

Advisory Committee on Evidence Rules
Minutes of the Meeting of May 3, 2019
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 3, 2019 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Committee were present:

Hon. Debra A. Livingston, Chair
Hon. James P. Bassett
Hon. Shelly D. Dick (by phone)
Hon. J. Thomas Marten
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. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, 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
Joe Cecil, Esq., Federal Judicial Center
Ted Hunt, Esq., Department of Justice
Andrew Goldsmith, Esq., Department of Justice
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Ahmad M. Al Dajani, Esq., Rules Committee Law Clerk
Lieutenant Colonel Adam Kazin, Joint Service Committee on Military Justice
Sri Kuehnlenz, Esq., American College of Trial Lawyers
Mark Cohen, Esq. American College of Trial Lawyers
Richard Cavanaugh, National Institute of Standards & Technology
Amy Brogioli, American Association for Justice
Abigail Dodd, Shell Oil Company
Caroline Nester

I. Opening Business

Announcements

The Chair opened the meeting by welcoming Judge Kuhl, who is the new liaison from the Standing Committee. The Chair noted Judge Kuhl's extensive service both on the bench and in the private sector and thanked her for providing invaluable assistance to the Committee. The Chair also congratulated Kathy Nester on her appointment as Executive Director of the Federal Defender's office in San Diego, and welcomed both Ted Hunt and Andrew Goldsmith from the Department of Justice.

Approval of Minutes

A motion was made to approve the minutes of the October 19, 2018 Advisory Committee meeting at the University of Denver Sturm College of Law. The motion was seconded and approved by the full Committee.

II. Proposed Amendment to Rule 404(b)

The Chair first directed the Committee's attention to the proposed amendment to Rule 404(b). The proposed amendment was approved by the Committee at its spring, 2018 meeting and recommended for publication for public comment. At its June, 2018 meeting, the Standing Committee unanimously adopted the Committee's recommendation and the proposed amendments were issued for public comment on August 15, 2018. The public comment period closed on February 15, 2019. The Chair asked the Reporter to walk the Committee through the public comment and final considerations with respect to the proposed amendment to Rule 404(b).

The Reporter explained that the proposed amendment would alter the notice requirement applicable to criminal cases in Rule 404(b) and that it would return the modifier "other" to its pre-restyling position before the language "crimes, wrongs or acts" in the heading and subheading of the Rule. He noted that the public comment on the proposed changes was sparse, but affirmative. He outlined three possible alterations to the proposed amendment and Committee Note in light of the public comment and comments received concerning the amendment at the Standing Committee.

First, the Reporter informed the Committee that a Standing Committee member had questioned the use of the terminology "non-propensity purpose" in the text of proposed Rule 404(b)(3)(B) and suggested the use of the term "non-character purpose" instead. Although non-propensity terminology is regularly used by the courts in describing the prosecution's obligations in admitting Rule 404(b) evidence, the Reporter explained that the terms "propensity" and "non-propensity" do not appear in Rules 404 or 405. Because of this and because "non-character" would

appear to be a non-substantive change, the Reporter recommended making a change to the term “non-propensity” in the amended provision.

The Committee then discussed the optimal terminology for the articulation requirement contained in Rule 404(b)(3)(B), debating the merits of the terms “non-character purpose,” “proper purpose,” and “permitted purpose” as alternatives to “non-propensity purpose.” Some Committee members were concerned that the term “non-character purpose” failed to capture the intent of the rule to forbid proof of *conduct* through character. Others were concerned that the term “proper” could be interpreted expansively. The Committee agreed that some modifier of the term “purpose” was necessary in the text of the Rule and ultimately voted unanimously to change “non-propensity purpose” in proposed Rule 404(b)(3)(B) to “permitted purpose.” The term “permitted purpose” is contained in the heading of existing Rule 404(b)(2) and captures the intent of the amended provision to require the prosecution to articulate a purpose for evidence of a criminal defendant’s other crimes, wrongs, or acts that does not run afoul of Rule 404(b)(1) and that complies with Rule 404(b)(2).

In light of its decision to change the text of subsection (b)(3)(B) from “non-propensity purpose” to “permitted purpose,” the Committee also discussed whether to change the references to a “non-propensity purpose” in the first bullet point of the proposed Committee Note discussing Rule 404(b)(3)(B) to conform to the textual change. The Committee unanimously voted to retain the term “non-propensity purpose” in the first bullet to the Committee Note notwithstanding the decision to remove the term from the rule text because the term “non-propensity” conforms to the cases and captures the intent of the amendment to avoid an inference of conduct from character.

Second, the Reporter summarized a public comment by Ann Paiewonsky, Esq. expressing concern that the amended rule fails to create a right for a criminal defendant to receive a fair opportunity to meet Rule 404(b) evidence when it is first presented at trial (upon a showing of good cause). The fair opportunity language in the text of the amendment as issued for public comment is tied to notice *before* trial and not to notice given during trial pursuant to the good cause exception. The Reporter noted two potential options the Committee could consider to address this concern and that either or both could quite easily be implemented. The Reporter first noted that the language in the text of proposed Rule 404(b)(3) regarding the need to provide a defendant with a fair opportunity to meet Rule 404(b) evidence could be moved up from subsection (b)(3)(C) of the Rule to subsection (b)(3)(A) so that it explicitly applies to all notice (pre-trial and during trial). In addition to that textual change, or as an alternative to it, the Reporter explained that the Committee could add language to the Committee Note regarding the need for a court to consider protective measures designed to allow a fair opportunity to respond to evidence presented at trial without pre-trial notice for good cause. The Reporter reminded the Committee that similar language was recently included in the Committee Note to amended Rule 807 that could be utilized in the note to amended Rule 404(b).

Members of the Committee expressed a preference for moving the “fair opportunity” language up to subsection (b)(3)(A) of the amended Rule to clarify in the operative text that the right applies to all notice. In addition, Committee members supported including language in the Committee Note (consistent with the language employed in the note to amended Rule 807) regarding protective measures to allow defendants to respond to Rule 404(b) evidence first

presented during trial. Judge Campbell suggested eliminating the specific reference to a continuance in the Committee Note with respect to protective measures to avoid any implication that a continuance is always necessary as a protective measure. The Department of Justice representative questioned whether adding any language to the Committee note regarding protective measures for the defendant was necessary given that courts are already taking steps to protect defendants in good cause circumstances.

The Chair questioned the citation of cases in the proposed Committee Note regarding protective measures for the defendant and queried whether this citation of case law represented a departure from prior Committee policy or practice prohibiting or discouraging citations. The Reporter suggested that there was no Committee policy prohibiting the citation of cases and noted that a member of the Standing Committee at its last meeting had inquired as to why there weren't *more* case citations in the Committee notes. Although concerns have been expressed in the past about citation to cases that have the potential to be overturned, the Reporter suggested that cases used in the notes to illustrate the intended operation of an amended rule are appropriate because the amended rule essentially codifies the case and ameliorates any concern about overruling. The Reporter suggested that citations to the cases regarding protective measures for a defendant faced with Rule 404(b) evidence for the first time at trial are necessary to clarify that the amendment to the notice provision is not intended to change the existing law in this respect. The former Reporter for the Standing Committee agreed with the Reporter that there is no existing ban on the citation of cases. He opined that it is problematic for a Committee Note to rely on a case for the authority supporting a rule due to the risk of overruling, but that a citation that illustrates the intended operation of a rule is acceptable.

Following this discussion, the Committee unanimously voted to move the "fair opportunity" language from subsection (b)(3)(C) of amended Rule 404 to subsection (b)(3)(A) and to include language in the Committee Note regarding a court's need to consider protective measures for a defendant when pre-trial notice is excused for good cause. The Committee also unanimously agreed that the express reference to a continuance should be omitted from the Committee Note regarding protective measures accompanying the amendment.

Finally, the Reporter noted a suggestion for a minor adjustment to language of the bullet point in the proposed Committee Note with respect to excusing the pretrial obligation to articulate the reasoning supporting the admissibility of Rule 404(b) evidence. The change would clarify that the duty to articulate such reasoning *at trial* when the evidence is proffered is not excused. The Committee agreed that a clarification would be helpful and unanimously voted to change the bullet point to read:

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for *the timing of* the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

With these minor changes, the Committee voted unanimously to recommend to the Standing Committee that it give final approval to the proposed amendments to Rule 404(b) and the accompanying Committee Note.

III. Rule 106

The Chair next opened up the discussion of a potential amendment to Federal Rule of Evidence 106, noting that the Committee had explored several possible amendment alternatives at its recent meetings. Specifically, the Committee had explored whether to amend Rule 106 to eliminate a hearsay objection to a completing statement (either by making the completing portion admissible for its truth or for context). In addition, the Committee had looked at the possibility of including oral statements within Rule 106, which currently covers only written or recorded statements. Finally, the Committee had considered the idea of changing the standard for completion under Rule 106 from “fairness” to require completion only when the initial presentation was found to be “misleading” --- at the suggestion of the Department of Justice. The Chair noted that the Reporter had prepared in the agenda materials several potential alternative draft amendments to Rule 106 dealing with all the possible permutations that were available to the Committee.

To start the discussion, the Chair explained that DOJ had, the day before the meeting, withdrawn its suggestion of adding language to the text of Rule 106 that would allow completion only if the statement offered by the proponent is “misleading”. The DOJ representative explained that the Department had proposed the “misleading” standard as a means of avoiding a potential overcorrection that would allow completion under Rule 106 too often – the intent behind the “misleading” language was to clarify that completion should be necessary only in rare cases. The problem with utilizing “misleading” language as a predicate for Rule 106 completion, however, is that there are ethical reporting obligations for DOJ lawyers. A finding by a judge that a DOJ lawyer had introduced “misleading” evidence would trigger formal reporting of misconduct every time the rule was invoked. Therefore, although DOJ had no formal proposal about new terminology for an amended Rule 106, DOJ no longer supported a change from “fairness” to “misleading” in any amendment proposal.

The Chair also noted that she had provided three sets of Advisory Committee Minutes from meetings in 2002-2003 in which potential amendments to Rule 106 were discussed. She noted that the Committee had voted unanimously against adding oral statements to Rule 106 at those meetings and had considered, but rejected, the possibility of amending Rule 106 to make clear that it trumps all other evidentiary objections (not only hearsay objections). She stated that the Committee in 2003 had considered potential amendments to Rule 106 as part of a broader review of all evidentiary rules and had determined that an amendment was not justified at that time. She emphasized that some recent cases, including those brought to the Committee’s attention by Judge Grimm, had suggested some contemporary issues in the application of the Rule and that the Committee was not bound by the determinations of the 2002-2003 Committee. She, therefore, suggested that there was reason for the Committee to continue its consideration of Rule 106.

The Chair next noted that New Hampshire had recently amended its counterpart to Rule 106 to include oral statements and that the Reporter had asked Judge Bassett for any guidance he might

have with respect to the New Hampshire experience with completion of oral statements. Judge Bassett reported that the New Hampshire provision was amended in 2017 and that it gives parties a right to introduce completing oral statements when fairness so requires. Judge Bassett sent emails to all New Hampshire trial judges, as well as to Supreme Court Justices who had been trial judges and/or practitioners, to solicit their experience with the completion of oral statements at trial. According to Judge Bassett, the common response was that the issue of completing with oral statements does not come up often and presents no trial difficulties. One of Judge Bassett's colleagues prosecuted the New Hampshire case from which the completion right emanates. He noted that completion of oral statements had been available in New Hampshire for 20-30 years and was only recently codified in the 2017 amendment to the New Hampshire Evidence Rules. He stated that judges overwhelmingly reported that the rule caused no issues, that completion of oral statements created a credibility issue, not an admissibility concern, and that the rule was considered very workable and non-contentious.

Judge Kuhl also reported on the California experience with completion, having consulted colleagues and trial judges in California. She noted that California has adopted the common law version of completeness, which deals with the hearsay issue by allowing completing hearsay – not so much as an exception to the hearsay rule, but rather on an “opening the door,” fairness basis. She noted that oral statements are included in the completion right. According to Judge Kuhl's California colleagues, the completion issue does arise with regularity, but there has been no difficulty in applying the completion doctrine at the trial level. She noted that the California rule is phrased very broadly and does not limit completion to statements made by the same person. She contended that there are many circumstances where the context for one person's statement is very important and it may be necessary to admit statements of another to which a declarant was responding. The Reporter noted a case in a memorandum by Professor Richter, in which the statement of an attorney was necessary to fairly complete a statement by a deponent. Judge Kuhl concluded that the California rule trusts trial judges to regulate such uses and has posed no difficulties.

The Chair informed the Committee that she had taken a deep dive into the Rule 106 case law and had found the topic sufficiently complicated that she had one of her clerks conduct some research, and had made notes on the subject --- which she circulated to the Committee, and to the Reporter, at the meeting. The Chair noted that California had codified the rule of completion in its full common law form. According to the United States Supreme Court in the *Beech Aircraft* case, Rule 106 only partially codified the common law. She noted that federal courts and academics had determined that the common law of completion persists in the face of the partial codification in Rule 106. The Chair explained that the Supreme Court in the *Beech* case had not found it necessary to apply Rule 106 on the facts of that case because the common law of completeness required completion in that circumstance. She pointed out a footnote in *Beech* suggesting that the completing letter could be admitted notwithstanding the hearsay rule, but that also indicated that the remainder could be admitted for context (and not for its truth). She further noted that the bulk of the federal courts have applied Rule 611(a) to admit oral statements when found necessary to complete. According to the Chair, there would be no need to consider an amendment to Rule 106 without the question about hearsay use of completing statements. She expressed two principal worries about adding oral statements to Rule 106: 1) most states follow the Federal Rules of Evidence and would have to decide whether and how to react to an amendment to Rule 106 that

added oral statements; and 2) the bulk of the federal courts use Rule 611(a) to accomplish completion of oral statements already, making a potentially disruptive amendment largely unnecessary. The Chair also noted that efforts to narrow the completion of oral statements within an amended rule, perhaps by limiting completion to statements by the “same speaker,” could be unduly restrictive and could limit the flexibility of trial judges in dealing with oral statements. She opined that it might be best to find a way to address the hearsay issue without adding oral statements to Rule 106.

The Reporter noted real problems with the current use of Rule 611(a) and the common law to govern the completion of oral statements. He contended that a trial lawyer’s first move might not be to look to Rule 611(a) (which deals with the trial court’s authority to control the “mode and order” of examining witnesses and presenting evidence) or to consult the “common law.” The fundamental point of the Evidence Rules is to give litigants a uniform set of evidentiary provisions they may consult quickly to determine the admissibility of a particular piece of evidence. *Beech Aircraft* notwithstanding, in theory, there are no “common law rules of evidence” following promulgation of the Federal Rules of Evidence. At best, the absence of express coverage of completion of oral statements within Rule 106 constitutes a trap for the unwary judge or litigant who is not an evidence professor with the necessary knowledge to consult Rule 611(a) or the common law. The current state of affairs – with one rule that covers written/recorded statements, another that does not expressly deal with completion but that has been applied to allow completion of oral statements in some jurisdictions, and governing principles in uncodified common law – presents a messy state of affairs for judges and litigants. Amending Rule 106 could address all outstanding issues and bring governance of them all within a single user-friendly provision.

The Federal Public Defender agreed with the Reporter’s concerns about the existing Rule and added that failure to deal with the hearsay question creates significant pressure for a criminal defendant to take the stand to attempt to rebut an incomplete presentation of his statements by the government. Another Committee member suggested that the Committee may want to treat oral statements separately from written/recorded statements. In particular, he suggested that the Committee might want to consider language that makes the standard for completing oral statements tighter or more restrictive than the standard for completing written/recorded statements. One alternative would be the language in the Texas provision that limits completion to statements “necessary” to explain portions already introduced.

The Reporter noted that the existing “fairness” standard already limits completion and that the case law interpreting the “fairness” standard already applies a quite restrictive approach – requiring that the initial portion of the statement be misleading or distorted without introduction of the remainder. So in his view a different, stricter test for oral statements was unwarranted. The Committee member suggested that he was concerned that protections in the case law may be inadequate and that the textual term “fairness” could be too broad and that the Committee should consider tighter text if it extends the completion right to oral statements. The Academic Consultant interjected that Rules 410(b), 502(a), and Federal Rule of Civil Procedure 32(a)(6) all utilize the same “fairness” language found in Rule 106, so altering the language in Rule 106 could have collateral consequences for the interpretation of those provisions. The Reporter agreed that changing the triggering language in Rule 106 could have collateral effects that the Committee would need to consider. He reiterated that the interpretation of the “fairness” standard was already

very strict and expressed confidence that an amendment dealing with the separate hearsay and oral statement issues would not broaden the well-accepted understanding of that language.

The Chair then noted decisions like the Sixth Circuit *Adams* decision, in which the panel held that the completing statements ought to have been admitted in fairness to the defendant, but that those statements were inadmissible hearsay and could, therefore, not complete. According to the Chair, rulings that completing statements are needed for fairness, but yet are inadmissible, are mistaken. Completing statements necessary for fairness should at least be admissible for context. She opined that it is not entirely clear from a review of the cases that *do* admit otherwise inadmissible completing hearsay whether it is being admitted for its truth or merely for its non-hearsay contextual value. Although some courts are clearly admitting completing statements for their truth, some are not necessarily going that far. The Chair circulated, at the meeting, some hypotheticals she had created in which litigants might not need or be entitled to have completing statements admitted for their truth. She suggested some potential language for an amendment to Rule 106 that would fix the mistaken exclusion of fairly completing statements without directly resolving the question of whether completing statements are admissible for their truth or merely for context. For example, an amendment might provide that “Written or recorded statements need not be independently admissible pursuant to the rule against hearsay when introduced pursuant to this rule.” One Committee member inquired whether such language *would* admit a completing statement for its truth. The Chair responded that the proposed language was one possible option that would purposely remain ambiguous as to the basis for admission. In some cases, the trial court might admit a completing statement for its truth and in others, the court could admit it for non-hearsay context only. Another option would be to draft an amendment that specifically distinguishes when a completing statement is admissible for its truth and when it is not.

A Committee member opined that any amendment should resolve the basis for admitting completing statements, arguing that lawyers need to know whether they can argue the truth of the statement to the jury. That said, the Committee member was concerned that allowing completion to serve as a complete waiver of hearsay rules could extend further than the Committee intends. He questioned why the Committee shouldn’t consider an amendment to Rule 801(d)(2)(A) dealing with party opponent statements, to the extent that the hearsay problem under Rule 106 is driven entirely by the one-way limitation on that hearsay exception that the government is able to use to present partial statements of a criminal defendant. The Reporter noted concerns with tinkering with the Rule 801 hearsay provisions, and also noted that such an amendment would be an incomplete remedy in any event. In cases where the *government* needs to complete an against-interest statement of a third party -- offered by a defendant because it tends to exonerate him --with another statement by the same third party that is *not* against the speaker’s interest because it implicates the defendant, the government would need relief from the hearsay rule to complete pursuant to Rule 106 as well. The Reporter pointed the Committee to the *Woolbright* case cited in the agenda materials as an example of this situation. An amendment limited to Rule 801(d)(2)(A) would not reach situations like this one.

The Reporter for the Advisory Committee queried whether an amendment that simply made clear that the hearsay rule would pose “no obstacle” to completion would be sufficient to inform parties of the operation of the rule, leaving it to trial judge discretion to determine whether the completing statement could be used for its truth on a case by case basis. The Chair reiterated that

if the rule were to specify the effect of the completing statement, she would favor admissibility for non-hearsay context only, but noted that specifying effect would limit the trial judge and that an amendment preserving discretion might be superior. Another Committee member noted that an amendment simply stating that the hearsay rule is no bar to completion would solve the problems presented by courts that deny needed completion on the basis of the hearsay rule.

Judge Campbell queried whether an amendment stating that the hearsay rule posed no obstacle to completion would, by definition, allow admission of completing statements for their truth. The Reporter noted that a drafting alternative expressly providing that a completing statement could be admitted for “context only” might be adopted to avoid that result if the Committee wanted to avoid admissibility for truth. That said, the Reporter noted that there are some circumstances in which the completing statement ought to be admissible for its truth. If, for example, a defendant admits to having owned a gun used in a crime, but claims to have sold it months before the commission of the crime in the same statement, the government should not be able to admit the statement of ownership for its truth to suggest that the defendant admitted owning the weapon, while the completing statement about the sale is admitted only for “context.” Moreover, use for context only would require a difficult-to-follow jury instruction --- a consequence that the Committee has sought to avoid.

The DOJ representative questioned the Reporter about the hypothetical statement of gun ownership, positing that the government might have a witness who can testify that the defendant still owned the gun at the time of the crime and perhaps a Facebook post of a picture of the defendant with the gun near in time. She questioned why the defendant’s false exculpatory claim that he sold the gun should be admitted for its truth when the government’s suggestion that he owned the gun at the time was not misleading or unfair based on this other evidence. She questioned why the defendant should be free to create a misimpression about his gun ownership and suggested that allowing use of his own statement for its truth would admit unreliable self-serving hearsay. Judge Campbell responded that the government would, of course, be free to present the witness and the Facebook post showing the defendant’s gun ownership, but that Rule 106 prevents the government from creating a false impression *about the defendant’s statement* – not about his gun ownership in general, but about the fact that he admitted it (which the government suggests he did by introducing his partial statement). The introduction of the rest of the statement would be designed to prevent the misimpression about what exactly the defendant admitted.

Another Committee member suggested that allowing use of the completing statement for context only, with an appropriate limiting instruction, would be perfectly suited to this type of circumstance. Although limiting instructions may seem difficult to articulate, he opined that in practice they work well and that juries can comprehend and follow them. Another member of the Committee agreed, noting that trial judges routinely allow completion with an appropriate limiting instruction and that the issue causes few problems and never makes its way to the appellate level.

Another Committee member suggested that an amendment to Rule 106 might provide that the completing statement could “be admitted for context unless the court rules otherwise.” The Chair offered the possibility of an amendment allowing completing statements to be admitted for context only “unless another hearsay doctrine permits otherwise.” The Reporter expressed concern that a “for context only” amendment would be too limiting, particularly in a situation where one party

has offered a partial statement for its truth in a misleading way. Admitting a completing statement also for its truth would be necessary to level the playing field and right the wrong. He also noted that allowing for context admission “unless otherwise permitted by the hearsay rule” would be superfluous because that would simply restate the operation of the existing rules to exclude hearsay unless a hearsay exception permits otherwise. Another Committee member suggested that allowing a completing statement to come in “for context or otherwise” might preserve trial judge flexibility on the point.

Judge Kuhl raised the language in one of the draft amendment alternatives limiting completion of oral statements to those in which the “contents are not substantially disputed.” She suggested that this limitation might be ambiguous – it could refer to whether the oral statement was “uttered” at all or to whether the substance or content of the oral statement is considered “true.” In any event, she suggested that the jury should determine such questions and opined that any amendment to Rule 106 should not incorporate that limitation. The Reporter agreed with Judge Kuhl, noting that this limiting language was raised at the Denver symposium last October, but opining that the trial judge should retain discretion about proper completion of oral statements if the Committee decided to add them to Rule 106’s coverage. If the Committee votes to exclude oral statements altogether, that issue will be moot, but if oral statements are included, the Reporter suggested dropping that language. Committee members unanimously agreed that the proposed language about the contents of oral statements not being substantially in dispute should be dropped in the event that the Committee proceeds with an amendment to Rule 106 that includes oral statements.

Another Committee member suggested that the Committee should do as little to Rule 106 as possible. He suggested that the big problem with the rule is the hearsay issue and that it comes up a lot at trial, particularly with regard to statements in depositions. Rather than rewriting the rule and tinkering with the language, he suggested that the Committee should fix this targeted problem.

The Chair then suggested that it might simplify the drafting process to make a decision with respect to the inclusion of oral statements in Rule 106, and she asked for a straw vote of Committee members who would rather *not* include oral statements in any potential amendment. Three Committee members voted against including oral statements, but four Committee members voted to continue discussing the possibility of adding oral statements to an amended Rule 106. The Chair then inquired whether the Committee was interested in narrowing the discussion of the completion of oral statements to those made by the same declarant. The Federal Defender expressed concern that such a limitation might be too narrow, particularly in connection with an interrogation where the context of a question asked by one declarant might be necessary to complete and make sense of an answer given by another. She noted that the question might change the entire meaning of the response given. The Reporter noted that Judge O’Malley expressed concern about limiting completion to the statements made by the same declarant at the Denver conference as well. No Committee member spoke in favor of retaining the limitation that the initial statement and the completing statement must be made by the same person.

Another Committee member noted that many federal courts are allowing completion of oral statements and that the same practice seems to be working well in states like New Hampshire that expressly include oral statements in their rule of completion. He expressed a desire to fully understand the concerns of Committee members who have reservations about including oral

statements in Rule 106. The Chair suggested that California and other states had adopted a broad common law approach to completion, but that the Federal Rules had only partially codified the concept. Another Committee member suggested that in states like New Hampshire, where oral statements are expressly included, they have at least arguably tightened the standard for granting completion in the first place. He suggested that the Rule 106 “fairness” language would need tightening if it were extended to oral statements. Another Committee member noted that the New Hampshire rule has a separate subsection (b) applicable to oral statements. The Reporter stated that the Committee could consider a provision drafted like the New Hampshire rule with distinct subsections for written/recorded statements and oral statements, but that to have separate standards for oral statements would be confusing and unworkable. Another Committee member opined that federal practice on completion largely works well, but that it is working well *in spite* of the Rules on the subject. Trial judges consult the rulebook in deciding what to allow and lawyers don’t cite to the common law of evidence. He opined that it is odd that oral statements are regulated between the cracks of the Rules as it were.

The Chair again expressed reservations about codifying the approach to oral statements, suggesting that California’s practice with respect to completion appeared to be narrower than the language of its rule, while the federal practice with respect to completion is broader than the language of Rule 106. Attempting to codify the completion doctrine in its entirety could open a can of worms and may not be worth it because most federal courts utilize Rule 611(a) to deal with oral statements when the need arises. Judge Kuhl confirmed the Chair’s characterization of California law, explaining that the completion rule does not open the door to an opponent’s entire case notwithstanding the broad language of the rule and that California courts treat the concept very much as one of proportionality. Judge Kuhl expressed confusion about the use of the common law to allow completion of oral statements in the federal system in light of the doctrine of *expressio unius est exclusio alterius*. It seems that lawyers would need to refer to case law to determine whether Rule 106 is supplemented by the common law.

The DOJ representative questioned why the Committee would tinker with Rule 106, suggesting that trial judges ably handle these issues regularly under the existing provision. She expressed concern that the addition of oral statements would cause time consuming mini-trials over whether a completing statement was actually made and that expanding the rule could broaden the interpretation of the “fairness” justifying completion. She noted that the Committee should resolve a circuit split if there is one, but that it should not start rewriting the rule and should leave it untouched to the extent possible because lawyers are accustomed to using the rule on their feet in court every day. The Reporter responded that the DOJ’s argument about stability was undermined by the fact that lawyers and judges trying to use the completion “rule” on the fly at trial now need to apply a combination of Rule 106, Rule 611(a) (and the case law applying it to completion of oral statements), and the Supreme Court’s decision in *Beech Aircraft* to fully master the rules on completion. That is hardly a user-friendly system.

The Chair then asked for a straw poll as to whether an amendment adding oral statements should be limited along the lines of the New Hampshire rule to help clarify drafting for the fall Committee meeting. Six Committee members agreed that a rule similar to the New Hampshire provision regarding oral statements should be explored.

The Federal Defender expressed concern about an amendment with varying standards applicable to written/recorded versus oral statements. Simply adding oral statements to existing Rule 106 seems less disruptive because it allows trial judges to continue doing what they are doing now. Creating varying subsections with differing standards becomes a new rule entirely. She disagreed that there is any genuine concern about mini-trials over oral statements, suggesting that it takes about 10 seconds to argue and resolve such an objection in practice. She suggested that the discussions reveal that everyone wants the rule to be administered fairly and that there are some circuits where fairness is being defeated by the interpretation being given to Rule 106. She advocated a unitary approach to drafting an amendment that would simply add oral statements to the current standard.

The Chair responded that trial judges might think we have a completely new rule and let everything in if the Committee were to enact a broad California approach. Conversely, if the Committee adds oral statements and creates limits on their use to complete, that may undermine the flexibility courts currently have in operating under Rule 611(a). If the Committee were to adopt an amendment that seeks to “fully” codify the doctrine of completion, it might fundamentally alter the existing practice in federal court.

Judge Campbell noted that the Chair’s notes on Rule 106 show that oral statements are allowed to complete in seven circuits. He inquired whether there are circuits that do *not* allow completion of oral statements under Rule 611(a). The Chair responded that the Reporter had cited the *Gibson* case that says that there should not be completion of oral statements in dicta only, but that she could not find any other cases holding that there could not be completion with oral statements. The Reporter pointed out that he had cited four circuits on page 17 of his agenda memorandum on Rule 106 that have case law stating broadly that oral statements are not allowed to complete. In particular, he noted cases out of the Fourth, Ninth and Eleventh Circuits refusing to allow completion of oral statements, including a 2005 opinion out of the Eleventh Circuit --- and while there is contrary authority in some of those circuits, that only shows that there is confusion in the courts about the admissibility of oral statements. The Chair suggested that the federal decisions on completion become confused over time and that the Committee should resolve conflicts that are deep and serious. She suggested that there is a real conflict with respect to the issue of completion with otherwise inadmissible hearsay, but that she is not sure that one truly exists with respect to completion of oral statements.

A Committee member asked whether the Committee could propose an amendment simply dropping the modifier “written or recorded” from the existing Rule 106 (or conversely adding the modifier “oral”) and whether that would do violence to the existing completion practice. The Reporter noted that some additional revision would be necessary to address the hearsay issue, but that would be an option with respect to the oral statements issue. The Committee member queried what downside there would be to simply adding oral statements to the language of Rule 106; if courts are already allowing completion of oral statements, what negative impact would there be in having the Rule match the common law practice? The Chair suggested that the original common law approach to completion (as enacted in California) was very broad and that codifying that original common law approach to completion would alter existing federal practice. The Reporter responded that the real question is not whether to codify the original common law practice on completion, but rather whether adding the term “oral” to existing Rule 106 would do violence to

the current federal practice. He suggested it would not and that the Committee has previously acted to codify case law, such as the amendment to Rule 801(d)(2)(E) to capture the holding in *Bourjaily*, to avoid forcing litigants to consult case law to ascertain the proper approach to a particular rule.

The Chair suggested that the discussion had produced two approaches to oral statements for the Committee to consider: 1) a narrowed approach to the completion of oral statements that tightens the standard for their use and 2) a simple addition of the term “oral” to the language of the existing Rule.

The Reporter promised to prepare additional drafting alternatives for the fall meeting based upon the Committee’s discussion. With respect to oral statements, the Committee could consider a draft like the New Hampshire rule with a possibly stricter standard for completion that applies only to oral statements. In the alternative, the Committee could consider the minimalist approach that would simply add the term “oral” (or remove the words “written or recorded”) from the existing Rule. With respect to the hearsay issue, the Committee could consider the “context-only” approach to admissibility, as well as the Chair’s proposal to draft in a way that elides the hearsay issue by providing that the hearsay rule “presents no obstacle” to completion.

The Chair suggested language that would make a statement admissible to complete “whether or not admissible under the hearsay rule if necessary for context.” The Reporter noted that the language of the context-only alternative in the agenda materials was very similar to that, but that he continued to think it was unfair for the proponent to get to use a partial statement in a misleading way *for its truth*, but to limit the adversary to non-hearsay use only for the completing portion of the statement. He stated that he would try to include a drafting alternative that gives the trial judge discretion over whether to allow use of a completing statement for its truth. He noted that the consensus of the Committee was to eliminate the language in some of the existing drafts that would require a completing statement to be made by the “same person” and that would allow completion of oral statements only if they are not “substantially disputed.” The Chair noted that she also sensed agreement to stay with the existing “fairness” language with respect to the completion of written and recorded statements and to tighten the standard, if at all, with respect to oral statements only.

IV. Rule 615

The Reporter introduced the discussion of Rule 615, noting that Judge Woodcock had originally brought the possibility of an amendment to the Committee’s attention. Judge Woodcock noted concerns about the mandatory nature of sequestration upon request, about the timing of a request for sequestration, and about the application of sequestration to expert witnesses. After carefully considering each of these concerns, the Committee determined that an amendment to Rule 615 was not necessary to address them. In studying Rule 615, however, the Committee encountered a conflict with respect to the scope of a court’s Rule 615 sequestration order that may create important notice issues for lawyers and witnesses. Trial judges frequently invoke “the Rule” in a case without further discussion or explanation. At a minimum, such an order means that trial witnesses (if not exempt from sequestration under Rule 615) must leave the courtroom. But such

an order remains vague with respect to excluded witnesses learning about testimony through other means, such as conversations with other witnesses, daily transcripts, or online or other news outlets. In most circuits, such an order means that witnesses are barred from obtaining or being provided trial testimony; but in the 1st Circuit, such an order *only* prevents witnesses from being present in the courtroom. Thus, there is a conflict in the circuits about the scope of a Rule 615 order. Ambiguity concerning the scope of a sequestration order could create a notice problem in the event that a court seeks to impose consequences for the violation of that order.

The Reporter provided two potential approaches to amending Rule 615 to deal with this conflict that were set forth in the Reporter's agenda materials on page 13 of the memo concerning Rule 615. First, the Committee could propose a discretionary rule, expressly noting the trial judge's authority to extend sequestration beyond the courtroom doors to communications and interactions outside the courtroom, but requiring the judge to specify any limits beyond exclusion from the courtroom in a Rule 615 order. Alternatively, the Committee could draft a mandatory amendment that automatically extends sequestration protections beyond the courtroom and defines the scope of a Rule 615 order to provide clear notice of what is prohibited. The Reporter noted that the Committee needed to decide whether the Rule 615 conflict is worth continuing to explore and, if so, whether any potential amendment should be discretionary or mandatory.

In thinking about a mandatory versus discretionary provision, Judge Campbell asked whether there would ever be circumstances where a trial judge would exclude witnesses from the courtroom during testimony, but would *want* to allow them to communicate or read about that testimony outside the courtroom. If there are not circumstances where the judge would want to allow that, there seems to be no reason to draft a discretionary rule. In drafting a mandatory rule, Judge Campbell pointed out that the draft language in the agenda materials on page 15 of the Reporter's memo regarding Rule 615 that would prohibit witnesses from "obtaining or being provided trial testimony" might need to be expanded to capture witnesses who unwittingly go on the internet and encounter information about trial testimony. These witnesses haven't been provided a transcript or "obtained" testimony so to speak, but they have "learned about testimony" in a manner that is incompatible with the principle of sequestration. The Reporter agreed that any amendment should cover both witnesses being provided testimony, such as through a transcript or summary, as well as witnesses learning about testimony through other means, such as through the news.

Another Committee member noted the routine efforts to prevent jurors from consulting information outside the courtroom and jurors' routine, sometimes unwitting, violation of these requests. This Committee member expressed concern about witnesses unwittingly violating any expanded version of Rule 615 and the importance of drafting a provision that is very clear about what is prohibited. The Chair characterized the Rule 615 case law as presenting a tiny circuit conflict, noting that only a single circuit interprets Rule 615 orders literally to prevent witnesses from being physically present in the courtroom *only* and that all other circuits are fairly nebulous about the scope of Rule 615 orders. She noted that commentators have expressed reservations about how far Rule 615 burdens should extend beyond the courtroom. Sometimes, trials are very long, witnesses live in the same house or work in the same place. Forbidding internet access to witnesses for a long period of time in this day and age is quite onerous. She inquired of the trial judges present as to how much they regulate witness conduct outside the courtroom and whether they think that an amendment to Rule 615 would be helpful.

One trial judge suggested that lawyers don't ask for specific protections outside the courtroom and that judges assume that witnesses follow the rule. Judge Campbell noted his longstanding practice of asking lawyers at the pre-trial conference whether they intended to invoke "the rule" without specifying precisely the confines of the limitation beyond the courtroom. In his circuit, invoking "the rule" means that witnesses may not learn about testimony outside the courtroom and he is now more careful in advising lawyers about the conduct that is prohibited. The Reporter suggested that trial judges are all over the map as to how specific they are about conduct that is prohibited, meaning that there is a problem with respect to notice for witnesses who can be brought in for violating "the rule." Another judge questioned whether it would make sense to allow the parties to opt out of a sequestration provision that prevents all witnesses from learning of testimony. For example, if both sides wanted their experts to be acquainted with the trial testimony, it might make sense to allow them the ability to limit the application of "the rule" by consent. A draft amendment might be limited by the words "unless the parties agree otherwise" to accomplish this result.

Rules Committee Chief Counsel, Rebecca Womeldorf, asked whether an amendment that extended sequestration protections beyond the courtroom would prevent a lawyer from prepping a witness with a transcript. The Reporter noted that the Advisory Committee's draft note to Rule 615 cites the *Rhynes* case from the Fourth Circuit holding that the sequestration protections do not apply to lawyers preparing witnesses. The former Reporter to the Standing Committee suggested that the Committee should adopt language in a Committee Note that avoids case citations and instead expressly states that the amended rule "should not be interpreted to prevent witnesses from talking to trial counsel."

A Committee member queried whether trial counsel may reveal the testimony of other witnesses in preparing a witness to take the stand. The Reporter responded that that was what the *Rhynes* case held. The Committee member suggested that it would be ill-advised to draft an amendment to Rule 615 that appears on its face to prohibit lawyers from revealing trial testimony to witnesses, only to take it back in the Committee Note. The Reporter noted the option of incorporating the trial counsel limitation into rule text. The Rule could exempt "conversations with trial counsel" or include a subsection providing that "the Rule does not apply to lawyers preparing witnesses to testify." Another Committee member described the facts involved in the *Rhynes* case in which the trial judge excluded a defense witness in a criminal trial due to counsel's discussion of testimony with him in preparation for his testimony. The *en banc* opinion held that the prohibition on communication of testimony does not extend to lawyers in this context (notwithstanding the fact that Rule 615 doesn't support that limit on the sequestration right). Another Committee member inquired whether that means that witnesses have a right to learn of other witnesses' testimony through counsel. The Reporter explained that the case law supports lawyers' ability to prepare witnesses to testify unhampered by restrictions on what they may communicate. Another Committee member noted that the remedy for such witness preparation should be cross-examination by the adversary about such communications, but that trial counsel rarely ask those questions of a witness.

The DOJ representative questioned the use of the word "learn" in the draft of a mandatory rule included in the agenda materials on page 15 of the Reporter's memo. She expressed concern that

a witness might accidentally violate such a rule by unwittingly “learning” about trial testimony. The Reporter responded that the term “learn” in subsection (a)(i) of the draft would not punish a witness who accidentally learns of testimony outside of court because that subsection only regulates physical exclusion from the courtroom to prevent witnesses from learning of trial testimony. Subsection (a)(ii) would regulate out of court conduct and is not so broadly worded as it prevents witnesses “from obtaining or being provided trial testimony.” The DOJ representative noted that creating airtight exceptions to sequestration rules limits the discretion of the trial judge to craft orders tailored to individual cases. The Reporter pointed out that the “exceptions” to sequestration that are enumerated in the Rule are already in the existing provision and that the Committee is not considering altering those.

The Chair noted that trial judges do possess significant discretion to determine the control necessary beyond the courtroom in a given case under the existing rule. The limits on outside interaction may need to be modest in some cases and more onerous in others. She noted that an amendment might cut back on a trial judge’s ability to exercise that discretion if it attempts to spell out specific prohibitions. She further noted that trial judges report that jurors routinely violate prohibitions on their exposure outside the courtroom and that it would be unwise for the Committee to propose rules so onerous that no one will follow them in practice. The Reporter responded that the critical issue was to make Rule 615 clear about its reach, whatever that reach may be. While a mandatory provision (prohibiting outside exposure to testimony) may be preferable, a discretionary provision that affords flexibility as to scope may also be acceptable as long as it forces trial judges to consider and clarify the meaning and scope of sequestration orders they enter.

Committee members, after this discussion, generally agreed with the proposition that if an amendment to Rule 615 were to be proposed, it should contain a discretionary rather than mandatory provision for regulating prospective witnesses outside the courtroom.

Another Committee member inquired about the importance of the sequestration rule, asking whether there are any studies to support the notion that witnesses will tailor their testimony to one another if they are privy to it. The Reporter responded that Wigmore characterized sequestration as second only to cross-examination as a tool for securing accurate outcomes. Although there are no formal studies of which the Reporter was aware, criminal defendants who are present in the courtroom throughout trial as an exception to sequestration have often been accused of tailoring their testimony and prosecutors routinely point this fact out to juries. Most importantly, the Reporter explained that if the sequestration right is retained in the Rules, it needs to be clear in its scope.

Another Committee member asked whether other Circuits had adopted the lawyer-preparation exception found in *Rhynes* that seems to undermine Rule 615, noting that it would seem troubling to craft an exclusionary rule about outside communication of testimony if the prohibition is undermined by that case law. Another Committee member suggested that the Committee follow up on the reach of the *Rhynes* decision for the next meeting to understand more fully the limits and context of that decision. The Committee’s choice would seem to be to push back on the *Rhynes* holding or to codify it in an amended Rule 615. The Committee member advocated exploring the issue further as part of due diligence on the subject. Another Committee member noted that the *Rhynes* case involved a pretty unique set of facts in which a defense witness was accused by

another witness of being involved in the charged conspiracy shortly before taking the stand. The defense lawyer had to ask the accused witness about his involvement before deciding whether to put him on the stand. The Committee should consider whether the appellate court's holding prohibiting the trial judge from excluding the defense witness on the basis of his preparation in that case necessarily means that *any* lawyer may tell *any* witness about other trial testimony in the course of preparing her to testify. The Reporter agreed that he would research the case law on the issue of lawyers conveying trial testimony in the course of witness preparation for the fall meeting.

The discussion concluded with the Committee deciding to consider a discretionary provision for the fall meeting and resolving to explore in detail the case law surrounding sequestration and lawyer-witness preparation.

V. Rule 702

The Chair opened the afternoon session by introducing a discussion of Rule 702. She first explained that the Committee would not be asked for any substantive vote on any rule amendment at the meeting, because such a vote was premature. She reminded the Committee that the topic of Rule 702 was brought to the Committee by the PCAST recommendation that the Committee draft a “best practices” manual or adopt a modified Committee Note regarding forensic feature comparison methods. She also reminded the Committee that PCAST was not the first to focus on Rule 702, explaining that the National Academy of Sciences also focused on the Committee Note to Rule 702 in its 2009 report, expressing concern about the application of experience-based expertise to forensic evidence. She also reminded the Committee that it had hosted a symposium on forensic evidence and Rule 702 at Boston College in 2017 and that Judge Schroeder had, thereafter, agreed to chair a subcommittee to study Rule 702 and forensic evidence. After study and recommendations by the subcommittee, the Committee determined that a free-standing evidence rule on “forensic evidence” would be ill-advised and that both an “amendment” to a Committee note and a “best practices manual” were outside the charter of the Committee. Thereafter, the Committee continued to study the possibility of amending Rule 702 itself to clarify the trial judge’s obligation to decide reliability pursuant to Rule 104(a) prior to admitting expert testimony. In addition, the Committee continued to explore the possibility of an amendment to Rule 702 that would require the trial judge to regulate an expert’s “overstatement” of the conclusions that may reliably be drawn from the principles and methods employed by the expert.

At its Denver symposium in fall 2018, the Committee heard from panelists about potential effects on expert testimony outside of the forensic arena were the Committee to pursue amendments to Rule 702, which is an all-purpose rule that controls admissibility of a wide range of expert opinion testimony. The Chair noted that all of the judges at the Denver symposium raised questions about amending Rule 702, suggesting that it was functioning properly in its current form. She reminded the Committee that the discussion at the Denver symposium had been captured in an issue of the *Fordham Law Review* and encouraged everyone to read the transcript and absorb the commentary that the Committee received there. After the symposium, the Committee determined that it would focus on the possibility of an amendment to Rule 702 that would limit “overstatement” by expert witnesses. The Chair noted that the Reporter had prepared two potential alternative drafts of an amendment to Rule 702 to deal with overstatement that were included in

the agenda materials. Finally, the Chair noted that the Committee would hear from additional judges concerning a possible amendment to Rule 702 at its upcoming fall 2019 meeting, at which point the Committee could decide how best to proceed. In the meantime, the Chair noted that the DOJ had circulated additional documentation to the Committee concerning its efforts to regulate overstatement in forensic testimony and that the Department wished to share its position concerning Rule 702 with the Committee.

The DOJ representative first noted that she had circulated a written response to the Reporter's case digest and apologized for pulling a wrong case and characterizing it as not about expert testimony at all. She further noted that her analysis of the case digest reveals a fundamental disagreement between DOJ and the Reporter about what constitutes "overstatement" by an expert in the forensic context. She found that many of the cited cases involved appropriate "source identification" testimony and that the Reporter equates "source identification" with testimony that there is a "match" and on this point they simply do not have a meeting of the minds. She then introduced Ted Hunt, the DOJ's expert in forensic evidence to describe DOJ initiatives with respect to forensic expert testimony.

Mr. Hunt began by telling the Committee that his sole focus is on expert forensic testimony and that he is fully immersed in the issues being considered by the Committee. He has witnessed a complete sea-change in forensics over the past 5-6 years. Forensic analysts have re-conceptualized what they do and DOJ has been collaborating with them to draft standards that reflect accurately what they do. He noted that this process takes time and is still evolving. Accordingly, he suggested that the federal cases in the Reporter's case digest do not fully reflect the progress that has been made in the past few years. He noted that the DOJ has implemented a uniform testimony monitoring program, and has developed testimonial standards for fourteen disciplines, with three more in development to address some of the more controversial methods discussed in the PCAST Report. Mr. Hunt suggested that it was difficult to observe the vast change that had taken place without following the subject on a daily basis but that there had been a steep decline after 2009 in the sometimes injudicious statements made by experts in the past. He also emphasized the efforts of outside expert organizations that are bringing hundreds of experienced professionals together to improve forensic evidence standards. Mr. Hunt suggested that the fruits of all of these labors were just beginning to manifest and that any potential amendment to the evidence rules should be tabled to allow time for these efforts to be fully realized. He suggested that any amendment to Rule 702 would be designed to address problems "that have left the building."

Mr. Hunt further emphasized that significant efforts were being made alongside the National Institute of Standards and Technology (NIST) to build empirical support into many forensic methods. For example, he noted that enormous work was ongoing to create an empirical basis for fingerprint evidence. He explained that most of the time, forensic practitioners are getting their analysis right, with very few false positives or negatives identified in their work. Importantly, these forensic examiners are not providing speculative opinions, but rather are providing reliable source identifications based upon past successful source identifications. He explained that these federal forensic examiners have successfully made thousands of correct source identifications or they would not be qualified to testify. Mr. Hunt conceded that these source identifications are inductive opinions that are not infallible. Still, he emphasized that the recipe for success in the

forensic arena is to allow DOJ, alongside outside groups, to continue making strides and to avoid a rule change to react to testimony that was being given five or six years ago.

One Committee member inquired whether the uniform language requirements apply only to federal expert witnesses. Mr. Hunt responded that they are directed to the federal examiners only, but that federal prosecutors may not make certain statements at trial. For example, prosecutors may not ask any expert witness for an opinion “to a reasonable degree of certainty.” Mr. Hunt noted that the DOJ was making a pitch to get state laboratories to incorporate the DOJ uniform language. There is, of course, no jurisdiction for the DOJ to force state labs to adopt federal requirements, but DOJ does have leverage over the federal prosecutors who may present the testimony of state analysts at trial and many states are voluntarily adopting the protocols.

The Reporter asked Mr. Hunt about recent cases like one in a Pennsylvania state court in which a bitemark examiner was allowed to give expert opinion testimony in a capital case. Mr. Hunt replied that the DOJ does not present bitemark evidence and that he is not aware of any lab with a bitemark examiner on staff. Any experts of this nature are coming out of private practice. Mr. Hunt suggested that even those private examiners could no longer claim infallibility because forensics got into trouble generally with quantitative sounding qualitative statements. He opined that forensic experts are being forced by judges to give testimony that is more modest.

The Federal Defender queried whether the DOJ was tracking and reviewing forensic testimony given in every single federal case nationwide. She expressed concern that some criminal defendants may be adversely impacted in the meantime if this is an edict or initiative that will take time to trickle down to the trial level. Mr. Hunt replied that the DOJ was engaging in “testimony monitoring” in ongoing cases, noting a 2017 case in which the testimony monitoring caught a nuanced defect in the testimony of a new DNA technician with respect to the expressed likelihood ratio. The prosecutor was notified of the error --- after trial but prior to sentencing --- to convey it to the court to allow correction if it was deemed material. Mr. Hunt claimed that the FBI is catching unwarranted claims by forensic experts in “real time,” either in person or by transcript review within 30 days.

The Reporter asked Mr. Hunt how often state lab technicians testify in federal court and how often trial judges direct them to testify “to a reasonable degree of certainty.” Mr. Hunt could not specify how many state examiners testify in federal court, but noted that there were only 9 federal examiners involved in the cases included in the Reporter’s case digest. He reiterated that federal prosecutors may not use the terminology “reasonable degree of certainty” and that it appears that trial judges are insisting on that verbiage when it appears. A Committee member offered that, in 11 years of presiding over criminal trials, the only federal expert witnesses he had seen in his courtroom were cell tower technology experts and that all others came from state laboratories (that would not be governed by DOJ uniform language protocols). Another Committee member agreed that the state laboratories do all the drug identification, although he suggested that there is rarely a dispute about drug identification.

Judge Dever, the Liaison from the Criminal Rules Committee informed the Committee that Criminal Rules was planning to host a mini-conference on May 6, 2019 to explore disclosure obligations for expert reports in criminal cases. He noted the vast difference between disclosure

obligations with respect to expert materials under Rule 16 of the Criminal Rules and under Rule 26 of the Civil Rules. He explained that the Criminal Rules Committee was exploring the possibility of strengthening the disclosure obligations in criminal cases to make them more analogous to disclosure on the civil side. He noted that the discovery issue may intersect with the concern over admissibility and invited Committee members to share any thoughts they might have in anticipation of the mini-conference concerning discovery of expert materials in criminal cases.

Dr. Lau of the FJC asked the DOJ representatives about two sentences in the memo that the DOJ circulated to the Committee prior to the meeting, in which it is stated that:

“[A]n examiner is not claiming that the questioned mark or impression is unique or that he or she can individualize it to the exclusion of all *other* questioned marks or impressions. Instead, an examiner’s ‘source identification’ conclusion is a knowledge, skill, and experience-based decision that the evidence provides sufficiently strong support in favor of the same-source proposition to conclude that, in his or her expert opinion, the questioned mark or impression came from the same source as the known mark or impression.”

Dr. Lau suggested that “source identification” is a term of art and questioned whether it is consistent to say that there is “strong support” for a source identification *without* making a claim about other possible sources. The Reporter noted that the question is whether the jury can understand such a distinction.

Mr. Hunt replied that an examiner’s source identification is not speculative and is supported by an examiner’s training and testing proving that he or she can successfully source identify. This is not to say that the examiner is infallible, but rather that he or she has a proven track record that makes the opinion reliable. Judge Campbell queried how an examiner logically could state that a mark came from a particular defendant without saying it *didn’t* come from another person. Mr. Hunt replied that the examiner’s testimony was based upon an inductive inference that gives us confidence in a certain result and that an examiner’s claim would be made in a qualified way (albeit within the context of testimony about a “source identification”). He explained that feature comparison examiners are akin to the engineer accepted in *Kumho Tire*; they are not improperly claiming to base their opinions on science and instead rely upon a proven track record that shows they are probably right – which is all that Rule 702 requires. Judge Campbell asked whether the DOJ uniform language guidelines tell an expert how to respond to certain cross-examination questions. For example, Judge Campbell queried how a federal feature comparison expert would be required to respond to a cross question such as “Do you admit this print could have been made by any of 200 other people?” Judge Campbell suggested that it would seem very damaging for a forensic expert to answer that question in the affirmative, but suggested that the expert would be purporting to exclude others if they answered in the negative. Mr. Hunt acknowledged that there are not specific cross-examination guidelines, but reiterated that federal examiners may not claim infallibility or suggest a “zero error rate.” Mr. Hunt argued that defense attorneys have access to the DOJ documents on uniform language and may, on cross, force the expert to admit all the limitations on his testimony outlined in those documents.

Another Committee member expressed similar confusion about the DOJ characterization of “source identification.” While this Committee member understood the expert’s inability to claim

infallibility, he expressed confusion about how the DOJ testimony allowed for a “source identification” without “individualizing” the opinion. He emphasized the logical inability to identify one source *without excluding other sources*. Mr. Hunt once again stated that, based upon an examiner’s training and experience, there is sufficient evidence to make a source identification. The Committee member clarified that the question is the nature of the examiner’s claim or proposition during trial testimony (rather than its basis). Mr. Hunt noted that examiners throw out contaminated or degraded evidence and will not draw an inference about source identification without extremely strong compatibility. He stated that DOJ fully admits that its examiners are drawing inferences about feature comparison but that this is acceptable so long as the examiners are clear that this is what they are doing.

Joe Cecil, who arrived during the course of the afternoon session, expressed continuing concerns about the DOJ uniform language. (Dr. Cecil is heading the project for the FJC’s revised manual on scientific evidence.) Consistent with many of the questions by Committee members, Mr. Cecil stated that the source identification language has implications for the exclusion of others. Mr. Cecil explained that the American Association for the Advancement of Science (AAAS) sent a letter to DOJ requesting a change in the source identification language because there is no basis for testimony by an examiner that this particular sample belongs to that individual defendant. Mr. Cecil suggested that the DOJ was engaged in rhetorical chicanery in attempting to distinguish “source identification” and “individualization.” He expressed concern the DOJ was taking common language and assigning it a meaning not used in the everyday common parlance with which jurors are familiar. Mr. Hunt responded that the AAAS report on fingerprint analysis suggested that an examiner may testify that a particular ridge feature is “rare” even if he has no basis for saying *how rare*. Similarly, Mr. Hunt suggested that an examiner may testify that there is strong support for a source identification even if he cannot say exactly *how strong*. Mr. Cecil disagreed, suggesting that examiners are telling juries that a particular fingerprint belongs to a particular defendant. Mr. Hunt contended that examiners may draw an inference about source identification so long as they do not claim it is “scientific.” He emphasized that forensic feature comparison testimony is experience-based. Mr. Cecil responded that when an expert takes the stand and testifies for example that a particular defendant left a particular fingerprint, the examiner is making a scientific claim. Mr. Hunt stated that he and Mr. Cecil simply disagree, noting that Rule 702 “doesn’t play favorites” and places testimony based upon knowledge, skill, and experience on equal footing with scientific testimony.

The Chair remarked that the exchange between Mr. Cecil and Mr. Hunt related directly to the issues the Committee has been wrestling with regarding whether feature comparison methods, like fingerprinting, need black box studies supporting them to justify their presentation in court. She clarified that the PCAST report did not recommend that federal investigators cease relying on fingerprint evidence. Rather, it was concerned with the manner in which such evidence was being presented in court. Mr. Cecil agreed that PCAST was concerned about the way that fingerprint evidence was being presented in court in criminal cases. Mr. Hunt noted that there were black box studies for fingerprint evidence and toolmark evidence that yielded a 1% error rate. A Committee member noted that the low error rate in black box studies shows that there is skill behind these feature comparison methodologies that allows them to distinguish and identify marks and impressions, even if the premise of exclusion is not quantified. Still, the Committee member expressed concern about DOJ language claiming to make a “source identification” without

excluding other sources. Even if the black box studies show that these examiners are likely right, this specific claim seems logically inconsistent.

The Federal Defender expressed appreciation for the DOJ's efforts to fix injustice that has happened in the past and congratulated the Department on its laudable work to self-police with respect to forensic evidence. That said, she suggested that there is an inherent conflict of interest in allowing experts to be regulated by the entity that benefits from their testimony. She noted that Rule 702 makes the trial judge the gatekeeper – not the experts themselves. While she was very supportive of the efforts to perform testimony review, she opined that such review *after the fact* could not serve as an effective safety net without a rule carefully regulating admissibility on the front end. She noted that effective gatekeeping by the trial judge was the key to the *Daubert* standard.

The Chair suggested that the Committee should discuss the drafting options for an amendment to Rule 702 to see if they could facilitate gatekeeping. She pointed the Committee to potential drafting alternatives on pages 25 and 28 of the Reporter's memo on Rule 702 in the agenda materials that both seek to resolve the problem of expert overstatement. She noted that the first alternative would seek to strengthen the relationship between the expert's methodology and opinion by affirmatively requiring that the testimony be "limited to the opinions that may reasonably be drawn from the reliable application of the [expert's] principles and methods." The second would seek to handle the concern with a prohibition, allowing an expert to provide an opinion so long as she "does not overstate the opinions that result from the expert's reliable application of the principles and methods." The Chair raised the question of which formulation might be more effective and easier to comprehend. She questioned whether the prohibition on "overstatement" could have unintended consequences in areas like valuation, favoring or permitting *understatement* of value. The Reporter suggested that this should not be a concern because an "overstatement" amendment would be geared toward an expert's level of confidence in his or her opinion and would not affect valuation opinions per se. The Chair noted a First Circuit opinion in which a mechanical engineer opined that a fuel management system was "defective" based upon a visual inspection of it, the fact that it smoked when the engine was started, and the fact that a removed spark plug was covered in soot. The First Circuit found this opinion admissible based upon the engineer's experience. The Chair questioned how an amendment to Rule 702 to prohibit overstatement would affect cases like this one. The Reporter suggested that such an amendment would prevent an engineer like the one in the First Circuit case from stating that he was "100% positive" the fuel system was defective, but would not otherwise change the result. The Reporter noted that an experience-based opinion like the one described might be subject to attack for lacking sufficient basis under existing requirements of Rule 702.

Another Committee member suggested that he would strongly prefer the drafting alternative that is phrased as a prohibition on overstatement. He expressed concern that the affirmative drafting alternative might suggest that a trial judge should evaluate the correctness of an expert opinion and not only its reliability. Judge Campbell expressed concern that a prohibition on overstatement would require a trial judge to focus too closely on the exact words used by an expert during testimony. It could require judges to start scripting confidence for experts and would be subject to numerous objections. He suggested that the affirmative drafting alternative that focuses more on an expert's basis than his or her word choice would be preferable. Another

Committee member noted that the Supreme Court's *Joiner* opinion sought to regulate the circumstance in which there was too great a gap between an expert's methodology and opinion. The Reporter explained that the 2000 amendment to Rule 702 included subsection (d) to address that problem and that an amendment that simply restated that existing requirement would be duplicative and so ill-advised.

The DOJ representative opined that the overstatement proposals would not add value to the Rule and that Rule 702 already contains everything a trial judge needs to perform effective gatekeeping. She suggested that an amendment would simply be an excuse to add unnecessary language to the Committee Note to address perceived problems with forensic feature comparison testimony. She also expressed concerns about trial judges micromanaging the precise language used by testifying experts and stressed the significance of the DOJ initiatives to strengthen forensic testimony. Another Committee member remarked that an overstatement amendment would not be limited to forensic experts and that it could be used to limit a treating physician's ability to report a diagnosis as "extremely likely."

Another Committee member opined that the solution to the overstatement problem is solid cross-examination during which the adversary calls an expert to task for going too far. This Committee member expressed concern about drafting a rule to deal with an issue that should be handled by competent counsel under existing conditions. He expressed a preference for no amendment to Rule 702, but suggested that the drafting alternative phrased as a prohibition might be superior if it were expressly directed to the expert's "degree of certainty" concerning an opinion. Mr. Hunt expressed concern about attempting to police an expert's degree of confidence, suggesting that there is an important distinction between an expert's personal degree of confidence about an opinion and what science can prove. Another Committee member agreed with the idea that the adversary system should deal with overstatement through cross-examination. He noted that the role of the trial judge is to exercise gatekeeping and to determine whether opinion testimony gets past the threshold of admissibility, but that the form in which it is presented should thereafter be left to the adversary system. He expressed concern that an amendment would put too much responsibility on the Rules and not enough on the lawyers.

The Reporter acknowledged these concerns, but suggested that they proved too much. On the theory that the adversary system should take care of these issues, the Rule could freely admit *all* expert testimony and leave it to the lawyers to discredit it. But the key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place. A Committee member agreed, but opined that Rule 702's existing regulation of reliability was sufficient to address these concerns and reiterated that an amendment to regulate the precise words to be used by expert witnesses would take regulation a step too far.

The Reporter noted some irony in the discussion given that some participants suggested that the existing Rule 702 *already* gives the trial judge sufficient authority to regulate overstatement, while others suggested that overstatement regulation would be a *new* limit that is beyond the reach of the trial judge. He suggested that it would seem impossible to have it both ways. The Chair summarized the concerns of Committee members that the first affirmative drafting alternative could create more work for trial judges without accomplishing anything to the

extent that the reliable application of methodology is already required by Rule 702. She suggested that the second prohibitive drafting alternative could be considered new, but might require a trial judge to micromanage language and may not work effectively outside the arena of forensic expert testimony. The Reporter noted that he had given a recent presentation to the Lawyers for Civil Justice concerning problems with expert testimony on the civil side and that civil defense lawyers also sought additional regulation of overstatement, outside the arena of forensic evidence. He stated that the question for the Committee should be whether the trial judge should be monitoring overstated testimony by experts consistent with their other *Daubert* gatekeeping obligations. He noted the possibility that a lawyer can cross-examine thoroughly without removing the impact of overstatement on lay jurors, as was evidenced by expert testimony on hair identification --- as to which the DOJ has recognized that its experts overstated their conclusions in hundreds of cases of convicted defendants.

The Federal Defender offered that Rule 702 does not currently address the problem of experts overstating their conclusions and that respected scientists are telling the Committee that this is a big problem in connection with forensic feature comparison testimony in particular. She suggested that an amendment to Rule 702 regulating overstatement will not require trial judges to parse words or script testimony; instead, it will alert the trial judge to pay attention to this problem. Without an amendment, trial judges will not be attuned to this concern because the existing provisions of Rule 702 do not cover it. Another Committee member clarified that he was not advocating the abrogation of the gatekeeping role in *Daubert* by any means, but that he remained concerned that an overstatement amendment would lead to trial judges editing expert testimony as a practical matter.

Judge Campbell proposed another potential drafting alternative for an amendment to Rule 702 that would prevent an expert from “claiming a degree of confidence in an opinion that cannot be drawn from the principles and methods.” The Reporter responded that an emphasis on “degree of confidence” was promising and that he would prepare that language as a drafting alternative for the next meeting.

The Chair raised the issue of medical experts’ longstanding practice of testifying to “a reasonable degree of medical certainty” and noted that the draft Committee Note to an amended Rule 702 would suggest the retirement of that verbiage. Judge Schroeder, Chair of the Rule 702 subcommittee, explained that he had a law clerk conduct some research into this issue. He found that the “reasonable degree of certainty” language originated in 1916 in the context of future damages in a medical malpractice case. By 1960, he noted that 22 states had adopted the verbiage. And by 1970, the terminology appeared in the case law of 48 states. He noted that the draft Advisory Committee note to a Rule 702 amendment proscribes such terminology “unless required by applicable law” to account for situations in which federal courts are handling diversity cases arising in states with such terminology. He directed the Committee’s attention to a law review article dealing with such issues entitled *When Daubert Gets Erie* and pointed out the different approaches to the issue taken by courts, depending upon whether they characterize the question as one of witness competency or admissibility. He further noted that states often adopt Federal Evidence Rules and suggested that a change in the federal approach to “reasonable degree of certainty” may have an effect on state practice as well. He concluded that the issue of state law requirements of opinions to a “reasonable degree of certainty” was one the Committee should

investigate more deeply in deciding how to proceed with Rule 702. Judge Kuhl expressed concern about the portion of the draft Advisory Committee note proscribing use of “reasonable degree of certainty” language to the extent that it suggests that some state standards of causation are irrational and to the extent that it might cause litigants to seek federal court in such cases. The Reporter responded that the draft Committee note regarding the “reasonable degree of certainty” language was limited, and should be limited, to the forensics context.

Another Committee member inquired whether any state evidence rules had added provisions to regulate expert overstatement. The Reporter promised to check on any state counterparts that might seek to regulate overstatement and to follow up with the Committee at the next meeting. The Reporter thanked Mr. Hunt for attending the meeting on behalf of the DOJ and thanked the DOJ for being so helpful throughout the process of considering a change to Rule 702. He also thanked Joe Cecil for attending and for offering his valuable perspective on the issue.

The Chair reiterated that there would be no vote taken on the Rule 702 issue at this meeting and promised that the Committee would hear from another round of judges at its fall 2019 meeting. Until then, she suggested that Committee members should think about whether the time is ripe for an amendment or whether postponement to allow forensic standards to develop is the better course.

VI. Closing Matters

The Chair thanked everyone for their contributions and noted that the fall meeting of the Committee will be held on October 25, 2019 at Vanderbilt University in Nashville, TN. The meeting was adjourned.

Respectfully Submitted,

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Liesa L. Richter