Advisory Committee on Evidence Rules
Minutes of the Meeting of October 25, 2019
Vanderbilt University Law School
Nashville, TN.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on October 25, 2019 at the Vanderbilt University Law School in Nashville, Tennessee.

The following members of the Committee were present:
Hon. Debra A. Livingston, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Thomas D. Schroeder
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. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
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
Ted Hunt, 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

I. Miniconference on Best Practices for Managing *Daubert* Questions; Rule 702

On the morning of the Committee's Fall 2019 meeting, the Committee held a miniconference on "Best Practices" for managing *Daubert* issues. The miniconference was designed to further the Committee's objective to provide education to the bench and bar on proper management of expert testimony as an addition to (or an alternative to) an amendment to Fed. R. Evid. 702. The Committee invited five experienced federal judges and a distinguished professor to share ideas about "Best Practices" in managing *Daubert* questions and in conducting *Daubert* hearings. The judges all have extensive experience in managing *Daubert* issues, and each has written extensive and influential *Daubert* opinions. The miniconference was moderated by the Reporter. A transcript

of the miniconference will be published in the Fordham law Review and copies will be distributed to federal judges.

The Chair opened the afternoon Committee meeting by applauding the great discussion that was generated at the miniconference and she invited comments for Committee discussion. Judge Campbell commented that the discussion was extremely helpful in focusing judges on the need to evaluate the admissibility requirements of Rule 702 and *Daubert* through Rule 104(a), using a preponderance of the evidence standard. He suggested that caselaw describing *Daubert* questions as primarily for the jury blurs the inquiry and noted that lawyers do not focus on the judge's obligation to make a preponderance finding when they brief *Daubert* issues. Judge Campbell stated that there may be no clear answer as to how to improve Rule 702, but that an amendment or Committee note emphasizing the trial judge's obligation to find all Rule 702 requirements by a preponderance of the evidence before admitting expert opinion testimony could be very beneficial. The Chair noted that the Committee had previously considered adding the Rule 104(a) preponderance standard to the text of Rule 702, but had ultimately rejected that option. The Reporter highlighted the problems caused by adding the Rule 104(a) standard to the text of Rule 702 – namely that the Rule 104(a) standard applies to many admissibility inquiries where it is not stated expressly in rule text – but reminded the Committee that it could emphasize the application of Rule 104(a) to Rule 702 in a Committee note if it moved forward on any other amendments to the Rule.

Judge Campbell also noted that the miniconference revealed that there can be many different problems with expert opinion testimony that might be characterized as expert "overstatement" – many of which are not the focus of the Committee's recent consideration of an amendment to Rule 702 to prevent "overstatement." In particular, he noted that an expert might attempt to testify to an opinion beyond his or her qualifications, or that an expert might be qualified and have a reliable foundation for one opinion and then attempt to add an additional opinion not supported by that same foundation. Judge Campbell suggested that these would be examples of expert "overstatement" that the Committee was not trying to address with an amendment. He explained that the Committee's concerns were centered more around an expert's "degree of confidence" for an opinion and suggested that much of expert opinion testimony (such as experience-based testimony) does not raise issues of an expert's "degree of confidence."

A Committee member responded that any factor that can affect whether a person goes to jail is significant --- for example, that risk arises when a forensic expert overstates the results that can fairly be reported from a feature-comparison. Judge Campbell agreed and the Reporter noted that even narrow rules amendments can be very effective and helpful. Still, Judge Campbell queried whether a "degree of confidence" amendment would be adding complexity to the cases not affected by that factor. The DOJ representative argued that adding a new "degree of confidence" factor to Rule 702 could create a battleground for litigants that could undermine the Rule. Judge Campbell reiterated his concern that a limitation on "overstatement" or a requirement regarding "degree of confidence" could lead to trial judges being asked to wordsmith expert opinions.

The Chair noted the ambiguity in the meaning of the term "overstatement." If a particular methodology has an error rate and the expert testifies to 100% certainty regarding an opinion, it is easy to recognize that as an "overstatement." But the Chair noted that it wasn't so clear how to

apply an "overstatement" prohibition to experience-based experts, for example. She suggested that the existing *Daubert* factors all represent standards with plenty of room for a trial judge to exercise judgment within a reasonable range. In contrast, "overstatement" seems to be a more binary factor – testimony either is or is not an "overstatement." Judge Campbell responded that "degree of confidence" may indeed reflect a standard about which judges may exercise judgment (rather than a binary inquiry). He suggested that a "degree of confidence" factor would have to be limited to types of expertise in which there is some concrete result that the expert attempts to surpass in testifying. One example might be a cell tower expert who overpromises on the precision of cell towers in locating a person's phone. He opined that it might be optimal to limit an amendment to Rule 702 to opinions with an identifiable data point from which to measure "degree of confidence" --- such as a forensic test, which provides a quantifiable result.

The Chair turned the discussion to judicial education regarding forensic evidence and science generally, querying whether the miniconference had revealed any effective methods for enhanced education. She noted that the Reporter was working with the FJC and Duke and Fordham Law Schools to put together a day-long conference on forensic evidence for federal judges to attend. One Committee member also noted that programs have been presented for judges at conferences of district and circuit courts. Another suggested that trial judges read the DOJ's uniform language regarding forensic testimony, emphasizing that opposing counsel may not object to expert overstatements and that trial judges would be better equipped to deal with the issue if they have examined the appropriate language. He suggested that trial judges should also learn to tell criminal defense counsel to review the DOJ uniform language so they are prepared to object to offending overstatements in forensic testimony. In sum, these Committee members noted that education for lawyers might be just as important as additional education for judges. Another Committee member suggested that DOJ training of non-DOJ expert witnesses on the appropriate uniform language to be used in testifying about forensic evidence could be very helpful. He noted the many cases in which the testifying experts are not DOJ analysts familiar with and bound by the DOJ policy on uniform language, and suggested that more training of the non-DOJ experts could improve the forensic expert testimony being offered in federal court.

DOJ representative Ted Hunt highlighted numerous training initiatives being undertaken by DOJ with respect to the uniform language. He described upcoming formal training for prosecutors at the National Advocacy Center, as well as engagement with state and local examiners who may be using Standard Operating Procedures not compliant with DOJ standards. He also discussed the efforts to interface with a working group of state and local leaders to educate them about feature comparison methods and to recast some of the outdated verbiage embedded in the state and local standards. Finally, he noted that efforts were underway at DOJ to strengthen some of the existing uniform language to ensure that it remains up to date. He expressed surprise that some of the federal judges participating in the miniconference had observed non-compliant overstatements in recent cases. Mr. Hunt also noted that DOJ was engaged in a working group with federal public defenders to raise awareness of the uniform language and of testimonial requirements for feature comparison experts.

Dr. Lau of the Federal Judicial Center noted that one of the participants in the miniconference had suggested that it would be helpful for judges to have a list of "red flags" that might indicate a reliability problem with expert opinion testimony. He suggested that it might be fruitful for the

FJC to explore a "red flags" list for certain areas of expertise for judges. Beyond that, Dr. Lau suggested that much of the needed education appeared to be directed to the bar rather than the bench and he suggested that much of this lawyer education was beyond the purview of the FJC. .

The Chair noted that judges can certainly help remind lawyers about the DOJ uniform language and the problem of forensic overstatement outside the trial context. Another Committee member offered that it is much easier to give reminders and admonitions in the civil context where there is significant briefing on expert issues and time to discuss and consider them, but that it is much more challenging in criminal cases where the testimony comes in "on the fly." Judge Campbell emphasized that it is very important to educate defense lawyers, particularly CJA lawyers, about appropriate forensic testimony and the risks of overstatement.

The Chair then asked Judge Dever, the Liaison from the Criminal Rules Committee, to update the Committee regarding a draft proposal to amend Federal Rule of Criminal Procedure 16 to improve advance disclosure of expert opinion evidence in criminal cases. Judge Dever noted that the goal was to have a draft proposal to the Standing Committee for its January meeting and to prepare a final draft at the April meeting of the Criminal Rules Committee. Judge Dever explained that the gist of the proposed amendment was to require a more complete statement of an expert's opinion in pre-trial disclosures in criminal cases, and to require trial judges in every criminal case to set a time for expert disclosure. Judge Dever noted that the DOJ was instrumental in helping the Committee come up with appropriate language to capture these concepts. He explained that the Criminal Rules Committee considered setting a specific number of days before trial for expert disclosures in the text of Rule 16, but determined that a set number of days would provide inadequate flexibility across districts and types of cases. But he noted that too many trial judges permit expert disclosures to be made in criminal cases right before trial. To correct the unfairness inherent in that practice without setting a rigid number of days, the Criminal Rules Committee compromised with language requiring trial judges to set a specific time for expert disclosures that will provide a "fair opportunity for the defendant to meet the government's evidence." (This language was taken from the Federal Rules of Evidence.) He noted that the proposal would require more detailed disclosures about expert opinions as well, such as a complete statement of all opinions that will be offered at trial, expert publications, and past testimony. Finally, the report will have to be signed by the expert, so it can be used to impeach the expert's trial testimony to the extent it is inconsistent with the report.

The Reporter suggested that the proposed amendment to Criminal Rule 16 might not have much impact in the forensics area, where the Committee has been focused, because the "Yates Memo" regarding disclosure of forensic evidence already required timely disclosure of the information covered by the proposed amendment to Rule 16. Judge Dever suggested that the amendment would be helpful in all cases because it would prevent a prosecutor from making disclosures three days prior to trial, would require a meet & confer between counsel, and would prevent an expert from disclosing two opinions and then testifying to five opinions at trial. The Reporter agreed that transforming a DOJ policy into a binding rule would be beneficial. A Committee member inquired whether the substantive disclosures under an amended Rule 16 would be broader or narrower than the disclosures currently required under the "Yates Memo." It was suggested that Rule 16 would add protections, in part, because it would require an expert witness to sign expert disclosures, making it difficult for the expert on cross-examination to avoid or reject

portions of the case file that are turned over under the "Yates Memo." Also, by requiring an expert to state all trial opinions in the disclosure, it will prevent an expert from giving one opinion before trial and tacking on additional opinions during testimony. Another Committee member also pointed out that advance disclosure of an expert opinion will help defense counsel identify and object to any "overstatement" with time for study and reflection.

The Reporter noted that the benefit of an amendment to Rule 16 might be tempered by the fact that some witnesses who might be experts are actually called by the government as lay witnesses, thus avoiding disclosure. He noted the confusion in the case law regarding the distinction between lay opinion testimony offered under Rule 701 of the Evidence Rules and expert opinion testimony offered under Rule 702. He explained that a witness offering an opinion on gang-related behavior, for example, might be offered as an expert under Rule 702 in some jurisdictions, but admitted as a lay witness under Rule 701 in others. The Reporter noted that the Advisory Committee attempted to resolve this issue with the 2000 amendment to Rule 701 that prohibited lay opinion testimony "based on scientific, technical, or other specialized knowledge." Still the line between expert and lay opinion testimony gets blurred in the courts. The Reporter suggested that the Evidence Rules Committee should explore mechanisms for distinguishing between lay and expert testimony to prevent prosecutors from avoiding obligations under an amended Rule 16.

II. Rule 615

The Reporter opened the discussion of Rule 615 by reminding the Committee of the conflict that exists in the courts about the meaning of a sequestration order. When a court invokes Rule 615, it is unclear whether that means only that testifying witnesses must leave the courtroom or whether such an order includes protections against obtaining information about trial testimony outside the courtroom (such as in the media or by virtue of daily transcripts or conversations). In most circuits, protections beyond the courtroom are *automatically* included in a Rule 615 order. In some circuits, however, courts have held that such an order only demands exclusion from the courtroom and does not include any protections against disclosures outside of it. These latter courts read Rule 615 by its express terms; the rule text provides only for "excluding" witnesses from the courtroom. The Reporter noted that both interpretations of Rule 615 can create notice problems for litigants and witnesses. In the former jurisdictions, a witness might not appreciate that an order excluding him from the courtroom automatically prohibits other access to trial testimony. In the latter jurisdictions, a lawyer might think that "invoking the Rule" is sufficient to extend protection beyond the courtroom and might not appreciate the need to specifically request additional protections.

The Reporter noted that the Committee had considered and rejected the possibility of amending Rule 615 to extend sequestration automatically beyond the courtroom in every case. Instead the Committee opted for a draft that would highlight a trial judge's authority to expand protections beyond the courtroom and would alert lawyers that they need to request and receive an explicit order including such expanded protection. He noted that while the Committee supported a discretionary amendment to Rule 615 that would allow for protection outside the courtroom, it had expressed concern about the issue of counsel communicating trial testimony during witness preparation. In particular, the Committee wanted to follow up on the opinion in *United States v.*

Rhynes, 218 F.3d 310 (4th Cir. 2000) (*en banc*), which held that a sequestered witness's testimony could *not* be excluded after defense counsel disclosed trial testimony in the course of preparing the witness to testify.

The Reporter explained that the case law reflected in the agenda materials did not establish that counsel are exempt from prohibitions on disclosures of trial testimony to witnesses. Indeed, he explained that there are many cases that prevent attorneys from disclosing trial testimony to sequestered witnesses, because lawyers can effectively prepare witnesses without disclosing trial testimony and because a lawyer exemption from such protections would create a gap in protection that could swallow the rule entirely.

The Reporter explained that the three drafting alternatives for an amendment to Rule 615 included in the agenda materials varied only with respect to the treatment of counsel. One amendment option would prohibit counsel from conveying trial testimony to sequestered witnesses. Another would exempt counsel from any prohibition on conveying trial testimony to sequestered witnesses outside the courtroom. The third amendment alternative is silent as to the treatment of counsel, leaving courts to determine how to supervise counsel on a case-by-case basis.

The Reporter explained that counsel's preparation of sequestered witnesses presents issues of professional responsibility as well as the Sixth Amendment right to effective counsel --- topics that are typically beyond the ken of the Evidence Rules. An amendment that is silent with respect to counsel was included as an alternative because it would be most hands-off as to the complicated policy issues. The Reporter explained that bracketed material was included in the draft Advisory Committee note to this third option to alert the parties and the court to the issues regarding counsel, but to take no position in the rule on counsel's use of trial testimony to prepare witnesses. He informed the Committee that the plan was to discuss the variations at the fall meeting and to create a draft amendment that could be voted on by the Committee at the Spring 2020 meeting.

The Federal Public Defender suggested that the Sixth Amendment right to confront witnesses should be added to the bracketed language in the draft Advisory Committee note discussing the issues raised by counsel's communication of trial testimony to sequestered witnesses --- and the Reporter agreed to add such language. The Public Defender noted that criminal defense lawyers win and lose cases based on cross-examination and that if one testifying officer has access to the testimony of another officer, the all-important right to cross-examine effectively is seriously hampered. Judge Campbell inquired whether defense counsel would be happy to be bound by a prohibition on revealing trial testimony themselves. The Federal Defender responded that it would not pose any issue with respect to preparation of the defendant because the parties are allowed to remain in the courtroom and so defense lawyers wouldn't likely have any objection. Most importantly, she opined that trial judges deciding how to manage counsel should consider the right to confront witnesses in the forefront of their analysis.

One Committee member noted that attorney preparation with witness testimony is a proper ground for cross-examination and that such cross-examination about conversations with counsel is common. He suggested that the impeaching effect of these conversations provide a limit on counsel's discussions with witnesses and that he favors the alternative for amending Rule 615 that is silent as to treatment of counsel. Another Committee member expressed reservations about an

amendment that would prevent lawyers from talking to witnesses and stated a preference for allowing the issue of counsel conferring with witnesses to be handled on cross-examination.

The Chair agreed that the question of counsel's witness preparation is a can of worms, but queried whether the other problems with Rule 615 are sufficiently significant to justify an amendment. She also noted the increasing difficulty that lawyers will have in controlling witness conduct outside the courtroom, particularly given ubiquitous internet access. She suggested that adding discretionary language to the Rule would encourage judges to enter more orders that extend beyond the courtroom. The Reporter responded that the draft proposals would not encourage or incentivize orders controlling conduct outside the courtroom. Instead, the draft proposals would encourage the trial judge to *consider* the issue and to provide clear and fair notice of the limits of any sequestration order that is entered. More importantly, in most circuits, a basic Rule 615 order *already* extends beyond the courtroom automatically. So in those circuits the amendment would not encourage more orders; and in the other circuits it will result in more orders only if the court in its discretion decides to extend the order outside the courtroom --- something it can already do today.

Judge Campbell suggested that the amendment alternative that is silent as to counsel would address the current concerns about sequestration without getting embroiled in the counsel question. The Chair agreed, as did another Committee member. Another Committee member also suggested that added clarification is advantageous for lawyers – how can lawyers be expected to appreciate the operation of sequestration if the Rule is vague?

The Reporter suggested adding language to the bracketed language contained in the draft Committee note to emphasize that the amendment is neutral with respect to protections beyond the courtroom and is not encouraging extension of sequestration orders. The Chair agreed with this proposal.

The Reporter agreed to prepare a draft amendment for the Spring 2020 meeting in keeping with the Committee's recommendations.

III. Rule 106 Rule of Completeness

The Reporter opened the discussion of Rule 106 by explaining that the Committee's review of the rule of completeness has revealed that it is one of the most complicated rules in the Federal Rules of Evidence. Because of the complexity of the Rule, the Chair suggested that the Committee try to focus on only a couple of the issues raised by the completeness doctrine at this meeting and have a longer discussion of all issues at the Spring 2020 meeting in the hope of coming up with a proposed amendment.

The Reporter reminded the Committee that the hearsay issue raised by completeness requests is the most significant problem with the existing Rule. While many circuits permit completion with otherwise inadmissible hearsay, some courts, like the Sixth Circuit, have held that a criminal defendant may not introduce a completing remainder necessary to correct a misleading impression created by the government's initial partial presentation of his statement. In essence, these cases

acknowledge the unfairness in the presentation that has been made, but find that the hearsay doctrine forecloses any remedy otherwise provided by Rule 106. The most significant question for the Committee is how to fix that serious defect in the interpretation of Rule 106.

The Chair emphasized that Rule 106 was intended to be only a partial codification of the doctrine of completeness, as recognized by the Supreme Court in *Beech Aircraft*, and was adopted to affect the timing of completion by allowing interruption of an opponent's case to complete misleading written and recorded statements. She noted that the common law doctrine of completion was much broader than Rule 106 and expressed concerns about retaining the standard adopted for a partial codification and extending it to a full codification of the doctrine of completeness. In particular, the Chair expressed concerns about an amended rule that would entirely displace the common law of completion. The Reporter queried whether the current draft heading for a proposed amendment to Rule 106 that characterizes the rule as the "Rule of Completeness" was creating that concern about displacing the common law in its entirety. The Chair stated that the heading purporting to capture all of the rule of completeness was a problem and that it would be important not to rewrite the common law of completeness. The Reporter responded that the heading was altered in the restyling process and that it would be very easy to modify to avoid the suggestion that Rule 106 displaces all common law completion rights.

The DOJ representative noted that the right to interrupt one's adversary with a completing statement was the entire purpose of Rule 106 as originally adopted. She questioned whether it made sense to retain Rule 106 if that right to contemporaneous completion were eliminated in favor of flexible timing in an amended Rule. The Reporter explained that the federal courts have interpreted the timing requirement flexibly, notwithstanding the strict language of Rule 106, and that an amendment that made the timing flexible would merely reflect the practice in the federal courts. That said, the Reporter acknowledged that the Committee could leave the timing requirement unchanged in an amended provision and reminded the Committee that the timing issue was the least important of the concerns with the existing Rule.

Judge Campbell inquired whether it would be accurate to say that existing Rule 106 does only one thing, but that an amended provision that added all of these changes would be doing three additional things (flexible timing, oral statements, otherwise inadmissible hearsay permitted). The Reporter agreed with that characterization. The Chair remarked that the Committee would not need to address the timing issue in an amended rule so long as it was careful to leave the common law untouched. Even if a party did not complete immediately under Rule 106, that party could still attempt to do so later under the common law of completion.

The Reporter again raised the significant hearsay question. The Chair opined that completing hearsay could be admitted for its truth if it independently satisfied a hearsay exception and could be admitted for its non-hearsay value of showing context if it did not fall within an exception. She noted that Wigmore was against reading Rule 106 as a hearsay exception and suggested that completing remainders might be insufficiently reliable to be admitted for their truth. She opined that Judge Grimm, who brought his concerns about Rule 106 to the Committee, would be satisfied with this approach, allowing the completing statement to be used for context only. The Reporter disagreed, noting that Judge Grimm expressed a preference for having the completing remainder admitted for its truth. That said, the Reporter suggested that an amendment that elided the issue of

the purpose for which the otherwise inadmissible remainder was offered might be satisfactory to all – as in, the completing statement may be admitted "over a hearsay objection." This amendment would prevent situations like those seen in the Sixth Circuit where the completing remainder is excluded, but would not necessarily make the completing remainder admissible for its truth.

Another participating judge reminded the Committee of the completeness scenarios trial judges face in court on a routine basis. Because of the increased use of video-recording during interrogations, prosecutors have video recordings of a defendant's admissions to present at trial, with the government offering one portion and the defendant seeking to complete with another. This judge noted that the increasing availability of video-recorded statements would make these completeness issues more common. The Reporter noted that the right to complete in these scenarios has to be addressed under the fairness standard in existing Rule 106 and that this narrow triggering standard would not be changed in an amended provision.

Another Committee member asked how the judge had handled these scenarios and he explained that the prosecution had abandoned its efforts to use the partial statements due to the defense objection and had, instead, relied on other evidence to prove the points demonstrated in the video interrogations. The Committee member queried whether the judge would have permitted the remainders in for their truth or for context if he had admitted them. He said probably for context only. The Committee member then expressed skepticism that a jury can understand an instruction limiting the use of a completing statement to context only. He suggested that juries are good at following many limiting instructions, but that a limiting instruction in this circumstance would be very difficult for jurors to comprehend and follow.

Another Committee member suggested that the hearsay issue might be addressed only in an Advisory Committee note to minimal amendments to Rule 106. Judge Campbell responded that these completion issues arise in the heat of trial and that trial judges only have time to review rule text before making an instant decision. He suggested that Rule106 – more than many others – needs to provide clear rule text to aid trial judges. Another Committee member echoed this observation, explaining that Rule 106 issues arise in "real-time" and that there are rarely motions *in limine* with respect to these issues. The Chair suggested that a minimalist amendment would simply add a second sentence to the existing rule that reads: "The court may admit the completing statement for its truth if it would otherwise be admissible or for context." Such an amended rule would resolve the hearsay question and leave remaining issues to a common law solution.

One Committee member expressed concern that completion would allow the admission of unreliable hearsay of criminal defendants. The Reporter in response noted that the parts of a defendant's statement offered by the government are themselves hearsay, and are not admissible because they are reliable --- but rather as party-opponent statements admissible under the adversary theory of litigation. The Chair again expressed reservations about creating a hearsay exception based on a fairness standard. The Reporter reminded the Committee that the fairness standard has been interpreted very narrowly and permits completion in very few circumstances. He stated that an amendment allowing substantive use of completing statements would not open the floodgates to hearsay so long as that narrow fairness trigger was retained.

Based upon the discussion of the hearsay and timing issues, the Reporter promised to present revised drafting alternatives for an amendment to Rule 106 at the Spring 2020 meeting that would:

- Rewrite the heading for the Rule to reflect the narrow scope of the provision and avoid displacing all common law completion;

- Eliminate flexibility with respect to the timing of completion and require completion contemporaneously (consistent with existing Rule 106);

- Provide two alternatives for addressing the hearsay issue: 1) allowing completion "over a hearsay objection" and 2) adding a second sentence to Rule 106 stating that "The court may admit the completing statement for its truth if it would otherwise be admissible or for context."

The Chair suggested that a completing remainder of a criminal defendant's statement would have to be presented simultaneously *by the prosecution* if the Rule remained a rule of interruption and that the completing remainder would be "otherwise admissible" as a statement of a party opponent when admitted by the prosecution --- even though it was likely to be unreliable.

The Reporter closed the discussion by noting that the Committee needed to continue its consideration of whether to include oral statements in an amended Rule 106 at the spring meeting. One question was whether to simply add oral statements to Rule 106's existing paragraph or to create a separate subsection for oral statements. Committee members unanimously disapproved of a separate subsection as unnecessarily complicated.

A Committee member noted that one draft amendment in the agenda materials simply dropped the modifiers "written or recorded" from the existing rule text and questioned whether that change would suffice to cover all written, video-recorded, and oral statements. The Reporter promised to consider that question for the next meeting. The DOJ representative repeated the Department's opposition to including oral, unrecorded statements in Rule 106. In response the Reporter referred the Committee to his memo, which indicated that almost all courts are *already* allowing admission of oral statements to complete, usually by citing Rule 611(a). He argued that all that adding oral statements to Rule 106 would do would be to treat all completeness issues under a single rule.

IV. Closing Matters

The Chair thanked Vanderbilt University for hosting the Committee and again praised the high quality of the miniconference on *Daubert* Best Practices. She thanked everyone for their contributions to a productive meeting. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra
Liesa L. Richter