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

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MEMORANDUM

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

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

DATE: December 1, 2022

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 28, 2022 at the Sandra Day O'Connor College of Law, Arizona State University, in Phoenix. On the day of the meeting, the Committee convened two panels of experienced judges, lawyers, and law professors to discuss two possible amendments to the Evidence Rules. At the subsequent meeting, the Committee discussed the comments of the panelists, and also reviewed its proposed amendments that are currently out for public comment.

A full description of the Committee's discussion can be found in the draft minutes of the Committee meeting, attached to this Report. In addition, the five proposed amendments that are currently out for public comment, discussed below, are attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Panel Discussions

1. Juror Questions Posed to Witnesses

The first panel provided the Committee with information regarding the practice of allowing jurors to pose questions to witnesses. Last year the Committee prepared a proposed amendment that would impose safeguards if a court decided to allow jurors to ask questions. The proposal did not take a position on whether juror questions should be allowed.

The proposed amendment was considered by the Standing Committee, but it was returned to the Advisory Committee for further research. Some members of the Standing Committee were concerned that the proposal would lead to more courts allowing jurors to pose questions to witnesses. It was suggested that the Committee conduct more research on how the practice actually works when it is employed, and on whether the benefits of the practice outweigh the costs. The panel was put together in response to the Standing Committee's suggestion.

The panel in Phoenix was made up of distinguished state and federal judges, and attorneys experienced in civil and criminal litigation. Each of the panelists had substantial experience in the practice of jurors submitting questions for witnesses. The practice is mandated in Arizona state courts (subject to a good cause limitation) and the two Federal judges on the panel have often allowed jurors to submit questions.

The panelists all reported very favorably on the practice. Their basic conclusions were: 1) when jurors are allowed to ask questions, they are more engaged and less likely to seek information from outside sources; 2) at most trials, the number of juror questions is around 5 to 10, a manageable number; 3) jurors generally do not pose questions in an argumentative form, and do not become advocates; 4) most questions are essentially for clarification purposes, such as when jargon is used by lawyers or witnesses that the juror does not understand; 4) it is always helpful for courts and lawyers to know what jurors are thinking; 5) there was no instance that any panelist could remember of a juror question raising an issue in a way that allowed the party with the burden of proof to correct a deficit in their case; and 6) the enactment of the safeguards proposed by the

Committee would likely lead more courts to allow jurors to submit questions to witnesses.

In the subsequent Committee meeting, the Committee reviewed the very helpful panel discussion and decided to continue its research on the practice of juror questions of witnesses. Some issues that remain to be considered are: 1) how frequently juror questioning is already allowed in Federal courts across the country; and 2) how frequently courts using the practice have been found to be lacking sufficient safeguards.

2. Illustrative Aids

At its spring 2022 meeting, the Advisory Committee unanimously approved, for publication for public comment, a new Rule 611(d), which sets forth a distinction between demonstrative evidence and illustrative aids and imposes requirements on the use of illustrative aids at trial. The Standing Committee unanimously approved the proposal, which was released for public comment in August. A panel was convened in Phoenix to provide comment on the proposed rule. The panel included the professor who drafted a similar rule in Maine. He concluded that proposed Rule 611(d) would be valuable, because courts and litigants have had difficulty in distinguishing demonstrative evidence (from which one derives inferences) from illustrative aids (which are not evidence). The professor concluded that the experience in Maine showed that the rule was a helpful ordering device, and that it had not given rise to any problems of interpretation in the courts.

The judges and lawyers on the panel expressed concern about the rule. Almost all of that concern was focused on the notice requirement in the rule. Panelists pointed out that there would be many situations in which an illustrative aid is used and advance notice could not be provided — such as where an illustration is made by a witness in the moment and without prior preparation. The lawyers also contended that an advance notice requirement would be problematic as to illustrative aids used in opening and closing arguments.

In the meeting, the Committee carefully considered the comments of the panelists. The sense of the Committee was that the notice requirement should be deleted, and the question of notice should be left to the discretion of the court. The Committee further concluded that if the objections about notice are thus addressed, the rule remaining would provide valuable guidance in distinguishing illustrative aids and demonstrative evidence — and it also would be helpful in distinguishing between summaries of voluminous evidence (covered by Rule 1006) and summaries that are offered not as evidence but only to assist the factfinder in understanding evidence or argument. The Committee adhered to its belief that it is important to write a rule on illustrative aids, as they are used in every case and yet there is nothing in the Evidence Rules that specifically addresses their use. A final vote on the proposed rule, with the notice requirement dropped from the rule, will be taken in the spring, hopefully with the benefit of more public comments.

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

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

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

The Committee is awaiting public comment on the proposed amendment and will process any comments at its next meeting.

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

A proposed amendment to Rule 801(d)(2) is currently out for public comment. Rule 801(d)(2) provides a hearsay exemption for statements of a party-opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent. The Committee has analyzed this conflict in the courts and has determined that it is an important one to rectify — and that the proper solution is that if a party stands in the shoes of the declarant the statement should be admissible, because it would be admissible against the declarant had the cause of action or defense been kept by the declarant.

The Committee is awaiting comment on the proposed amendment and will process any comments at the spring meeting.

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

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

The Committee is awaiting comment on the proposed amendment and will process any comments at the spring meeting.

E. Rule 1006

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

The proposed amendment addresses and corrects the above problems, and also states

specifically that a summary that simply promotes the factfinder's understanding of the evidence is covered by the rule on illustrative aids, and not by Rule 1006.

The Committee is awaiting comment on the proposed amendment and will process any comments at the spring meeting.

IV. Minutes of the Fall 2022 Meeting

The draft of the minutes of the Committee's fall 2022 meeting is attached to this report. These minutes have not yet been approved by the Committee.