

FILED

January 25, 2016

**OFFICE OF
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8047

**ORDER REGARDING PROPOSED AMENDMENTS TO THE
MINNESOTA RULES OF EVIDENCE**

O R D E R

The Advisory Committee for the Rules of Evidence has recommended amendments to the Minnesota Rules of Evidence, in Articles 6, 7, and 8 of those rules. The Committee's report with the proposed amendments to the Rules of Evidence is attached to this order. The court will consider the proposed amendments after soliciting and reviewing any written comments regarding those amendments.

IT IS HEREBY ORDERED that any individual wishing to provide comments in support of or opposition to the proposed amendments shall file one copy of those comments with AnnMarie O'Neill, Clerk of the Appellate Courts. Written comments shall be electronically submitted for filing in Administrative Case Number ADM10-8047 using the appellate courts' e-filing application, E-MACS, or may be filed in person at 25 Rev. Dr. Martin Luther King Jr. Blvd., Suite 305, Saint Paul, Minnesota 55155. The written comments shall be filed so as to be received no later than March 25, 2016.

Dated: January 25, 2016

BY THE COURT:



Lorie S. Gildea
Chief Justice

FILED

December 22, 2015

**REPORT AND PROPOSED AMENDMENTS TO THE
MINNESOTA RULES OF EVIDENCE**

**MINNESOTA SUPREME COURT
RULES OF EVIDENCE ADVISORY COMMITTEE**

ADM10-8047

December 22, 2015

Professor Ted Sampsell-Jones, Chair

Lisa Agrimonti	Melissa Haley
Hon. Jana Austad	Hon. Fred Karasov
Benjamin Butler	Peter Knapp
Phillip Cole	Hon. Kristin Larson
Katie Conners	Brenda Miller
Hon. Francis Connolly	Anne Robertson
Hon. Elizabeth Cutter	Marc Sebor
Theodora Gaitas	Peter N. Thompson, Reporter

Hon. David Lillehaug
Supreme Court Liaison

Karen Kampa Jaszewski
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I. INTRODUCTION

As directed by the Supreme Court in its February 4, 2015, Order, the Committee met beginning in June 2015 to discuss whether amendments to the Rules of Evidence are needed. The Committee, led by the work of subcommittees, primarily discussed whether amendments were needed to Article 6, Article 7, or Article 8 of the Rules of Evidence. As a result of the subcommittee and full Committee discussions, the Committee recommends amendments in each of those Articles. In addition, the Committee discussed other issues that the Committee agrees warrant further study and discussion.

II. PROPOSED AMENDMENTS

A. Article 6

The Committee proposes the addition of language to Rule 606(b) permitting a juror to testify as to whether a juror gave false answers on voir dire which concealed prejudice or bias toward one of the parties. Although in recent Minnesota appellate cases the alleged juror misconduct did not result in a reversal, if a prejudice or bias was concealed that in effect denied a party a fair trial, reversal could be warranted. United States Supreme Court case law holds that Fed. R. Evid. 606(b) prohibits such an attack on the verdict and that jurors cannot testify about a lie on voir dire if it comes out during deliberation. The Committee recommends that language should be added in Rule 606(b) to codify the Minnesota interpretation, which is that the rule does not prohibit such an attack on the verdict. The Committee also proposes the addition of language consistent with Fed. R. Evid. 606(b)(2)(C) allowing juror testimony regarding a mistake in entering the verdict on the verdict form.

The Committee also considered whether an amendment to Rule 609(a) was needed to address impeachment through an unspecified felony conviction. Ultimately the Committee determined that a rule amendment was not necessary and that a comment was sufficient to help clarify the law for judges and new lawyers.

B. Article 7

The Committee proposes an amendment to Rule 701 to clarify that when witnesses testify based on specialized knowledge they must satisfy the foundational requirements for expert testimony under Rule 702 and possibly the disclosure requirements in the rules of procedure. The Committee believes that the proposed Rule 701 amendment is helpful and fair, and will provide judges with notice if a witness begins providing expert testimony.

The Committee also discussed whether amendments to Rule 702 are needed. The Committee will continue to study the issue.

C. Article 8

The Committee proposes an amendment to Rule 804(b)(3) to conform to the federal rule and make the trustworthiness requirement apply equally to prosecutors and criminal defendants. Under the amendment, statements exposing the declarant to criminal liability are subject to the same admissibility standard without regard to whether the statement is offered to exculpate or inculpate the accused. The Committee agrees this is a fairness issue and that the burden should be the same for the defendant and the prosecutor.

The Committee also proposes an amendment to Rule 804(b) codifying the forfeiture by wrongdoing doctrine. The Committee believes that in cases of witness tampering, a declarant's statement should be admissible against the party who made the declarant unavailable. Put simply, a party should not be able to create his or her own hearsay problem by making a witness unavailable through threats, violence, bribery, or other wrongful conduct. The Committee also believes that the new exception will conform the hearsay inquiry to the Confrontation Clause inquiry. In recent years, both the United States Supreme Court and the Minnesota Supreme Court have clarified that the Confrontation Clause is subject to a forfeiture exception.

The proposed forfeiture exception is similar to the exception contained in Federal Rule 804(b)(6), but the exception does not track the federal rule verbatim. The federal exception applies when a party either causes the declarant's unavailability "or acquiesced in wrongfully causing" the declarant's unavailability. The Committee was concerned that the "acquiescence" clause in the federal rule might result in the exception being applied too broadly, so the Committee recommends an exception without that language. The Committee recommends codifying this exception as Rule 804(b)(6) to be consistent with the corresponding federal rule; the Committee understands this will leave (5) unused and recommends including a notation that (5) was intentionally left blank.

Unlike the other amendments proposed herein, the proposed forfeiture exception was not unanimously approved by the Committee. A minority of members believe that the proposed exception is unwise, because it will allow the admission of unreliable hearsay, and also unnecessary, because Minnesota courts already apply other hearsay exceptions liberally. Ultimately, however, by a vote of 10-4, the Committee decided to recommend the forfeiture exception.

III. OTHER ISSUES

In addition to the Committee's ongoing discussion of Rule 702 as noted above, the Committee also discussed changes in the federal rules simplifying the admissibility of business records under Rule 803(6) and Fed. R. Evid. 902(11). The Committee decided

to take no action at this time. The Committee will continue to monitor the issue and may consider rules amendments in the future depending on the outcome of proposed federal rules amendments.

The Committee also discussed issues relating to the reliability of eyewitness identification. The Committee is forming a subcommittee to continue to study the issue, to reach out to other interested groups, and to consider possible evidence rules amendments. Finally, the Committee discussed and plans to form subcommittees to further study issues relating to privilege law and *Spreigl* evidence. The Committee will report to the Court at such time as further rules amendments relating to these or other issues are recommended for consideration.

Respectfully Submitted,

RULES OF EVIDENCE ADVISORY COMMITTEE

PROPOSED AMENDMENTS TO THE RULES OF EVIDENCE

Note: Throughout these proposals, deletions are indicated by a line drawn through the words, and additions are underlined. A double underline indicates that the proposed text, if approved by the Court, should also be underlined in the final publication.

1. Amend Rule 606 as follows:

Rule 606. Competency of Juror as Witness

(a) **At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called to so testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict, or as to whether a juror gave false answers on voir dire which concealed prejudice or bias toward one of the parties, or in order to correct an error made in entering the verdict on the verdict form. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

2. **Amend the Committee Comment to Rule 606 as follows:**

Committee Comment--1989

The rule is based on the same rationale that gives rise to rule 605. However, when a juror is called as a witness an objection is required by the party opposing this testimony. Opportunity should be provided for an objection out of the presence of the jury.

Rule 606(b) is a reasoned compromise between the view that jury verdicts should be totally immunized from review in order to encourage freedom of

deliberation, stability, and finality of judgments; and the necessity for having some check on the jury's conduct. Under the rule, the juror's thought processes and mental operations are protected from later scrutiny. Only evidence of the use of extraneous prejudicial information or other outside influence that is improperly brought to bear upon a juror is admissible. In criminal cases such an intrusion on the jury's processes on behalf of the accused might be mandated by the Sixth Amendment. See Parker v. Gladden, 385 U.S. 363, 364, 87 S.Ct. 468, 470, 17 L.Ed.2d 420, 422 (1966).

The application of the rule may be simple in many cases, such as unauthorized views, experiments, investigations, etc., but in other cases the rule merely sets out guidelines for the court to apply in a case-by-case analysis. Compare Olberg v. Minneapolis Gas Co., 291 Minn. 334, 340, 191 N.W.2d 418, 422 (1971) in which the Court stated that evidence of a juror's general "bias, motives, or beliefs should not be considered" with State v. Hayden Miller Co., 263 Minn. 29, 35, 116 N.W.2d 535, 539 (1962) in which the Court holds that bias resulting from specialized or personal knowledge of the dispute and withheld on voir dire is subject to inquiry.

The rule makes the juror's statements by way of affidavit or testimony incompetent. The rule does not purport to set out standards for when a new trial should be granted on the grounds of juror misconduct. Nor does the rule set the proper procedure for procuring admissible information from jurors. In Minnesota it is generally considered improper to question jurors after a trial for the purpose of obtaining evidence for a motion for a new trial. If possible misconduct on behalf of a juror is suspected, it should be reported to the Court, and if necessary the jurors will be interrogated on the record and under oath in court. Schwartz v. Minneapolis Gas Co., 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960); Olberg v. Minneapolis Gas Co., 291 Minn. 334, 343, 191 N.W.2d 418, 424 (1971); ~~Minn.R.Crim.P. 26.03, subd. 19(6)~~ Minn.R.Crim.P. 26.03, subd. 20(6). See also rule 3.5 of the Rules of Professional Conduct in regard to communications with jurors. The amended rule allows jurors to testify about overt threats of violence or violent acts brought to bear on jurors by anyone, including by other jurors. Threats of violence and use of violence is clearly outside of the scope of the acceptable decisionmaking process of a jury. The pressures and dynamics of juror deliberations will frequently be stressful and jurors will, of course, become agitated from time to time. The trial court must distinguish between testimony about "psychological" intimidation, coercion, and persuasion, which would be inadmissible, as opposed to express acts or threats of violence. See State v. Scheerle, 285 N.W.2d 686 (Minn.1979); State v. Hoskins, 292 Minn. 111, 193 N.W.2d 802 (1972).

Committee Comment—2015

Consistent with the federal rule, Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. In addition, in accordance with the common law, the rule has been amended to provide that jurors may testify or provide affidavits “when there is some indication that a juror gave false answers on voir dire which concealed prejudice or bias toward one of the parties and thereby deprived that party of a fair trial.” State v. Stofflet, 281 N.W.2d 494, 498 (Minn. 1979) (quoting Note, 4 Wm. Mitchell L. Rev. 417, 432).

3. Add a 2015 Committee Comment to Rule 609 as follows:

Committee Comment – 2015

Rule 609(a) does not prohibit impeachment through an unspecified felony conviction if the impeaching party makes a threshold showing that the underlying conviction falls into one of the two categories of admissible convictions under rule 609(a). However, a party need not always impeach a witness with an unspecified felony conviction. Instead, “the decision about what details, if any, to disclose about the conviction at the time of impeachment is a decision that remains within the sound discretion of the district court,” considering whether the probative value of admitting the evidence outweighs its prejudicial effect. “If a court finds that the prejudicial effect of disclosing the nature of the felony conviction outweighs its probative value, then it may still allow a party to impeach a witness with an unspecified felony conviction if the use of the unspecified conviction satisfies the balancing test of Rule 609(a)(1).” State v. Hill, 801 N.W.2d 646, 651-53 (Minn. 2011) (citations omitted).

4. Amend Rule 701 as follows:

Rule 701. Opinion Testimony by Lay Witness

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness; ~~and~~ (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

5. Add a 2015 Committee Comment to Rule 701 as follows:

Committee Comment -- 2015

Rule 701(c) comes from the 2000 amendment to the Federal Rules of Evidence. Parties should not avoid the foundational requirements of Rule 702 and the pre-trial disclosure requirements of Minn. R. Civ. P. 26.01(b) and Minn. R. Crim. P. 9.01, 9.02 by introducing testimony based on scientific, technical, or specialized knowledge under this rule. The rule addresses the nature of the testimony, and is not an attempt to characterize a particular witness. As stated in the Federal Advisory Committee Note:

The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g., United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices).

Non-expert inference or opinion testimony tends to fit into two separate categories. First, as a matter of necessity, witnesses may testify in the form of a generalized opinion about common matters they observed such as speed, size, distance, how they felt or how others appeared, intoxication, mental ability and numerous other subjects, if helpful.

The second category involves testimony from a skilled layman. The Federal Advisory Committee Note describes this as testimony, not based on specialized knowledge, but based on “particularized knowledge” developed in day- to-day affairs, including testimony from an owner about the value of a business, house, or chattel. See, e.g., Vreeman v. Davis, 348 N.W.2d 756, 757-58 (Minn. 1984) (allowing owner to testify about the value of a mobile home); Ptacek v. Earthsoils, Inc., 844 N.W.2d 535, 539-40 (Minn. Ct. App. 2014) (allowing experienced farmers to testify about the cause of their crop failure).

The amendment is not a change from past practice but is designed to assist lawyers and judges in the line-drawing process distinguishing between lay and expert testimony. In deciding whether the testimony fits under Rule 701 or 702, the trial judge should initially consider the complexity of the subject area, although some subject areas, such as handwriting or intoxication, are susceptible to both lay and expert testimony. The inquiry should center on the extent to which the testimony involves “inferences or thought processes not common to every day

life.” See *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1991) (“the distinction between lay and expert witness testimony is that lay testimony ‘results from a process of reasoning familiar in everyday life,’ while expert testimony ‘results from a process of reasoning which can be mastered only by specialists in the field’”).

Finally, to qualify under Rule 701 both the witness’ understanding about the historical facts as well as the underlying foundation for making the inference or opinion must derive from the witness’ personal experience and personal knowledge. See *Pierson v. Edstrom*, 160 N.W.2d 563, 566 (1968) (precluding police officer, who was not an eyewitness to the accident, from testifying about the speed of the vehicle); *Marsh v. Henriksen*, 7 N.W.2d 387, 389 (Minn. 1942) (excluding passenger’s testimony about the speed of a car when the witness lacked personal knowledge and experience to judge speed at the time of the accident).

6. Amend Rule 804(b) as follows:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former testimony.* In a civil proceeding testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered or a party with substantially the same interest or motive with respect to the outcome of the litigation, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. In a criminal proceeding involving a retrial of the same defendant for the same or an included offense, testimony given as a witness at the prior trial or in a deposition taken in the course thereof.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of personal or family history.* (A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family

history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Intentionally left blank]

(6) Forfeiture by wrongdoing. A statement offered against a party that wrongfully caused the declarant's unavailability as a witness, and did so intending that result.

7. **Add a 2015 Committee Comment to Rule 804 as follows:**

Committee Comment -- 2015

Consistent with the 2010 amendment to the federal rule, Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. As the federal advisory committee explained: "A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception."

Rule 804(b)(b) has been added to codify the forfeiture by wrongdoing exception. Rule 804(b)(6) is consistent with the Minnesota Supreme Court's decisions addressing waiver of the sixth amendment right to confrontation. See *State v. Cox*, 779 N.W.2d 844, 851 (Minn. 2010) (stating that forfeiture by wrongdoing requires the state to prove that the declarant-witness is unavailable, that the defendant engaged in wrongful conduct, that the wrongful conduct procured the unavailability of the witness, and that the defendant intended to procure the unavailability of the witness); *State v. Her*, 781 N.W.2d 869 (Minn. 2010).