rule 106 suggests that the original Advisory Committee decided to limit the Rule to written and recorded statements only due to "practical problems" inherent in including oral statements. The Chair expressed an interest in understanding more about the debate surrounding the original decision to limit Rule 106 to written and recorded statements before proceeding with a proposal to extend the Rule to oral statements. The Reporter stated that the Rules Clerk offered to research this question of legislative history and would present his findings in the agenda book for the next meeting.

The DOJ representative inquired whether the Federal Public Defender usually succeeded in admitting completing portions of a defendant's statements at trial. The Federal Public Defender responded that judges usually allow completing statements when fairness so requires, but noted that disputes about the timing of the originally admitted statement and the completing statement are common. She noted that prosecutors typically argue that completion should be limited to statements made within one or two sentences of the original statement, while defense counsel take a more expansive approach to completion with statements made at the same time (even if not within one or two sentences of the originally introduced statement).

The DOJ representative argued that the threshold requirement for completion should be that the introduction of the original partial statement is truly misleading. The Reporter stated that one possible amendment alternative, included in the agenda book, would be to add the term "misleading" to the language of Rule 106 to ensure that completion is only required where the original presentation is indeed distorting or misleading --- and that corresponding language could be added to state that completion would be required if the statement corrected the initial misimpression. The Federal Public Defender asked why a new "misleading" limitation would need to be added to the Rule. The DOJ representative responded that the justification for amending

Rule 106 to overcome a hearsay objection is that the circumstances in which completion is necessary are very narrow and truly rare. The DOJ experience is that courts are not limiting completion to truly misleading circumstances and that trial courts take a much more expansive view of when a defendant may admit completing statements. Adding a "misleading" limitation to an amended Rule 106 would thus restore equilibrium and ensure that the Committee's narrow intent with respect to the amendment would be implemented. She noted that the DOJ will oppose any attempt to extend Rule 106 to allow completion of oral statements --- even though oral statements are currently allowed for completion in many federal courts.

The Reporter noted that because many circuits already allow completion of oral statements through Rule 611(a), it would be difficult for the Committee to resolve the conflict in the circuits concerning the admissibility of hearsay to complete without also resolving the circuit split regarding oral statements. This is especially so because a number of courts simply prohibit completion with oral statements, and an absolute distinction between oral and written or recorded statements for completion purposes makes no sense.

A trial judge remarked that completion questions often arise in the context of wiretaps or recorded jail telephone calls and that he has never encountered the issue of completion with respect to oral statements. Still, the Reporter noted that the Committee should resolve the issue of oral statements one way or the other in an amendment proposal. Another Committee member asked whether Rule 807 could be used to admit completing portions of statements that would otherwise be hearsay in place of amending Rule 106 to provide for a limited hearsay exception. The Reporter noted that completing statements are most often made by criminal defendants and that the completing portion omitted by the government's original presentation is typically self-serving for the defendant. In that context, it is highly unlikely that the trustworthiness requirement of Rule 807 would be satisfied with respect to the completing portion of the statement.

The Chair noted that she had always understood that a statement need not be admitted for its truth in order to complete a partial statement or to correct a misimpression because the completing portion could be admitted for its nonhearsay purpose of providing needed context. The Reporter replied that even if "context" were a solution (and it is not in many courts) it would not be a fair outcome. If the completing portion were allowed only for context, the party benefitting from the completion could not argue the truth of the completing statement during closing arguments, meaning that the party that introduced the original misleading partial statement would retain an advantage in being able to argue the truth of the misleading portion of the statement. Because the party who offers a misleading statement is committing a wrong, the Reporter argued that it is unfair to allow that party to benefit from its own wrong. The Federal Public Defender commented that if the prosecution opened the door to the statement with a misleading presentation, the defense should be able to use the portion necessary to complete that statement for its truth as well. The Reporter queried why completion shouldn't truly level the playing field between the parties with respect to the statements, by permitting arguments that both are true.

Another Committee member agreed with the Chair that a completing statement could be admitted for context only and need not be taken as true to perform its completing function of placing the original statement in context. That Committee member suggested that Rule 106 should not overrule a hearsay objection to a defendant's admission of a completing statement. Rule 106 could allow the completing portion of the statement to be admitted for its nonhearsay purpose of

showing context only and a defendant could choose to testify if he or she wished to offer a self-serving statement for its truth. But others argued that a completing statement is useful for "context" only if it is true. Another Committee member observed that a criminal defendant cannot be required to testify and certainly wouldn't testify to a statement to show context only; nor should the criminal defendant have to risk impeachment by testifying to correct a misimpression that was created by the government. The Reporter questioned whether admitting a completing statement for its nonhearsay purpose in proving context only was adequate to level the playing field, raised concerns about the limiting instruction that would have to accompany a completing statement admissible only for its nonhearsay purpose, and posed other problems for a criminal defendant wanting to testify to his own self-serving statements (including that they would be excluded as prior consistent statements).

The Department of Justice representative queried whether it would be fair to admit a completing self-serving statement for its truth given that the prosecution would have no right to cross-examine the defendant declarant to determine whether the self-serving portion of the statement was a lie. The Reporter acknowledged the prosecution's inability to cross-examine the defendant, but suggested that the prosecution waives its right to object to the defendant's completing hearsay statement if it introduced a misleading portion of the defendant's statement.

The Chair noted that the truly problematic case would be one in which a court found a statement necessary to correct a misleading and incomplete partial presentation of the statement but then excluded it altogether. She suggested that it would seem unlikely that the court and litigants would spend time arguing about the admission of a completing statement for its truth or only for context once a decision was made to admit it. The Reporter noted that in one circuit, the completing portion is admissible for the limited nonhearsay purpose of providing context, but that others allow the completing portion to be admitted for its truth, while others hold that the Rule cannot overcome a hearsay objection. He concluded therefore that an amendment to allow a completing statement to be admitted for context only would change the law in every circuit but one.

Even if the Committee determined that Rule 106 should be amended to eliminate a hearsay objection to a completing statement, one Committee member noted that the scope of such an amendment would still need to be determined. The Committee could propose an amendment that would allow the statement to be admitted over a "hearsay objection" specifically or it could propose a more generic amendment that would allow completion with a statement even when it is "otherwise inadmissible." The Committee member noted that the latter amendment would be broader and might allow completion over objections other than hearsay. That Committee member expressed concern about the unintended consequences of the broader amendment that would defeat any and all objections to a completing statement offered under Rule 106, and expressed a preference for a narrower amendment tailored to a hearsay objection only. The Reporter noted that it is a hearsay objection that is currently used to defeat completion and that a narrower amendment limited to hearsay objections would focus courts on the precise problem that created the need for a change.

Another Committee member reiterated that it would be important to limit Rule 106 to circumstances in which the original partial presentation of the statement was specifically "misleading" if Rule 106 were amended to create a hearsay exception. He suggested that the use

of the word "fairness" in current Rule 106 might not be adequate to capture the intent of the Rule if it were amended to provide a hearsay exception. In particular, a party should not be able to argue that it is simply "unfair" that the hearsay rule prevents his presentation of some out of court statements to gain admission under Rule 106. Only if a party's opponent has presented a partial statement in a misleading way that demands correction should the Rule 106 hearsay exception apply. The Reporter agreed that the term "misleading" better captures the concerns Rule 106 is designed to remedy. The Federal Public Defender suggested that if a defendant gave one version of events on one occasion and another version at some other time, she would still argue that it is "misleading" to introduce only of the two statements even though they were made at different times. The Chair noted that an amendment that would allow introduction of any other statements made at other times would expand Rule 106 and the current caselaw significantly. The Federal Public Defender responded that defense lawyers would interpret the term "misleading" more broadly than prosecutors would.

Another participant queried whether it would make sense to leave Rule 106 alone and to add a hearsay exception to Rule 803 to deal with completing statements. He noted the hearsay objection is the primary concern under the current Rules and that placing the remedy in a hearsay provision could make more sense and would focus judges more closely on the hearsay issue. The Reporter noted that Rule 802 precludes the admission of hearsay unless "these rules" (meaning the Evidence Rules as a whole) provide otherwise, such that an amendment to overcome a hearsay objection to completing statements does not have to appear in Article Eight of the Rules and could be placed in Rule 106. Still, he promised to discuss the possibility of incorporating an amendment into Rule 803 in the memorandum for the next meeting.

Another Committee member remarked that the issue of completion is most commonly litigated in the context of a criminal defendant's recorded confession. He noted that a defendant may deny involvement in the alleged crime for the first couple hours of recorded conversations only to confess in the latter part of the recording. The Committee member opined that the prosecution will want to admit only the later inculpatory portion of the recorded statement while the defense will want to put in the whole thing. A hearsay objection would suffice to exclude the early self-serving portion of such a recorded confession under existing law and any amendment that would change that result and allow the entire recording to be admitted would have a significant impact on criminal cases every day. Judge Campbell suggested that perhaps an amendment could be drafted to guard against such expansive views of the Rule 106 completion right. In particular, he suggested language that would clarify that a party's original presentation of a statement or a portion thereof must create a misleading or distorted view of that statement before completion will be permitted. For example, an amended Rule 106 might say: "If a party introduces all or part of a written or recorded statement so as to create a misleading impression about the statement, an adverse party may require the introduction, at that time, of any other part – or any other written or recorded statement by the same person – that corrects the misleading impression."

The Committee determined that it would continue its consideration of potential amendments to Rule 106 at its Spring meeting. The Reporter promised to report back on potential Rule 106 amendments at the Committee's spring meeting in light of the discussion and proposals raised.

IV. Federal Rule of Evidence 615 and Sequestration of Witnesses

Judge John Woodcock, a former Committee member, requested that the Committee consider amendments to Rule 615, the rule on sequestering witnesses. He had three concerns, arising from a recent case over which he presided. They were: 1) The rule provides no discretion for a court to deny a motion to sequester; 2) There is no timing requirement in the rule, so it would be possible for a party to make a "midstream" request for exclusion, after some witnesses had already testified; and 3) There should be an explicit exemption from exclusion for expert witnesses, to substitute for the current vague exemption for witnesses who are "essential to presenting the party's claim or defense." These proposed changes were raised at the roundtable discussion, and the Committee obtained valuable information, especially from the participating judges.

At the meeting, the Chair acknowledged that Judge Woodcock had some very valid points about improving its operation. Still, she noted that the current Rule had been drafted to constrain a trial judge by making sequestration mandatory, while preserving some discretion in the exceptions. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware about the risk of tailoring trial testimony. The Chair noted how successful the Federal Rules of Evidence have been and cautioned that amendments that make them more complicated and cumbersome could erode their value. She stated that she would want to observe more of a problem in the daily operation of Rule 615 before recommending the proposed amendments to the Rule. Committee members agreed that Rule 615 would not be improved by allowing for court discretion; that the timing problem is not pervasive; and that courts have not had significant problems in applying the "essential" exception to those experts who should be allowed to be present during trial.

The Reporter noted that in researching Judge Woodcock's suggestion he came upon another issue about the application of Rule 615 that has resulted in a conflict among the courts. The issue involves 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 can it extend outside the confines of the courtroom to prevent prospective witnesses from learning about trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts read the rule as it is written. 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. A Committee member noted that an amendment to address the problem of witnesses learning about testimony outside the courtroom should be drafted simply, to avoid excess verbiage that would complicate Rule 615 and make it difficult to memorize and apply. That Committee member suggested a straightforward amendment providing that a trial judge "must" order witnesses excluded from the courtroom upon request, but providing that a trial judge "may" also order measures to prevent witnesses from learning about trial testimony outside the courtroom, whether from talking with other witnesses or from reading the news. The Reporter noted that changing the focus of Rule 615 to prevent witnesses from "learning" of the testimony of other witnesses rather than from simply "hearing" the testimony (as has been done in Pennsylvania) could help to extend the policy of sequestration beyond the courtroom.

Another Committee member agreed that a Rule 615 exclusion order should remain mandatory but thought that an order concerning out of court witness communication should be discretionary. As to language, the Committee member pointed out that merely adding the word "learn" to the

language of existing Rule 615 (or replacing the word "hear" with the term "learn") would not adequately cover out of court information because the current version of Rule 615 is tied to "exclusion" from the courtroom only. (So saying that "the court must order the witness excluded so that she cannot hear or learn of other witnesses' testimony" doesn't deal with out of court contacts because it only deals with "learning" due to courtroom presence). The Committee member suggested adding a new sentence to Rule 615 that would say something like: "At its discretion, the court may issue further orders to prevent witnesses from learning out of court about the testimony of other witnesses." Other Committee members agreed that exclusion from the courtroom should remain mandatory, but that measures to prevent witnesses from learning of testimony beyond the courtroom should be discretionary with the trial judge.

The Chair pointed out that an amendment to extend Rule 615 protection outside the courtroom may be consistent with the Committee's 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. The Committee agreed to consider a potential amendment to Rule 615 to deal with the issue of witnesses learning about testimony outside the courtroom in light of these concerns, and the conflict in the courts, at the Spring meeting. The Committee agreed not to proceed with any other amendments to Rule 615.

The Federal Public Defender reported that trial judges sometimes refuse to issue orders preventing a witness from conferring with their own counsel during a recess when a break is taken in the middle of a cross-examination. She suggested that the principle of sequestration is the one invoked by the courts in the case law preventing consultation with counsel midstream during an examination, but that this protection is not express on the face of the Rule. Therefore, she suggested that the Committee consider also amending Rule 615 to make express a prohibition on a witness's consultation with counsel during a recess taken in the midst of an examination. The Reporter questioned whether the issue of conferring with counsel is a Rule 615 issue directed at protecting witnesses from hearing the testimony of other witnesses. He suggested that this concern about witness coaching during an examination was not a Rule 615 concern and that an amendment directed to that issue would not belong in Rule 615. Another Committee member suggested that it would be a Rule 615 problem for a lawyer to convey the content of another witness's testimony to a trial witness, but that general coaching did not seem to be within the Rule 615 protections.

V. A Roadmap Rule for Impeachment

The Reporter next raised the possibility of adding a new Evidence Rule to Article Six to cover methods of impeachment, such as bias, sensory perception, and contradiction, that are not covered by the Federal Rules. He noted that Professor Lynn McLain of the University of Baltimore School of Law had done a significant amount of work to add such a provision as Rule 616 of the Maryland Evidence Rules and that the Maryland Rule provided a roadmap on impeachment and rehabilitation of witnesses. The Reporter emphasized that the Committee would have to ensure that any such rule comported with all of the federal case law regarding impeachment and rehabilitation, and opined that it if such a rule would be adopted it might be preferable to add it to Rule 607 of the Federal Rules as a roadmap at the beginning of the provisions regarding impeachment. All that said, he inquired whether the Committee had any interest in proceeding with a roadmap impeachment provision as essentially a good housekeeping matter.

One Committee member suggested that the Maryland provision was a bit cumbersome, reading more like a benchbook than a rule of evidence. Another participant agreed that the roadmap rule seemed like a table of contents and expressed concern about drafting a provision that would not conflict with any of the existing tenets of impeachment in these areas. After further discussion, the Committee determined that it would not proceed with an impeachment roadmap rule.

VI. Rule 404(b) Public Comment

The Reporter reminded the Committee that the proposed amendment to Rule 404(b) had been published for public comment. He further noted that there are public hearings scheduled in January with respect to the proposal and that the public comment period would close in February, 2019. He informed the Committee that it had received two pertinent comments concerning the Rule 404(b) proposal to date: 1) a suggestion from a member of the public to include a reference to a continuance or other protective measures in the event of late notice for good cause (as was done in the recent proposal to amend Rule 807) and 2) a suggestion from a Standing Committee member to eliminate the term "propensity" in the proposed amendment in favor of the term "character" currently used in existing Rule 404(b)(1).

With respect to the first suggestion, the Reporter noted that there may be an argument for including a reference to a continuance or other protective measures in the text of the proposed amendment to Rule 404(b) to align the amendment with the recent proposal to amend Rule 807. On the other hand, he explained that Rule 404(b) already has a good cause exception to the existing notice requirement and that there is case law surrounding that good cause exemption and protective measures necessary in the event of late notice (making a rule change in the Rule 404(b) context unnecessary). Rule 807 had no good cause exception to its notice requirement and the proposed amendment is introducing one for the first time. In that different context, it may make sense to include more direction regarding protective measures, including continuances, than it does in the Rule 404(b) context. However, the Reporter suggested that the Committee might consider adding to the Note the same provision regarding continuances that was placed in the Note to Rule 807.

As to the suggestion to change the word "propensity" to the term "character," the Reporter noted that the term "propensity" came from the Seventh Circuit's decision in the *Gomez* case that led to the consideration of Rule 404(b), but that a change to the term "character" may make sense in order to keep the language consistent throughout the Rule.

The Committee will discuss the public comment received and any potential alterations to the proposed amendment to Rule 404(b) as a result of those comments at the spring meeting.

VII. Closing Matters

The Chair thanked the Reporter for the excellent work in putting together the agenda materials, thanked Judge Schroeder and the Subcommittee on Rule 702 for their efforts, and the entire Committee for the very constructive exchange. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra
Liesa L. Richter