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Acting Secretary and General Counsel
Committee on Practice & Procedure
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AMENDMENTS TO EVIDENCE RULES PROPOSED FOR COMMENT, Aug. 2021

To the Committee and Staff:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the three proposed amendments the Federal Rules of Evidence.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has almost 10,000 direct members. Including NACDL's 95 state and local affiliates, in nearly every state, we speak for a combined membership of some 40,000 private and public defenders, along with many academics.

EVIDENCE RULE 106 – COMPLETION OF A STATEMENT

NACDL strongly supports the proposed amendment to F.R.E. 106, the rule of completeness. There has long been a Circuit split on each of two different issues that arise under the rule: 1) whether a party can use an oral statement to "complete" a written statement offered by the opponent; and 2) whether Rule 106 itself authorizes admission of the completing statement even though that statement might otherwise appear to be inadmissible under another Rule, such as, for example, the general prohibition on hearsay. The amendment resolves each split in favor of broader admissibility. These proposals advance the stated goal of the rule: fairness. The amendments are also consonant with the overall purpose of the evidence rules, "ascertaining the truth and securing a just determination" of cases. F.R.E. 102.

Although the current version of the rule refers only to a right to introduce "any other writing or recorded statement," some courts have read F.R.E. 611 in tandem with 106 to allow the use of oral expressions as completing statements. NACDL thinks that this has always been the better conclusion. With this amendment, the Circuit split is resolved. Expressly allowing oral statements to be used for this purpose clearly serves the goal of fairness by protecting against the introduction of written or recorded statements that are misleading by omission.

The second change to Rule 106 offers the same benefits. It resolves a Circuit split and allows for fairer results. The rule was silent on whether otherwise inadmissible evidence could be used as the completing statement, and courts therefore disagreed, in particular, over whether hearsay, even if it fell outside any of the many exceptions, could be used for that purpose. It is clear in many circumstances that fairness requires the admission of hearsay for this purpose. In criminal cases, in particular, this amendment will serve as an important protection against the

government's use of unfairly selected excerpts of statements of the defendant. Under present practice, prosecutors can block the admission of completing statements – such as explanations, qualifications or even retractions of apparent admissions – on the basis that they are hearsay or "self-serving" when offered by defendants themselves, even when the result of the exclusion is to mislead to the jury. NACDL agrees that the circumstances of each individual case will determine whether the completing statement should be admitted only for a non-hearsay purpose – such as establishing state of mind or what an individual knew before undertaking a certain action – or whether it is admitted for the truth of the matter asserted, which the amendment would now permit (subject only to the potential for exclusion under F.R.E. 403). NACDL therefore looks forward to adoption and implementation of this amendment.

EVIDENCE RULE 615 – SEQUESTRATION OF WITNESSES

Evidence Rule 615 authorizes and governs judicial orders barring prospective witnesses from hearing the testimony of other witnesses, a process designed to ensure that the testimony of each witness reflects only their own knowledge and is not influenced by hearing the questions asked of or answers given by other witnesses. NACDL believes that some of the proposed changes to F.R.E. 615 are salutary, while others should be reconsidered.

Rule 615(a)(2) and (a)(3). NACDL supports the proposed amendment, in what would now be subsection (a)(2), to specify that only one officer or employee of a party that is not a natural person (such as the United States government when acting as prosecutor in a criminal case) may be exempted from the exclusion of witnesses from the courtroom. As the Committee Note indicates, limiting an entity party to one representative in the courtroom would generally "provide[] parity for individual and entity parties." This is particularly true in criminal cases, where that designated "representative" is typically the "case agent," that is, the principal or coordinating criminal investigator. To fully implement and enforce the intent behind this change, however, the Committee must do more with subsection (a)(3) to prevent a party from negating the (a)(2) reform through the "back door."

Proposed subparagraph (a)(3) retains current paragraph (c) with one change. That change would facilitate, rather than protect against, evasion of the salutary (a)(2) reform. The current rule states: "[T]his rule does not authorize excluding a person whose presence a party shows to be essential to presenting the party's claim or defense." The amendment would change "a person" to "any person." This provision is readily susceptible to an interpretation that would eliminate most of the beneficial effects intended to be effected by new subparagraph (a)(2). Since the negation of one provision by another in the same Rule cannot have been intended, the amendment of (a)(3) therefore must be clarified to prevent its misuse. Otherwise, all that an entity party would have to do in order to get around (a)(2)'s limitation of one representative in the courtroom is to claim that more than one person is essential to presenting its claim or defense. The change from "a person" to "any person" invites that tactic. The wording of both (a)(3) and the Advisory Committee Note must therefore be modified to prevent evasion of the (a)(2) reform.

The Committee Note makes it clear that subparagraph (a)(3) is intended to allow the judge to exempt "from exclusion multiple witnesses if they are found essential under (a)(3)." In criminal trials the government almost always enjoys an enormous advantage in resources over the defense. The vast majority of criminal defendants in federal court are represented by appointed counsel.

Many of those lawyers are solo practitioners, or working in two- or three-lawyer partnerships, often without any support staff at all. The government, by contrast, frequently has two AUSA's assigned to a case. The case agent (that is, the lead or coordinating criminal investigator) is also seated at counsel table, as the party "representative," providing assistance to the lawyers. The decision to limit the government to one such agent is a praiseworthy attempt to decrease the disparity between the parties. The proposed change to (a)(3) must not be allowed casually to nullify that salutary effort.

To protect against this risk, the wording of both the Rule and the Note should be strengthened. As Rule 615 (with its venerable tradition and history) recognizes, allowing prospective witnesses to hear or be otherwise exposed to the examination of other witnesses poses a substantial risk to the fairness of any hearing or trial. Thus, a potential exception is allowed only for a witness whose continuing presence is "essential" to the presentation of a party's case, not merely if it would be *helpful* or *convenient.* The proponent of invoking this exception should bear the burden of demonstrating (not merely contending) that this high bar is satisfied. And whether the party has persuasively satisfied that burden is for the Court to determine; it is not up to counsel for any party to decide for themselves, nor does any burden rest on the adverse party to persuade the judge otherwise. A second agent, for example, is not "essential to presenting" the government's case because that agent is familiar with the computer program being used to display exhibits or play recordings for the jury when a paralegal or technician could be utilized for that purpose, nor because two agencies cooperated in investigating the case, each of which wants its "case agent" at the table. NACDL therefore suggests that the wording of the amended rule be modified to state, "(3) any person whose presence a party <u>demonstrates, to the satisfaction of the court,</u> to be <u>genuinely</u> essential to presenting the party's claim or defense."

The risk that (a)(3), as proposed to be amended, could be too easily invoked to negate the reform of (a)(2) is exacerbated by the reference in the Committee Note to *United States v. Arayatanon*, 980 F.3d 444, 448–49 (5th Cir. 2020), as approved authority on the issue of when a person is "essential" for the government within the meaning of this Rule. The defendant in that case argued on appeal that the trial court had abused its discretion in exempting more than one agent from the rule excluding witnesses. The Court of Appeals panel rejected that argument on the basis that the court had not abused its discretion in exempting two witnesses based on a bare representation of the prosecutor, that the defendant had "made no showing to overcome the government's representation that both agents were essential," and also for lack of prejudice (as only one of the two agents, in the end, had testified). By citing that case with approval in the Note, the Committee is, in essence, saying that the amendment merely clarifies and does not work any change. Worse, the cited case does not provide any guidance on what kind of "show[ing]" suffices to establish that a person is "essential," and instead suggests that a conclusory representation by counsel will suffice to shift the burden to the opponent to "overcome" the contention. The court does not appear to acknowledge that the standard of "essential" implies a high burden, that the phrase "a party shows" puts the burden squarely on the proponent of an exception to sequestration, or that the term "shows" requires more than an assertion. The cited opinion mentions no facts that were proffered by the prosecutor, nor does it try to explain why the witnesses in *Arayatanon* were in fact or even could have both been truly "essential." It mentions no criteria a court should apply in differentiating between witnesses whose presence is "essential" and those who would merely be helpful. And most important, the record and reasoning of that case do not discuss or explain when special circumstances can overcome the truth-protecting purpose of witness sequestration. The

reference to *Arayatanon* should be stricken. The Advisory Committee Note should not cite such a case as a model for interpreting and applying the amended Rule.

Rule 615(a)(4). In 1998, Rule 615 was amended to add a fourth exception (originally, paragraph (d); now to be redesignated as subparagraph (a)(4)) to make clear that a Rule 615 order did confer authority to supersede any statutory right to be present. The Advisory Committee Note from 1998 states that this was intended to refer to the rights of an alleged crime victim under 42 U.S.C. § 10606 (eff. 1990) and 18 U.S.C. § 3510 (eff. 1997). Since then, an additional statute on the subject was enacted, codified at 18 U.S.C. § 3771(a)(3) (the "Crime Victims' Rights Act," eff. 2004), and the Supreme Court adopted a corresponding and implementing Rule of Criminal Procedure (*see* Fed.R.Crim.P. 60(a)(2) (eff. 2008)). It is important to note that neither the Criminal Rule nor any of these statutes *exempts* alleged victims from exclusion by order under Rule 615; subsection (a)(4) thus does not address an issue directly analogous to the categories of persons listed in (a)(1)–(1)(3). Rather, the Rule and statutes impose particular and specific *limitations* on Rule 615 orders, such as the requirement of a finding by clear and convincing evidence (§ 3771(a)(3) and Rule 60(a)(2)) and the restriction in § 3510(a) that an alleged victim not be excluded *from trial* on the basis that they might be called to testify as a witness *at sentencing* in the event of a conviction. As drafted, the Rule and the Advisory Committee Note imply that these provisions are more generous to alleged victims than they in fact are. We therefore urge that the wording of the new 615(a)(4) be revised to read "a person authorized by statute or Rule of Procedure to be present, but only to the extent provided in the statute or Rule." We further suggest that a sentence or two be added to the Advisory Committee Note calling judges' attention to the limitations of the referenced provisions.

Language should also be added to the Note to clarify that an alleged "victim" in a criminal case is neither a representative of a party under proposed Rule 615(a)(2) nor a person essential to the presentation of the government's case under proposed Rule 615(a)(3). The court's authority to order sequestration of witnesses under Rule 615 extends fully to an alleged victim who is a prospective witness, subject only to the specific limitations, incorporated under (a)(4), of statutes such as the CVRA and as provided in Criminal Rule 60.

Rule 615(b). We support the amendment in proposed subparagraph (b) that explicitly grants to the trial judge the authority to extend an exclusion order beyond the walls of the courtroom. It serves little purpose to exclude as-yet-unheard witnesses from the courtroom if spectators or other witnesses can influence those persons' prospective testimony by informing them of what has been testified to by others while they were physically excluded. In this connection, however, we highlight and endorse the comment in the Committee Note suggesting that only a specific directive from the judge would apply the rule to counsel's interactions with the represented party's witnesses, given the potential to interfere with counsel's good faith efforts to prepare a party's witnesses to testify. We believe that criminal defense counsel, like other members of the Bar, should be presumed to act in keeping with the obligations of professional responsibility and thus to communicate with witnesses only in a manner designed to facilitate the giving of truthful testimony and in a manner that will be clearly understood by the factfinder. The adverse party's right of cross-examination includes the opportunity to inquire into the process of witness preparation, and thus fully protects against any potential for abuse that might arise from subjecting counsel routinely to an order entered under proposed Rule 615(b)(1). As the Note points out, an order limiting a criminal defense attorney's freedom of action in accordance with counsel's

own professional judgment may have the effect of denying the accused the effective assistance of counsel, as well as the related Sixth Amendment rights to compulsory process and confrontation.

EVIDENCE RULE 702 – TESTIMONY BY EXPERT WITNESSES

The proposed amendments to Rule 702 would clarify that a district court must find, under F.R.E. 104(a), that an expert's testimony meets the reliability requirements of Rule 702(b) through (d) to be admissible. The Committee notes that a number of district courts have incorrectly held that these requirements go to weight, not admissibility, and that – under Rule 104(b) – an expert's testimony should be admitted as long as its proponent proffers sufficient evidence for a jury to conclude that the expert's testimony is reliable. Indeed, as Lawyers for Civil Justice note in their comment, its study of 1,000 federal expert-evidence decisions decided in 2020 found that in two-thirds of the opinions did not mention the preponderance standard at all. It is vital that the courts do not abdicate their gatekeeping function in this way.

NACDL thus enthusiastically supports the Committee's proposed clarification for many of the same reasons described by other commenters, including the International Association of Defense Counsel and the Federation of Defense & Corporate Counsel (both referring to the defense of civil cases, not criminal), who focus on the existing confusion among the lower federal courts as to the proper standard for admitting expert testimony. Beyond that, however, the need to exclude unreliable or dubious evidence is particularly acute in the criminal context. Experts with few or no credentials or in spurious fields of "expertise," along with numerous forms of once-accepted forensic evidence that had never been subjected to verification by the scientific method, have led to hundreds, if not thousands, of wrongful convictions – and have the potential to do so in the future. As the Reporter comments in the proposed Note on this amendment: "Judicial gate-keeping is essential because just as jurors may be unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also be unable to assess the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support." Both, as Rule 702 has long said, are matters for the court as an initial matter.

We appreciate the Committee's efforts, since 2017, to grapple with the challenges to forensic evidence raised in a September 2016 report by the President's Council of Advisors on Science and Technology. While NACDL understands the Committee's decisions not to include "a freestanding rule on forensic expert testimony" and to eschew "detailed requirements for forensic evidence," it is our hope that it will nonetheless continue to consider and implement amendments to Rule 702 designed to combat unreliable experts and analyses. As new fields of so-called "expertise"—such as "gang structure" or "drug slang"—continue to be deployed in criminal cases across the country, Rule 702 remains a critical bulwark protecting criminal defendants' rights and must be updated to respond to new developments. This is especially so because the Federal Rules remain a model for State rules of evidence across the country. This year's proposed amendment is a strong step in the right direction.

NACDL thanks the Committee for its excellent and valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
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