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Judicial Conference Advisory Committee on the
Federal Rules of Evidence
Rules Committee Support Office
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Members of the Advisory Committee on the Federal Rules of Evidence,

I'd like to start by congratulating the Committee on its work. The restyling will make it easier for students to learn the Federal Rules of Evidence. I wish the rules had been written that way in the first place.

In particular, I' like to compliment the Committee for taking the misleading word "admission" out of Rule 801(d)(2) and for changing Rule 609(a) to present its categories more clearly. I was also pleased to see the proposal at your November meeting to change Rule 405(a) so as to specify that its second sentence of the rule refers to the cross-examination of a character witness. Those changes will clarify language that has been problematic for students.

I'm amazed at how successful the Committee has been in avoiding substantive changes. The restyled rules obviously have been carefully vetted.

Two of the comments that I had intended to make were mooted by action at your November meeting. However, I still have comments about three rules. I think that restyled Rule 104(a) arguably makes a substantive change. Restyled Rules 103(c) and 401 do not make substantive changes, but I think that they shorten the existing rules in ways that make them less clear.

RULE 103(c)

Current rule 103(c) provides that:

"In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."

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The restyled version takes out the examples that follow the words "such as." I suggest that the examples be reinstated. Examples almost always help clarify a concept, and no one is likely to think that the list of examples is exhaustive.

RULE 104(b)

In the November 2009 meeting, the following version of Rule 104(b) was proposed:

"When the relevancy of evidence depends on whether a fact exists, the proponent must provide the court with evidence sufficient to support a finding that the fact does exist. The proponent's showing may be made at the time the evidence is offered or later in the trial."

In terms of clarity, this is quite an improvement over the current rule, which has dense language about "fulfillment of a condition of fact." Moreover, the Committee's action at the November 2009 meeting improves restyled Rule 104(a) and lessens the danger of unintended substantive change. However, as Professor Fred Moss has suggested on the evid-fac-l listserve, the November 2009 version does not specifically provide the judge with discretion over when the showing must be made. (The "may" in the final sentence seems to give the proponent an option without specifically providing that the judge can control the timing.) I suggest that the rule be revised to read as follows:

"When the relevancy of evidence depends on whether a fact exists, the proponent must provide the court with evidence sufficient to support a finding that the fact does exist. In the discretion of the judge, the proponent's showing may be made at the time the evidence is offered or later in the trial."

Also, I suggest that the Advisory Committee Note state that if a timely showing is made that the foundation fact is true, then the judge must admit the evidence unless it is excluded by a rule other than Rule 104(b).

RULE 401

The current rule provides:

"Rule 401. Definition of 'Relevant Evidence'
"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The proposed restyling would bring a shorter rule:

"Rule 401. Test for Relevant Evidence
"Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action."

I disagree with this change. I like the current rule's final words, "than it would be without the evidence." Those words encourage a comparison between the state of the proof with and without the proffered evidence. The restyled rule means the same thing, but making a sentence as short as logic permits does not always make the sentence more clear. The old version helps students remember that the evidence does not need to make the fact more probable than not, but only more probable than it would be without the evidence. In class, I find myself saying things like "it only has to be more probable than it would be without the evidence" or "it only has to move the needle a little bit."

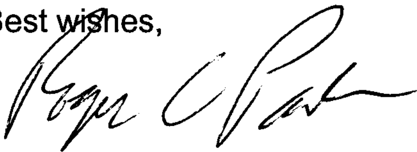
Professor Michael Avery of Suffolk was the first to make this point on the faculty evidence list. Several evidence professors responded "amen" or made comments agreeing with him.

I suggest that the body of the restyled rule be changed to read as follows:

"Evidence is relevant if it has any tendency to make a fact that is of consequence in determining the action more probable or less probable than it would be without the evidence."

Thank you for the opportunity to comment.

Best wishes,



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