

NOTES OF ADVISORY COMMITTEE ON RULES—1988
AMENDMENT

The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2011 AMENDMENT

The language of Rule 613 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 614. Court's Calling or Examining a Witness

(a) **CALLING.** The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) **EXAMINING.** The court may examine a witness regardless of who calls the witness.

(c) **OBJECTIONS.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Subdivision (a). While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. McCormick §8, p. 14; Maguire, Weinstein, et al., Cases on Evidence 303-304 (5th ed. 1965); 9 Wigmore §2484. One reason for the practice, the old rule against impeaching one's own witness, no longer exists by virtue of Rule 607, *supra*. Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.

Subdivision (b). The authority of the judge to question witnesses is also well established. McCormick §8, pp. 12-13; Maguire, Weinstein, et al., Cases on Evidence 737-739 (5th ed. 1965); 3 Wigmore §784. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

Subdivision (c). The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures. Compare the "automatic" objection feature of Rule 605 when the judge is called as a witness.

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Rule 615. Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;

- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

- (d) a person authorized by statute to be present.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Pub. L. 100-690, title VII, §7075(a), Nov. 18, 1988, 102 Stat. 4405; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore §1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *United States v. Infanzon*, 235 F.2d 318 (2d Cir. 1956); *Portomene v. United States*, 221 F.2d 582 (5th Cir. 1955); *Powell v. United States*, 208 F.2d 618 (6th Cir. 1953); *Jones v. United States*, 252 F.Supp. 781 (W.D.Okl. 1966). Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See California Evidence Code §777. (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore §1841, n. 4.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE
REPORT NO. 93-1277

Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in—he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our under-

standing that this was the intention of the House committee. It is certainly this committee's construction of the rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1988
AMENDMENT

The amendment is technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—1998 AMENDMENT

The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, 42 U.S.C. §10606, which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 (18 U.S.C. §3510).

COMMITTEE NOTES ON RULES—2011 AMENDMENT

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AMENDMENT BY PUBLIC LAW

1988—Pub. L. 100-690, which directed amendment of rule by inserting "a" before "party which is not a natural person.", could not be executed because the words "party which is not a natural person." did not appear. However, the word "a" was inserted by the intervening amendment by the Court by order dated Apr. 25, 1988, eff. Nov. 1, 1988.

ARTICLE VII. OPINIONS AND EXPERT
TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of firsthand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick §11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes

of pleading under the Field Code, extends into evidence also. 7 Wigmore §1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, *Expert Testimony*, 5 Vand.L.Rev. 414, 415-417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform Rule 56(1). Similar provisions are California Evidence Code §800; Kansas Code of Civil Procedure §60-456(a); New Jersey Evidence Rule 56(1).

NOTES OF ADVISORY COMMITTEE ON RULES—1987
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The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2000 AMENDMENT

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. *See Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). *See also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

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). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).