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09-EV-014

VIA FIRST CLASS MAIL

March 3, 2010

To: Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure

Re: The Proposed Restyling of the Federal Rules of Evidence

The undersigned are Council members and other leaders of the American Bar Association's Section of Litigation.[1] The ABA's Litigation Section is comprised of over 65,000 members nationwide. We are the largest specialty section of the American Bar Association, itself the largest bar organization in the country. We are dedicated to helping attorneys be better advocates for their clients. One of our missions is to assist in the improvement of the administration of justice.

We have reviewed the proposed restyling of the Federal Rules of Evidence and appreciate the opportunity to provide comments during the ongoing public comment period. We commend the Advisory Committee on their excellent and careful work. The overwhelming majority of the proposed changes will lead to clearer rules that will be of great benefit to the practicing bar and the public. We respectfully submit the following comments to the proposed restyling in an effort to improve the rules even further and to highlight any suggested stylistic changes that may have unintended substantive import.

Respectfully submitted,

Lorna G. Schofield
Ronald L. Marmer
Jeffrey J. Greenbaum

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[1] Ms. Schofield and the other persons listed in the column following her name are officers and members of the Council of the Section of Litigation of the American Bar Association. Ms. Best serves as the Section's liaison to the Advisory Committee on Federal Evidence Rules and Mr. Wolfsohn serves as Co-Chair of the Section's Evidence Committee. We are submitting our comments in our individual capacities: they have not been approved by the ABA nor do they reflect ABA policy.

Lawrence J. Fox
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Rule 101

With respect to the phrase "electronically stored information," the reference is apparently to the use of that phrase in the Federal Rules of Civil Procedure. If that is indeed the case, perhaps that should be made explicit.

Rule 102

There are two "ends" in the latter part of this sentence: that of ascertaining the truth and that of securing a just determination. Accordingly, we suggest that the plural—"ends"—be used.

Rule 104

We generally agree with the proposed revisions, but suggest, as does the American College of Trial Lawyers ("ACTL"), that Rule 104(b) on conditional relevancy could be further clarified. Unless the committee considers the "existence of fact" and whether a "condition of fact is fulfilled" to be conceptually different, the ACTL proposal adds clarity, although we would propose a slight modification: "When the relevancy of evidence depends on whether one or more facts exist, the court may admit the evidence upon, or subject to, the introduction of ~~proof~~ evidence sufficient to support a finding that those facts or that fact exist". *Garner* recognizes a distinction, relevant here, between "evidence" and "proof."

Rule 201

With regard to section (a), we suggest that the word "of" be placed before "legislative," as follows: "This rule governs notice of an adjudicative fact only, not of a legislative fact."

Rule 402

While the bullet points make the rule clearer from a visual perspective, we propose that use of numbers or letters would be preferable. Use of numbers or letters facilitates citation, while still fulfilling the goal of visual clarity intended with use of the bullet points.

Rule 404

In (a)(1), the word "character" is retained as modifying "trait." Accordingly, to avoid questions and arguments over whether the omission of the word "character" in the second part of section (a)(1) is significant in a substantive sense, we propose that it be added as follows: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or *character* trait. Likewise, we propose adding the word "character" in section (a)(2) as modifying "trait": "a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged crime victim's pertinent *character* trait, and if the evidence is admitted, the prosecutor may: (i) offer evidence to rebut it; and (ii) offer evidence of the defendant's same *character* trait."

Rule 406

We are concerned that the replacement of the strong language "is relevant" with "may be admitted" could result in an unintended substantive effect, even though we understand the reason for the change. The ACTL has recommended that the last sentence of this rule be deleted as superfluous, since corroboration or eyewitness testimony goes to the weight, not admissibility, of the evidence. We think, however, that if the committee retains the change from "is relevant" to "may be admitted," there is a need to retain the last sentence as well to underscore the relevance of this type of evidence.

Rule 407

While the bullet points make the rule clearer from a visual perspective, the addition of numbers or letters might be helpful for facilitating citation and case law, while still achieving the visual clarity provided by the bullet points.

We are seriously concerned that the use of the phrase "may admit" to replace "[t]his rule does not require" could very well have an effect on the decisional calculus. The new phrasing seems affirmatively to encourage the court to admit the evidence, whereas the existing phrasing merely says that Rule 407 does not affect admissibility when the evidence is offered for another purpose. We believe that this type of amendment could occasion litigation regarding the rule's substantive meaning, thereby potentially resulting in a substantive change.

We agree with the ACTL's recommendation that the word "subsequent" be added before "measures" in the first sentence. Although such an addition would technically be redundant in light of the word "earlier" that appears later in the sentence and therefore arguably violate one of the style guidelines, the use of "subsequent" meshes nicely with the title of the rule and makes the meaning clear at the very outset of the sentence.

Rule 408

The existing version of Rule 408(a)(1) excludes certain statements made "in compromising or *attempting* to compromise the claim" whereas the proposed restyled Rule omits the word "attempting" and instead refers to such statements made "in order to compromise the claim." We surmise that this was done because subsection (2) should be construed as covering all conduct or statements that are made in the compromise negotiations, which would include "attempts" to compromise. We are nonetheless concerned that lawyers may argue that 408(a)(1)'s prohibition extends only to statements made in the course of settlement discussions that have in fact succeeded and resulted in an agreed-upon settlement. This could undermine the purpose of the Rule, and be considered arguably substantive.

Rule 411

We are concerned that the substitution of the words "have liability insurance" for "insured against liability" could result in an unintended substantive change. One tends to consider someone who has liability insurance as someone who has a liability insurance policy. By con-

trast, the phrase "insured against liability" has a broader connotation, including, for example, indemnity agreements that are not often thought of as "liability insurance." Accordingly, we recommend retention of the original phrasing.

Rule 501

While the bullet points make the rule clearer from a visual perspective, we suggest that the use of numbers or letters might make specific citation easier while still achieving the visual clarity provided by the bullet points.

In the third bullet point, the use of the word "other" seems misplaced. Neither the United States Constitution nor federal statutes are rules prescribed by the Supreme Court.

We would recommend the use of commas rather than semicolons immediately preceding the first two bullet points. See, e.g., *Words Into Type* at 182: "The semicolon indicates a more definite break in thought or construction than a comma would mark, and calls for a longer pause in reading. It is used wherever a comma would not be sufficiently distinctive." We do not think a "longer pause" is called for here, so commas should suffice.

Rule 604

We think that the proposed revision could result in a substantive change. The existing Rule 604 provides that a translator is subject to the rules relating to the qualification of an expert, whereas the proposed restyled rule simply requires that a translator be qualified without cross-referencing the rules and case law related to qualification of an expert. Arguably, this change could lessen the requirements for qualifying an interpreter.

Rule 608

We agree with the comment of the ACTL that the phrase "having a character for truthfulness or untruthfulness" is somewhat awkward and confusing. One does not usually speak of "a" character in this context. The ACTL's proposed language is an improvement: "A witness's credibility may be attacked or supported by evidence in the form of an opinion about—or a reputation for—truthfulness or untruthfulness."

We also agree with the comment of the ACTL that the use of the word "accused" is so important in existing section (b) that it should be retained in new proposed section (c) lest its absence be interpreted as having some substantive import.

Rule 609

We propose that the meaning might be somewhat clearer if, instead of using the phrase "This subdivision (b) applies if more than 10 years have passed . . ," the subsection began as follows: "When more than 10 years have passed . . ." The period after "later" would then be replaced with a comma.

Rule 611

We agree with the comment of the ACTL that use of the words "in the exercise of discretion" in the existing rule provides meaning that is lacking in the proposed revision. We also suggest that the semicolons be replaced with commas.

Rule 612

The ACTL suggests that subdivision (b) should be broken down into two subdivisions: with subdivision (b) dealing exclusively with "Adverse Party's Options," and a new subdivision (c) dealing with "Deleting Unrelated Matter." We agree.

The ACTL also suggests that the exception pertaining to 18 U.S.C. § 3500 is out of place, since it has little to do with an Adverse Party's Options, and nothing to do with Deleting Unrelated Matter. Accordingly, the ACTL suggests that the reference to section 3500 appear in subdivision (a), regarding "General Application." We agree.

Professor Kimble and the ACTL propose that the words "unrelated matter" in lines 15-16 not be used, and that the existing "matter unrelated to the testimony" be retained, or that the sentence read: "If the producing party claims that the writing includes matter unrelated to the testimony, the court must . . . ." We agree.

Mr. Meyers and the ACTL question why the reference to "justice" is deleted in line 21 but retained in line 24. We would recommend either eliminating "justice" from both lines 24 and 10, or leaving it in line 21.

Rule 613

Everyone in the courtroom still uses the phrase "cross examination." No one calls it "cross questioning." For sure, we are talking about the same thing when using either word. But the word "examining," like "examination," is prevalent and accepted in the courtroom. We therefore do not see any benefit in substituting "examining" with "questioning."

Rule 701

We disagree with the deletion of the word "inference." The word "opinion" means a belief or conclusion that is not necessarily based on substantiated proof or evidence. On the other hand, an inference is the result of reasoning from factual knowledge or evidence. An inference may not rise to the level of a belief or conclusion. The words are therefore not synonymous. Accordingly, the deletion of the word "inference" could have a substantive effect on the interpretation of the rule.

Rule 703

We disagree with the deletion of the word "inference." The word "opinion" means a belief or conclusion that is not necessarily based on substantiated proof or evidence. On the other hand, an inference is the result of reasoning from factual knowledge or evidence. An inference may not rise to the level of a belief or conclusion. The words are therefore not synonymous. Accordingly, the deletion of the word "inference" could have a substantive effect on the interpretation of the rule.

Rule 704

We disagree with the deletion of the word "inference." The word "opinion" means a belief or conclusion that is not necessarily based on substantiated proof or evidence. On the other hand, an inference is the result of reasoning from factual knowledge or evidence. An inference may not rise to the level of a belief or conclusion. The words are therefore not synonymous. Accordingly, the deletion of the word "inference" could have a substantive effect on the interpretation of the rule.

Rule 705

We disagree with the deletion of the word "inference." The word "opinion" means a belief or conclusion that is not necessarily based on substantiated proof or evidence. On the other hand, an inference is the result of reasoning from factual knowledge or evidence. An inference may not rise to the level of a belief or conclusion. The words are therefore not synonymous. Accordingly, the deletion of the word "inference" could have a substantive effect on the interpretation of the rule.

Rule 801

We believe the word "manifested" in Rule 801(d)(2)(B) should be retained instead of the proposed replacement "appeared." The phrase "a statement of which the party has manifested an adoption or believe in its truth," while admittedly somewhat awkward, does convey a much more active role on the part of the "party" than the word "appeared," which focuses entirely on the observer rather than the "party." Accordingly, the use of the word "appeared" instead of "has manifested an adoption . . ." could result in a substantive change.