ADVISORY COMMITTEE
ON
EVIDENCE RULES

October 28, 2022

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

October 28, 2022

Sandra Day O'Connor College of Law

I. Panel Discussions on Illustrative Aids and Juror Questions of Witnesses.

The Committee has convened two panels to discuss issues pertinent to two agenda items. Panel One will discuss the practice of allowing jurors to pose questions of trial witnesses. Panel Two will discuss the issues raised by the proposed amendment to Rule 611 that would govern the use of illustrative aids.

The Committee is very grateful to the Federal and State trial judges, and to the many experienced practitioners, who have come today to provide their insights on these two important matters.

Each panel is scheduled for 90 minutes in length. Committee members are invited to engage in a dialog with the panel. A transcript of the proceedings will be published in the Fordham Law Review.

The program for the panel discussions, including bios for the participants, is set forth behind Tab I in the Agenda Book.

II. Committee Meeting (Afternoon)--- Opening Business

Opening business includes:

- Approval of the minutes of the Spring 2022 meeting.
- Report on the June 2022 meeting of the Standing Committee.
- Welcome to new members, Justice Mark Massa and James P. Cooney, III

III. Discussion of Morning Panels

The Committee will have an open discussion of the takeaways from the morning panels. This will include a discussion of proposed Rule 611(d) on illustrative aids (which is currently out for public comment), and an amendment providing safeguards if a court decides to allow jurors to pose questions of witnesses (which was sent back to the Committee for further consideration). A memorandum on each of these proposals is set forth behind Tab III of this agenda book.

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IV. Proposed Amendment to Rule 613(b)

At its last meeting the Committee unanimously approved a proposed amendment to Rule 613(b), that would generally require a party impeaching with extrinsic evidence of a prior inconsistent statement to provide the witness an opportunity to explain or deny the statement before the extrinsic evidence may be admitted. The proposal is currently out for public comment. A short memorandum prepared by Professor Richter on the proposed amendment is behind Tab IV of the agenda book.

V. Proposed Amendment to Rule 801(d)(2)

At its last meeting the Committee unanimously approved an amendment to Rule 801(d)(2) to treat the situation in which a party has succeeded to a claim or defense and the predecessor has made a hearsay statement that would have been admissible against the predecessor under Rule 801(d)(2). The amendment would provide that such a statement is admissible against the party who succeeds to the claim of the declarant or declarant's principal. It is currently out for public comment. The Reporter's brief memo on the proposed amendment is behind Tab V.

VI. Proposed Amendment to Rule 804(b)(3)

At its last meeting the Committee unanimously approved a proposed amendment to Rule 804(b)(3), the hearsay exception for declarations against interest. The amendment would clarify that corroborating evidence must be considered in determining whether a declaration against penal interest is supported by "corroborating circumstances" that clearly indicate the trustworthiness of the statement. The proposed amendment is currently out for public comment. A short memorandum prepared by Professor Richter, discussing the amendment, is behind Tab VI.

VII. Proposed Amendment to Rule 1006

At its last meeting, the Committee unanimously approved a proposed amendment to Rule 1006, to provide uniform treatment of summaries of voluminous admissible evidence. The amendment is currently out for public comment. It would clarify, among other things, that a summary under Rule 1006 is evidence, as distinguished from an illustrative aid, which is not. A brief memo on the proposed amendment, prepared by Professor Richter, is behind Tab VII.

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(Standing Committee)

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Secretary to the Standing Committee

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Administrative Office of the U.S. Courts
Office of the General Counsel – Rules Committee Staff
Washington, DC

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ADVISORY COMMITTEE ON EVIDENCE RULES

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

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Honorable Mark S. Massa Indiana Supreme Court Indianapolis, IN	Honorable Marshall L. Miller* Principal Associate Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
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Honorable Richard J. Sullivan United States Court of Appeals New York, NY	Rene L. Valladares, Esq. Office of the Federal Public Defender Las Vegas, NV

Consultants

Professor Liesa Richter
University of Oklahoma School of Law
Norman, OK

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Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date	End Date
Patrick J. Schiltz	D	Minnesota	Member: 2020 Chair: 2020	---- 2023
James P. Cooney III	ESQ	North Carolina	2022	2025
Shelly Dick	D	Louisiana (Middle)	2017	2023
Mark S. Massa	JUST	Indiana	2022	2025
Marshall L. Miller (ex-officio)	DOJ	Washington, DC	----	Open
Thomas D. Schroeder	D	North Carolina (Middle)	2017	2023
Arun Subramanian	ESQ	New York	2021	2023
Richard J. Sullivan	C	Second Circuit	2021	2023
Rene L. Valladares	FPD	Nevada	2022	2024
Daniel J. Capra Reporter	ACAD	New York	1996	Open

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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Honorable D. Brooks Smith (*Standing*) Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Honorable Gary Feinerman (*Standing*)
Liaisons for the Advisory Committee on Evidence Rules	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. M. Hannah Lauck *(Civil)*

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Senior Research Associate
(Standing)

TAB 1

Judicial Conference Advisory Committee on Evidence Rules

Fall Meeting, 2022

Sandra Day O'Connor College of Law

Schedule

8:30-10:00 a.m. Panel Discussion on Juror Questioning of Witnesses

Participants:

Hon. Susan R. Bolton

Zachary Cain, Esq.

Elizabeth Gonzalez, Esq.

Hon. Stephen Hopkins

William Klain, Esq.

Paul McGoldrick, Esq.

Hon. Douglas L. Rayes

Sharon Sexton, Esq.

Hon. Danielle J. Viola

10:30-Noon Panel Discussion on Illustrative Aids

Participants:

David Cantor, Esq.

Milagros Cisneros, Esq.

Hon. Sally S. Duncan

Hon. Dominic W. Lanza

James Melendres, Esq.

Professor Peter Murray

Michael Perez-Lizano, Esq.

David Rosenbaum, Esq.

Wendi Sorensen, Esq.

Hon. James A. Teilborg

Noon -1 p.m. Lunch

1:00 – 3:00 Committee Meeting (open to the public)

The Advisory Committee is grateful to the Sandra Day O'Connor School of Law for its hospitality and for the use of its beautiful facilities. Special thanks to Dean Zachary Kramer and to Professor Jessica Berch.

Attachments: Participant Bios

Possible amendment to Rule 611 providing safeguards to employ if jurors are allowed to question witnesses.

Proposed amendment, released for public comment, regulating the use of illustrative aids.

Panel Participant Bios

Hon. Susan R. Bolton

(Juror Questions)

Judge Susan R. Bolton is a Senior District Judge for the District of Arizona. She was appointed to the court in 2000. She is a graduate of the University of Iowa College of Law and received her undergraduate degree from the University of Iowa. She was a law clerk for Judge Laurance T. Wren of the Arizona Court of Appeals from 1975 to 1977. She was then in private practice in Phoenix from 1977 to 1989. Judge Bolton served on the Arizona Superior Court for Maricopa County, from 1989 to 2000. Judge Bolton chaired the Ninth Circuit Jury Trial Improvement Committee, which recommended allowing jurors to pose questions to witnesses in civil cases.

Zachary Cain, Esq.

(Juror Questions)

Zachary Cain is an Assistant Federal Public Defender in the District of Arizona. He has represented individuals in state and federal courts for more than twenty years as a public defender, solo practitioner and as a white collar and government investigations attorney at two national law firms. He currently serves as a trial attorney representing individuals prosecuted in the United States District Court. He is a graduate of the Sandra Day O'Connor College of Law at Arizona State University.

David Cantor, Esq.

(Illustrative Aids)

David Cantor is the founding partner of DM Cantor in Phoenix. Since becoming a lawyer in 1989, he has handled many high-profile cases which have been covered by the local and national news media. He is a Certified Criminal Law Specialist since 1999. He is a former Assistant Prosecutor in the City of Phoenix, and a former Trial Instructor at the Phoenix Police Academy. He is a Member of the National College for DUI Defense at Harvard Law School, and a Life Member National Association of Criminal Defense Lawyers.

Milagros Cisneros, Esq.

(Illustrative Aids)

Milagros Cisneros is a Supervisory Assistant Federal Public Defender in the trial unit of the Office of the Federal Public Defender for the District of Arizona. She has been with the office since 2002. Ms. Cisneros is a graduate of Bryn Mawr College and the Sandra Day O'Connor College of Law, where she serves as adjunct faculty in the Trial Advocacy Program. From 2018

through 2020 she was the Federal Defender detailee to the Judiciary Committee of the U.S. House of Representatives and served as counsel to the Subcommittee on Crime, Terrorism and Homeland Security.

Hon. Sally S. Duncan

(Illustrative Aids)

After 18 years of resolving disputes as a Maricopa County Superior Court Judge, Sally Duncan transferred her skills to a platform where she can help litigants reach mutually satisfying conclusions to costly and distracting litigation. Judge Duncan's "been around the block" experience in all areas of civil litigation equips her to find solutions others may not. Beyond her judicial experience on the civil, family, and criminal benches, Judge Duncan was a partner at two international law firms and practiced at one of Phoenix's oldest and most respected firms. She understands every corner of the courtroom with substantial trial experience as a litigator and as the trial judge with dozens of trials. She has also argued before the Ninth Circuit where she learned that listening before you speak is the surest way to finding the best answer. After 18 years as a trial judge on the 4th largest court in the United States, Judge Sally Duncan retired from the Maricopa County Superior Court on August 31, 2022. Known as a "by the rules" judge and with many years of service on the Bar's and Court's rule making committees, Judge Duncan has always had a keen interest in balancing the efficiency that wise rule making can bring to an often over-burdened judicial system against the threat to a sense of due process and fair dealing that that can flow from an overly Procrustean set of rules. Judge Duncan earned her undergraduate degree and J.D. from the University of Arizona.

Elizabeth Gonzales, Esq.

(Juror Questions)

Serious Injury Lawyer Elizabeth "Liz" Gonzalez, Esq., is a Partner at AJ Law in Phoenix. Liz plays a very important role on the firm's litigation team. AT the AJ firm, she has litigated more than a dozen jury trials and twenty bench trials. Prior to joining AJ Law in 2018, Liz was a public defender in Mohave County, where she defended and protected the rights of individuals charged with misdemeanor and serious felony matters. Liz then moved to a private firm where she continued representing those with criminal matters, as well as family or domestic cases and personal injury cases. Liz has a Bachelor's Degree in Communications from California State Polytechnic University, Pomona, California, and a law degree from the Phoenix School of Law where she served on the Law Review and competed on the Moot Court Team.

Hon. Stephen Hopkins

(Juror Questions)

Judge Steve Hopkins is a judge in the Civil Department of the Maricopa County Superior Court. He has served in the Criminal and Family Courts as well. He has been on the bench since 2015. Judge Hopkins received his law degree from the University of Kansas and his undergraduate

degree from Knox College. He began his legal career and Snell & Wilmer, and then moved to his own firm, where he practiced for 20 years before joining the bench. Among other activities, Judge Hopkins served on the State Bar of Arizona, Civil Jury Instructions Committee, the State Bar Rules of Professional Conduct Committee, and the State Bar Criminal Jury Instruction Committee. He is a Member of the National Judicial College Summit on the Use of Science in the Judicial System.

William Klain, Esq.

(Juror Questions)

William G. Klain is a member of Lang & Klain, PC. He focuses his practice on complex corporate and commercial litigation. He is a 2012-2022 Super Lawyers® selectee in business litigation and is listed in Best Lawyers in America® for commercial litigation and Bet-the-Company litigation. In 2018 and 2022, Super Lawyers® ranked Bill as one of the Top 50 Attorneys in Arizona, and he was named one of the Top 100 Lawyers in Arizona by AZ Business Magazine in 2019.

Bill has served on the State Bar of Arizona's Civil Practice and Procedure Committee since 2000 and chaired the Committee from 2011-2014. He is an appointed member of the Arizona Judicial Council's Committee on Superior Court. Previously, Bill served as Co-Chair of the Court's Task Force on the Arizona Rules of Civil Procedure and as a member of the Court's Advisory Committee on the Rules of Evidence, Committee on Civil Justice Reform, Business Court Advisory Committee, and Committee on Civil Rules of Procedure for Limited Jurisdiction Courts.

Through these committees and task forces, Bill has been involved with the restyling of the Arizona Rules of Civil Procedure, the Arizona Rules of Civil Appellate Procedure and the Arizona Rules of Evidence, the drafting of the 2018 Civil Justice Reform Amendments and Justice Court Rules of Civil Procedure, the design of the Maricopa County Superior Court's Commercial Court, and a host of other civil rules projects. He was awarded the Chief Justice's Outstanding Contribution to the Courts Award in 2016, the State Bar's Member of the Year Award in 2013, the Scottsdale Bar Association's Award of Excellence in 2012, and the State Bar President's Award in 2008.

Bill teaches a course on Civil Pretrial Practice as an adjunct professor at Arizona State University's Sandra Day O'Connor College of Law. Bill has also authored a number of law-related articles for various publications. He received his J.D. from the University of Denver and B.A. from the University of Richmond.

Hon. Dominic W. Lanza

(Illustrative Aids)

Judge Lanza was appointed as a District Judge for the District of Arizona in 2018. Judge Lanza earned his undergraduate degree from Dartmouth and his J.D. from Harvard, where he served as editor and transition chair of the Harvard Law Review. After graduating from law

school, Judge Lanza clerked for Judge Pamela Ann Rymer on the Ninth Circuit. He then practiced for five years as an associate in the constitutional and appellate law practice group of Gibson, Dunn & Crutcher. Thereafter he joined the United States Attorney's office and served as Chief and Executive Assistant United States Attorney for the District of Arizona.

Paul McGoldrick, Esq.

(Juror Questions)

Paul McGoldrick is a partner at Shorall McGoldrick Zerlaut, and is co-chair of the firm's litigation practice group. Paul focuses his practice on personal injury and insurance cases. He also has experience as lead counsel in complex business disputes. Paul routinely represents clients in nearly every locale of Arizona, and has represented both plaintiffs and defendants, both in tort cases and in the context of commercial and professional liability suits.

Paul is a Fellow in the American College of Trial Lawyers. He is the former State Chair for the 2019-2021 term. The American Board of Trial Advocates has elected Paul an associate based upon his many jury trials and peer review. He was the Phoenix Chapter President in 2015.

In addition to his litigation practice, Paul is a frequent mediator and arbitrator. Paul is a member of the National Academy of Distinguished Neutrals. Phoenix Magazine recognized Paul as a Top Lawyer in 2022 in the category of Arbitration and Mediation.

Before entering private practice in Phoenix, Paul was a law clerk to the Honorable Frank X. Gordon, Jr., the then Vice Chief Justice of the Supreme Court of Arizona. Since that time, Paul has been appointed a judge pro tempore of the Maricopa County Superior Court (2002-2015). Paul received his law degree from the University of Arizona and his undergraduate degree from Arizona State University.

James Melendres, Esq.

(Illustrative Aids)

James Melendres is a partner and Snell & Wilmer, where he co-chairs the Investigations, Government Enforcement and White Collar Protection practice and Cybersecurity, Data Protection and Privacy practice. Prior to joining Snell & Wilmer, James served as a federal prosecutor and led high-profile and complex matters, including the prosecutions of former Central Intelligence Agency Director David Petraeus and the leader of the Tijuana Cartel. He also served in the leadership offices at the Department of Justice in Washington, D.C., and in his role as counsel to the Assistant Attorney General for National Security, James helped manage the DOJ National Security Division and counseled senior DOJ officials on a wide variety of matters - from high-profile cyber investigations and related litigation to the strategic use of trade sanctions to counter cyber-related national security threats. James is a graduate of Stanford Law School and Dartmouth College.

Professor Peter Murray

(Illustrative Aids)

Peter Murray is currently teaching Evidence at Harvard Law School, where he has been a full-and part-time faculty member since 1993. In 1973 he and retired HLS Professor Richard Field, as Consultants to the Maine Advisory Committee, drafted the Maine Rules of Evidence patterned after the Federal Rules of Evidence then in the process of adoption by Congress. Professor Murray served as Consultant to the Committee until 2017 and over this more than 40-year time span prepared and proposed numerous amendments to the Maine Rules, including Rule 616 addressing the use of illustrative aids (which is the model for proposed Federal Rule 611(d) . Professor Murray the author of Maine Evidence, now in its 7th Edition (1st edition with Field) and a co-author of Green, Nesson and Murray, Problems, Cases and Materials on Evidence (3rd and 4th Editions). In addition to his academic work, Professor Murray has had an active career as a trial lawyer in civil and criminal matters in Portland, Maine. Professor Murray received both his undergraduate and law degrees from Harvard University. He clerked for Judge Edward T. Gignoux in the District of Maine.

Michael Perez-Lizano, Esq.

(Illustrative Aids)

Michael Perez-Lizano is an Assistant United States Attorney at the United States Attorney's Office in Tucson, Arizona. He has been a federal prosecutor for approximately ten years. Currently, as a member of the Organized Crime Drug Enforcement Task Force, he focuses on prosecuting complex drug trafficking and money laundering crimes. Michael also is Senior Litigation Counsel for the Tucson office. In this role, he advises other prosecutors on a variety of issues, including litigation and trial strategy.

Prior to joining the United States Attorney's Office in Tucson, Michael worked as a Special Assistant United States Attorney in San Diego, California and as an Assistant District Attorney in the San Francisco, California District Attorney's Office.

Michael also has experience with civil litigation. After law school, he worked for over five years at the Palo Alto, California office of Simpson Thacher & Bartlett LLP, where he represented the firm's clients in high-stakes commercial litigation and related matters.

To date, Michael has conducted a total of thirteen jury trials as either lead or co-counsel, including ten federal criminal jury trials. His appellate experience includes researching and drafting briefs in criminal matters before the United States Court of Appeals for the Ninth Circuit and two amicus briefs in matters before the United States Supreme Court.

Michael graduated cum laude from New York University School of Law (New York, NY) and summa cum laude (salutatorian) from the Edmund A. Walsh School of Foreign Service at Georgetown University (Washington, DC). While in college, he held an internship at the White House. He also completed coursework at St. Peter's College, Oxford University in Oxford, England. Michael has been a member in good standing of the California State Bar since 2006.

Hon. Douglas L. Rayes

(Juror Questions)

Judge Douglas Rayes was appointed to the District Court for the District of Arizona in 2014. Judge Rayes received his undergraduate and law degrees from Arizona State University. He served in the Army Judge Advocate General's Corps, from 1979 to 1982. From 1982 to 1984, he was an associate at the law firm of McGroder, Pearlstein, Pepler & Tryon. From 1984 to 2000, he was a partner at that law firm, which was named Tryon, Heller & Rayes at the time of his departure. From 2000 to 2014, he served as a Judge of the Maricopa County Superior Court. During his tenure on the bench, he presided over a wide range of cases, including civil, criminal and family law matters.

David Rosenbaum, Esq.

(Illustrative Aids)

David Rosenbaum is a partner at Osborn Maledon in Phoenix. His practice focuses on complex commercial litigation in state and federal courts. He has represented public companies and their officers and directors in numerous securities fraud class actions, and in a wide range of complex commercial litigation matters, including securities and intellectual property litigation, class action claims, and other large commercial disputes.

David has served as President of the Federal Bar Association Phoenix Chapter and as Lawyer Representative to the Ninth Circuit Judicial Conference. He currently serves on the Arizona State Bar Board of Governors and the Board of Directors at the Arizona Foundation for Legal Services and Education. He has been recognized in America's Leading Lawyers for Business by Chambers USA and has been named multiple times as Lawyer of the Year for Phoenix in Best Lawyers® and as a Top 100 Lawyer in Arizona by AZ Business Magazine. David chaired the Arizona Supreme Court Business Court Advisory Committee, which led to the creation of Maricopa County's Commercial Court. He co-chaired the Arizona Supreme Court Task Force on the Arizona Rules of Civil Procedure, which led to the full restyling of Arizona's Rules in 2015.

David received his law degree from Georgetown University, where he served as Associate Editor of the Georgetown Law Review. He received his undergraduate degree from the University of Pennsylvania. After law school he clerked for Judge Murray M. Schwartz in the District of Delaware.

Sharon Sexton, Esq.

(Juror Questions)

Sharon Sexton has been a prosecutor for 33 years. She spent 5 ½ years at the Maricopa County Attorneys Office, primarily working child and adult sex crimes. She has been an AUSA at the U.S. Attorney's Office, in the District of Arizona, for 27 ½ years. She has worked exclusively in the Violent Crimes/Indian Country section, handling all types of major crimes including homicides, sexual assault, child physical abuse, infant homicide, child sexual abuse and domestic

violence. Throughout her career, she has tried nearly 100 cases, including numerous first degree murder cases and multiple child sexual abuse cases. Sharon received her undergraduate degree from the University of Wisconsin Eau Claire and her law degree from Hamline University.

Wendi Sorensen, Esq.

(Illustrative Aids)

Wendi Sorensen is a shareholder at Burch & Cracchiolo, which she joined in 2011. She is a certified Specialist in Personal Injury and Wrongful Death Law and serves as Chair of the State Bar of Arizona's Board of Legal Specialization, the committee responsible for setting standards and vetting potential certified specialists in Arizona. Prior to joining Burch & Cracchiolo, Wendi served as Chief Trial Attorney and Major Case Counsel for one of the largest commercial insurance carriers in the world. She received her J.D. from Arizona State University, where she was a William H. Pedrick Scholar. She received her undergraduate degree from Westminster College.

Hon. James A. Teilborg

(Illustrative Aids)

Judge Teilborg is a Senior District Judge for the District of Arizona. He was appointed to the bench in 2000. He is a graduate of the University of Arizona College of Law. Judge Teilborg was in private practice from 1967-2000. He served as a Colonel in the United States Air Force Reserve from 1974 to 1997. Judge Teilborg served with distinction as a member of the Judicial Conference Rules Committee (the Standing Committee), and was the Chair of the Subcommittee that oversaw and directed the restyling of the Federal Rules of Evidence, which went into effect in 2011.

Hon. Danielle J. Viola

(Juror Questions)

Judge Viola is the Civil Presiding Judge in Maricopa County Superior Court. She has served in the tax court, family court and criminal court as well. She received her undergraduate degree from Arizona State University, and her law degree from the Sandra Day O'Connor College of Law. She began law practice at Snell & Wilmer in 1999 and became a partner in 2005. She left private practice for the bench in 2011. Among other activities, Judge Viola is a Former Steering Committee Member of the Arizona Women Lawyers Association, Former Steering Committee Member, Past President of the Sandra Day O'Connor Inn of Court, and a Member and Past President of the Sandra Day O'Connor College of Law Alumni Association.

Juror Questions Panel --- Possible F.R.E. 614(e), Mandating Procedural Safeguards if the Court Decides to Allow Jurors to Pose Questions to Witnesses[1]

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * * * *

(e) Juror Questions for Witnesses.

(1) ***Instructions to Jurors If Questions Are Allowed.*** If the court allows jurors to submit questions for witnesses during trial, then the court must instruct the jury that:

(A) any question must be submitted to the court in writing;

(B) a juror must not disclose a question's content to any other juror;

(C) the court may rephrase or decline to ask a question submitted by a juror;

(D) a juror must draw no inference from the fact that a juror's question is asked, rephrased, or not asked;

(E) an answer to a juror's question should not be given any greater weight than an answer to any other question; and

(F) the jurors are neutral factfinders, not advocates.

(2) ***Procedure When a Question Is Submitted.*** When a question is submitted by a juror, the court must, outside the jury's hearing:

(A) review the question with counsel to determine whether it should be asked, rephrased, or not asked; and

(B) allow a party to object to it.

(3) ***Posing the Question to a Witness***. If the court allows a juror's question to be asked, the court must pose it to the witness or permit one of the parties to do so.

Proposed Committee Note

New subdivision (e) sets forth procedural safeguards that are necessary when a court decides to allow jurors to submit questions for witnesses at trial. Courts have taken different positions on whether to allow jurors to ask questions of witnesses. But courts agree that before the practice is undertaken, trial judges should weigh the benefits of allowing juror questions in a particular case against the potential harm that it might cause. And they agree that safeguards must be imposed.

Rule 611(e) takes no position on whether and under what circumstances a trial judge should allow jurors to pose questions to witnesses. The intent of the amendment is to codify the minimum procedural safeguards that are necessary when the court decides to allow juror questions. These safeguards are necessary to ensure that the parties are not prejudiced, and that jurors remain impartial factfinders.

[1] Rule in development. Not issued for public comment.

The safeguards set forth are taken from and are well-established in case law. But the cases set out these safeguards in varying language, and often not in a single case in each circuit. The intent of the amendment is to assist courts and counsel by setting forth all the critical safeguards in uniform language and in one place.

The safeguards and instructions set forth in the rule are mandatory, but they are not intended to be exclusive. Courts are free to impose additional safeguards, or to provide additional instructions, when necessary to protect the parties from prejudice, or to assure that the jurors maintain their neutral role.

A court may refuse to allow a juror's question to be posed, or may modify it, for a number of reasons. For example, the question may call for inadmissible information; it may assume facts that are not in evidence; the witness to whom the question is posed may not have the personal knowledge required to answer; the question may be argumentative; or the question might be better posed at a different point in the trial. In some situations, one of the parties may wish to pose the question, and the court may in its discretion allow the party to ask a juror's question—so long, of course, as it is permissible under the rules of evidence. In any case, the court should not disclose—to the parties or to the jury—which juror submitted the question.

After a juror's question is asked, a party may wish to ask follow-up questions or to reopen questioning. The court has discretion under Rule 611(a) to allow or prohibit such questions.

Illustrative Aids Panel --- Proposed F.R.E. 611(d), Regulating the Use of Illustrative Aids. Issued for Public Comment

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * * * *

(d) Illustrative Aids.

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence if:

(A) its utility in assisting comprehension is not [substantially][2] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time; and

(B) all parties are given notice and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise.

(2) ***Use in Jury Deliberations.*** An illustrative aid must not be provided to the jury during deliberations unless:

(A) all parties consent; or

(B) the court, for good cause, orders otherwise [so orders] [orders that it be provided].[3]

(3) ***Record***. When practicable, an illustrative aid that is used at trial must be entered into the record.

Committee Note

The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that

[2] "Substantially" is in brackets to invite discussion about how the balancing test should be set. "Substantially" tracks Rule 403, thus rendering relevant evidence presumptively admissible. But there is a question as to whether the same permissive standard should apply when the information presented is not probative of any disputed issue in the case, but is offered solely to assist the factfinder to understand evidence already presented.

The question of the proper balancing test will be discussed by the panel.

[3] At the Standing Committee meeting, there was apparently some discussion about whether "unless the court orders otherwise" should be changed to "unless the court so orders." The amendment issued to the public retains the language approved by the Advisory Committee --- "orders otherwise." I consulted the restylists and both stated that "the court so orders" is confusing because it is too vague a reference. One restylist suggested: "unless the court orders that it be provided." The other preferred to keep the rule the way it is: "unless the court orders otherwise." This style kerfuffle will be resolved before the Spring meeting.

latter term is vague and has been subject to differing interpretation in the courts. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the factfinder thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, to study it, and to use it to help determine the disputed facts.

The second category—the category covered by this rule—is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party presenting evidence. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the finder of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible information offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be prepared to distort the evidence presented, to oversimplify, or to stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. Cf. Fed.R.Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive demonstrative evidence of a disputed event. If those dangers [substantially] outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its discretion to prohibit—or modify—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

One of the primary means of safeguarding and regulating the use of illustrative aids is to require advance disclosure. Ordinary discovery procedures concentrate on the

evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection—unless the court, for good cause, orders otherwise. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with testimony or presentation by the proponent, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

TAB 2

Advisory Committee on Evidence Rules
Minutes of the Meeting of May 6, 2022
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 6, 2022 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Committee were present:
Hon. James P. Bassett
Hon. Thomas D. Schroeder
Elizabeth J. Shapiro, Esq., Department of Justice
Arun Subramanian, Esq.
Hon. Richard J. Sullivan
Rene Valladares, Esq., Federal Public Defender

The following members of the Committee were present Via Microsoft Teams:
Hon. Patrick J. Schiltz, Chair
Traci L. Lovitt, Esq.

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Andrew Goldsmith, Esq., Department of Justice
Bridget M. Healy, Counsel, Rules Committee
Scott Myers, Rules, Counsel, Rules Committee
Brittany Bunting, Rules Committee Staff
Allison Bruff, Rules Committee
Burton Dewitt, Rules Clerk
Timothy Lau, Esq., Federal Judicial Center

Present Via Microsoft Teams:
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Joe Cecil, Berkeley Law School
Sri Kuehnlenz, Esq., Cohen & Gresser LLP
Abigail Dodd, Senior Legal Counsel Shell Oil Company
Alex Dahl, Strategic Policy Counsel
John G. McCarthy, Esq., Federal Bar Association

Lee Mickus, Esq., Evans Fears & Schuttert LLP
Mark Cohen, Esq., Cohen & Gresser LLP
Leah Lorber, Esq., GSK
John Hawkinson, Freelance Journalist
Joshua B. Nettinga, Lt. Colonel, Judge Advocate General's Group
Nate Raymond, Reuters Legal Affairs
James Gotz, Esq., Hausfeld

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting and stated that he wished he could be present but that he was recovering from COVID. He thanked the Reporter and the Academic Consultant for the extraordinarily high caliber of the materials in the agenda book. The Chair then invited all participants to introduce themselves.

After the introductions, the Chair noted that two members of the Committee were rotating off of the Committee after six years of devoted service. He thanked Justice Bassett and Traci Lovitt for their invaluable contributions to the work of the Committee and invited each to share remarks. Justice Bassett thanked the Chair and the Committee for the opportunity of a lifetime to contribute to the work of the Committee. He stated that he wished every judge and lawyer could witness the careful deliberative process of the Committee and the thought and attention to detail that goes into every word chosen for a rule or committee note. He further noted the importance of comity between federal and state courts and the importance of including state court judges in the work of the Committee. Traci Lovitt stated that it was a sincere honor to be a part of the Committee's work. She praised the intellectual firepower around the table and stated that she was in awe of the extraordinary work that goes into the rulemaking process.

The Chair then gave a brief report on the January, 2022 Standing Committee meeting, explaining that the Evidence Rules Advisory Committee had only informational items regarding work on several potential amendments to share with the Standing Committee. He noted that there was a great deal of interest in proposals regarding illustrative aids and safeguards for juror questions.

Approval of Minutes

A motion was made to approve the minutes of the November 5, 2021 Advisory Committee meeting. The motion was seconded and approved by the full Committee.

II. Rules 106, 615 and 702 Published for Comment

The Reporter opened a discussion of the three Rules that had been released for public comment, explaining that the public comment period had closed in February, 2022. He explained that the issue for the Committee was whether to approve the three proposed amendments to be transmitted to the Standing Committee and the Judicial Conference.

A. Rule 106

The Reporter called the Committee's attention to the published proposal to amend Rule 106, the rule of completeness. That proposal appeared on page 98 of the agenda book. He reminded the Committee that the proposal would make two changes to the existing rule. First, it would allow completion of all statements in any form. This would be a change from the current rule that applies only to written or recorded statements and would permit completion of unrecorded, oral statements. He noted that many jurisdictions already permit completion of oral statements through Rule 611(a) and the common law and that the amendment would bring completion of all statements under one rule. Second, the Reporter reminded the Committee that the amendment to Rule 106 would allow completion over a hearsay objection because a party who presents a portion of a statement in a manner that distorts the meaning of that statement forfeits the right to object to completion based upon hearsay. He lauded the Committee for its unanimous approval of an amendment to Rule 106 after many years of work.

The Reporter explained that there were few public comments on the proposed amendment to Rule 106, but that the comments that were received were largely positive. Even so, the Committee decided to make small changes to the language of the rule text that was published for comment. First, the published amendment would have covered "written or oral statements." But it was pointed out that some statements may be neither written nor oral. Assertive conduct is considered a statement and American Sign Language represents a form of communication that contains assertive statements that are not oral or written, but that should be subject to completion. For that reason, the Committee at its last meeting determined to remove the modifiers "written or oral" from the text of the amendment, such that Rule 106 would cover "statements" in any form. The Reporter noted that a version of the amendment deleting "written or oral" from rule text appeared on page 106 of the agenda book. The Reporter further noted that some corresponding changes would need to be made to the committee note to reflect that alteration. He directed the Committee's attention to page 107 of the agenda book where the language of the paragraph that began "Second, Rule 106 has been amended" had been revised to reflect that the amendment would apply to statements "in any form – including statements made through conduct or sign language." A Committee member noted that the modifiers "written or oral" would also need to be deleted from line 180 on page 108, and the Reporter made the change. Another Committee member inquired whether the modifier "oral" should also be deleted from line 140 on page 107 of the agenda book that read "Second, Rule 106 has been amended to cover all statements, including oral statements that have not been recorded." The Reporter responded that the modifier "oral" should remain in that sentence of the note as an example of what the amendment would permit. He noted that the completion of oral statements through Rule 106 was a principal innovation of the amendment and that, while it was important to include assertive conduct, the amendment would be used much more commonly to allow completion of oral statements. The Chair agreed that he would prefer to leave the word "oral" in line 140 on page 107 of the committee note to reflect the fact that most of the practical impact of the expansion to all statements would be with respect to the coverage of oral statements.

The Reporter suggested one additional change to the committee note. He proposed deleting a sentence in the committee note on page 100 of the agenda book that stated that "the results under this rule as amended will generally be in accord with the common-law doctrine of

completeness at any rate." The Reporter explained that this sentence was unnecessary to explain the operation of the amended rule and that the common law included various iterations of the rule of completeness before it was codified in Rule 106. Thus, he recommended deleting the entire sentence. By consensus, the Committee agreed with the recommendation.

The Chair then sought the Committee's vote on whether to approve an amendment to Rule 106 and the accompanying note reflecting these changes (appearing on pages 106-108 of the agenda book), with the added change to line 180 on page 108 to delete the words "written or oral." Participating Committee members unanimously approved the proposed amendment to Rule 106 and the accompanying note.

B. Rule 615

Next, the Reporter called the Committee's attention to the proposal to amend Rule 615, the rule of witness sequestration. He explained that there was a deep division in the courts about the scope of a Rule 615 order. Some courts hold that a Rule 615 order extends only to the courtroom doors and does not protect against witness access to testimony outside the courtroom. The Reporter explained that this is problematic because sequestration is not effective if witnesses may access testimony from outside the courtroom. For that reason, other courts hold that a Rule 615 order automatically extends beyond the courtroom to control witness access to information. The Reporter explained that this approach is also problematic because Rule 615 does not extend so far on its face. For this reason, the Committee published a proposed amendment to Rule 615 that would clarify that a Rule 615 order automatically covers only access to testimony inside the courtroom, but that a trial judge may extend protection outside the courtroom in her discretion. The proposal also addressed a subsidiary issue regarding how many representatives an entity party may designate as exempt from sequestration under Rule 615(b). While the vast majority of courts recognize that an entity party may designate only one representative under Rule 615(b) to provide parity with individual parties, some courts allow multiple designations. The proposed amendment would clarify that an entity party may designate only one representative as of right under subsection (b) and must show that any additional exempt witnesses are "essential to presenting the party's claim or defense" under Rule 615(c).

The Reporter explained that public comment on the proposal was sparse but positive and that the Magistrate Judge's Association thought the amendment would be a useful addition. The Reporter asked that the Committee consider two minor changes to the committee note based on the public comment. First, he explained that the AAJ helpfully suggested that all references to an "agent" in the committee note should be changed to "representative" to track the text of the rule. He called the committee's attention to page 117 of the agenda book to see the proposed change. He further noted that the NACDL suggested elimination of the citation to the *Arayatanon* case in the committee note. The Reporter explained that the case did support the proposition for which it was cited -- that a court may approve multiple exemptions from sequestration for witnesses "essential" to prove a party's case – but that the case also suggested that the opponent of the exemption had to disprove essentiality. Because the burden of proof is on the party seeking the exemption, including this citation in the committee note could muddle the proper burden of proof. The Reporter recommended deletion of the citation for that reason.

The Chair then sought the Committee's approval of the proposed amendment to Rule 615 with no changes to the rule text and two minor changes to the note – to replace the word "agent" with the word "representative" and to eliminate the case citation. Participating Committee members unanimously approved the proposed amendment to Rule 615. The Reporter opined that the amendment was a perfect one for the Committee to advance because the courts are deeply divided and because the amendment will offer concrete and practical clarification for courts and litigants.

C. Rule 702

The Reporter reminded the Committee that it had been considering clarifying amendments to Rule 702 since 2016 and that the project had culminated in two proposals. First, the proposed amendment published for comment would seek to limit overstatement by testifying experts by emphasizing that trial judges must determine that the opinions expressed by an expert reflect a reliable application of the expert's principles and methods to the facts of the case. Second, the amendment would emphasize that Rule 104(a) applies to Rule 702, requiring a trial judge to find the admissibility requirements satisfied by a preponderance of the evidence before submitting expert opinion testimony to the trier of fact over objection.

The Reporter explained that there was a large volume of public comment. Although there was substantial support for the amendment, a large volume of public comments were negative. Upon close inspection, many of the comments appeared to be "cut and paste" comments quoting identical phrases and talking points. The Reporter further noted that the negative comments were reminiscent of – and sometimes virtually identical to -- the comments received in opposition to the 2000 amendment to Rule 702. Predictably, the comments fell along party lines. The defense bar generally favors the amendment, and the plaintiffs' bar generally opposes it. He explained that a division of opinion about an amendment along party lines does not necessarily suggest that an amendment should not be approved so long as the amendment is the product of sound and neutral rulemaking principles. The Reporter noted that many successful amendments, such as the recent amendment to the notice provision of Rule 404(b), were favored by one side and not the other. Finally, the Reporter noted that the negative commentary about the proposed amendment usurping the role of the jury actually demonstrates the need for the amendment, as such comments reflect a fundamental misunderstanding that a jury decides the admissibility of expert opinion testimony. Rule 104(a) already applies to the admissibility requirements of Rule 702, demanding that the judge alone determine whether those requirements are satisfied. Comments arguing for a role for the jury reflect the very misunderstanding that underscores the need to emphasize the applicable Rule 104(a) standard. The Reporter nonetheless noted that several minor changes to the rule text and committee note could be considered to address some of the concerns raised in the public comment.

The Reporter explained that the negative public commentary took issue with the use of the phrase "preponderance of the evidence" in the text of the proposed amendment. He noted that the requirements of Rule 702 are undoubtedly preliminary questions of admissibility governed by Rule 104(a). He further noted that it was the Supreme Court in *Bourjaily v. United States* that held that the "preponderance of the evidence" standard applies to the judge's Rule 104(a)

findings. So, the preponderance of the evidence standard already governs. And the point of the amendment is to emphasize and clarify that fact for the courts that have missed it.

Still, the Reporter explained that many of the commenters opined that the preponderance of the evidence standard carries with it a connotation of fact-finding by the jury. The Reporter suggested that the phrase "more likely than not" describes the preponderance of the evidence standard and could be employed in rule text instead. The Chair noted that some commenters also expressed concern that "preponderance of the evidence" language could suggest that the trial judge is limited to admissible evidence in considering the requirements of Rule 702, which is inconsistent with Rule 104(a). He explained that it was not necessary to trade "preponderance of the evidence" language for "more likely than not" language, but that it could be beneficial to avoid what appeared to be a term that was a lightning rod for negative public comment. Some Committee members suggested that there was no need to make a change because all competent lawyers and judges understand that the preponderance of the evidence standard is not restricted to juries. If the public comment on the point appeared to be a "talking points campaign" rather than constructive feedback, perhaps there is no need to modify accurate rule language in response to it. Another Committee member suggested that the amendment might require a finding "by a preponderance" and avoid the remainder of the phrase "of the evidence." The Reporter suggested that such language might be too abrupt and may not satisfy the commenters concerned about "preponderance" language in any event. The committee consensus was to change the language in the text of the amendment from "preponderance of the evidence" to "more likely than not." Though the Committee felt that this change was unnecessary and would not alter the standard of review employed by the trial court in evaluating the admissibility of expert testimony, the Committee ultimately concluded that there was value in making a modification to respond to the public comment.

Some Committee members expressed concern that the change might be interpreted to signal a substantive change in the governing standard when no change is intended because the "preponderance of the evidence" standard and the "more likely than not" standard are equivalent. The Reporter responded that changes could be made in the Advisory Committee's note to ensure that the change would not be misconstrued. The Chair noted that several changes to the note suggested prior to the meeting would actually increase the risk of a misunderstanding, as they eliminate virtually all references to "preponderance of the evidence." He argued that, if the phrase "preponderance of the evidence" was replaced by "more likely than not" in the rule text, then the committee note should be crystal clear that the two phrases were equivalent. The Reporter noted that the note includes a citation to the Supreme Court's decision in *Bourjaily* that does articulate the preponderance of the evidence standard, but he suggested that the Committee might wish to add a sentence to the note directly stating that "more likely than not" means a "preponderance of the evidence." The Chair proposed adding the following sentence to the first paragraph of the note immediately after the citation to Rule 104(a): "This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules." Committee members agreed that this sentence should be added to avoid any inference that the Committee intended to alter the applicable standard by switching the language of the text from "preponderance of the evidence" to "more likely than not." Judge Kuhl explained that she had suggested switching to "more likely than not" in the note to avoid using the term "by a preponderance" without "of the evidence." She agreed that using "preponderance

of the evidence" in the note was appropriate. She also pointed out that she had suggested a citation in the note to the 2000 committee note to Rule 702 that cited the Supreme Court's opinion in *In re Paoli* to distinguish the court's preliminary findings regarding the admissibility of an expert from merits findings with respect to the expert's opinion.

One Committee member queried whether the second paragraph of the note was superfluous in light of the added sentence equating the more likely than not standard with the preponderance of the evidence standard. The Reporter responded that the second paragraph of the note was important to eliminate any negative inference about the application of the Rule 104(a) standard to other evidence rules that do not explicitly reference it. Rule 104(a) applies to preliminary findings of admissibility without being articulated in every evidence rule. An amendment to Rule 702 articulating the standard expressly was necessary because courts were failing to apply it in this context.

Next, the Reporter explained that there were several public comments urging the Committee to reinsert the language "if the court finds" into the text of the amendment. These comments noted that the reason for the amendment is confusion about the respective roles of judge and jury in deciding admissibility of expert testimony. These commenters argued that the text of the amendment should specify that it is "the court" that must "find" the requirements of Rule 702 satisfied before submitting the opinion to the jury, lest courts continue to defer to juries about the sufficiency of an expert's basis and the reliable application of principles and methods to the facts of the case even after the amendment. The Reporter explained that some Committee members had concerns about the language "the court finds" and that an alternative that would achieve the same purpose could be to require that "the proponent demonstrates to the court that it is more likely than not that." One Committee member stated that the amended text should not require the proponent to demonstrate the Rule 702 requirements in every case because no demonstration is necessary in the absence of an objection from the other side. The Committee member suggested that such language could be read as a pre-clearance requirement for all expert testimony even without any objection and that this would be an unintended change in well-established practice. The Reporter stated that it is implicit in all of the evidence rules that the court is not required to rule in the absence of objection and that no pre-clearance requirement would be inferred due to that fundamental norm. Still, he noted that language might be added to the committee note clarifying that no finding would be necessary in the absence of objection.

Judge Bates inquired whether adding the caveat requiring an objection would make a substantive change to the amended rule in the note. The Reporter explained that the caveat in the note about an objection would not change the text of the rule but would instead underscore a generally applicable principle. The Reporter for the Standing Committee concurred that it is important to avoid adding substantive material to notes but agreed with the Reporter that this particular addition to the note would simply bring to light an underlying assumption, and that such a change would be appropriate. A Committee member then suggested a sentence in the note clarifying that there is no gatekeeping obligation in the absence of objection. Several judges objected, noting that plain error review requires a level of gatekeeping in all circumstances – even in the absence of an objection. They argued that it would be more accurate to state that *the amendment* does not require the court to make findings of reliability in the absence of objection, rather than to say that judges have no obligation whatsoever to consider whether expert

testimony is reliable in the absence of an objection. The Committee ultimately decided to add a sentence to the second paragraph of the note stating that: "Nor does the rule require that the court make a finding of reliability in the absence of objection." This sentence avoids any notion that the rule imposes a pre-clearance requirement without undermining a court's duty to avoid plain error.

The Chair then asked the Committee whether all members were supportive of the proposed changes discussed thus far: 1) a change to the text of the rule to state: "if the proponent demonstrates to the court that it is more likely than not that"; 2) a new sentence in the first paragraph of the note equating the preponderance of the evidence standard and the more likely than not standard; and 3) a new sentence in the second paragraph of the note clarifying that the amendment does not require the court to make findings in the absence of objection. All Committee members agreed to these changes.

The Reporter next called the Committee's attention to the paragraph in the note describing the reason for the change to Rule 702(d) to avoid expert overstatement. He explained that some of the public comment suggested that the note language was insulting to jurors because it stated that jurors "may be unable to evaluate" and "unable to assess" expert methodology and conclusions. The Reporter explained that there was certainly no intent to insult jurors and suggested that the note might provide that jurors lack the "background knowledge" necessary to assess expert methodology and conclusions. Another participant queried whether "background knowledge" was the best terminology to describe jurors' ability to assess expert methodology. He suggested using the term "specialized" knowledge as that language is already used in Rule 702 to describe the type of knowledge that experts possess and laypersons do not. The Committee agreed to use the term "specialized" knowledge in the seventh paragraph of the note.

The Reporter then noted that additional changes to the first two sentences of the seventh paragraph of the note regarding overstatement had been suggested to emphasize the trial judge's "ongoing" gatekeeping authority with respect to the opinions expressed by an expert witness during trial testimony. Other Committee members questioned whether a trial judge has an "ongoing" obligation with respect to Rule 702 after finding expert testimony admissible. The Reporter explained that this was the purpose of the amendment to Rule 702(d) – to emphasize the trial judge's ongoing obligation to prevent an admitted expert from testifying to unsupported overstatements like a "zero error rate." The Chair suggested combining the first and second sentences of the seventh paragraph of the note – which essentially say the same thing – and avoiding the term "ongoing." The combined sentence would read: "Rule 702(d) has also been amended to emphasize that each expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology." All agreed that this was a constructive change. The Committee also agreed to remove the word "extravagant" from the final sentence of the note. The Chair also proposed deleting the words "of course" from the third paragraph of the note and adding numbers 1) and 2) to the sections of the note discussing the two features of the amendment. Another Committee member suggested that the third paragraph of the note should say that: "the fact that the expert has not read every single study that exists *may* raise a question of weight" instead of "*will* raise a question of weight."

A Committee member then moved to approve the amendment to Rule 702 with the changes to the rule text and note agreed upon at the meeting. The rule text would be changed to read "if the proponent demonstrates to the court that it is more likely than not that" with corresponding changes to the note to equate the "more likely than not" standard with the "preponderance of the evidence" standard. The note would also include a sentence clarifying that the amendment does not require findings of reliability in the absence of objection. It would use "specialized knowledge" to describe the foundation that jurors lack. It would add organizing numbers, would condense the first two sentences of the seventh paragraph, and eliminate the words "of course" from the note. It would also eliminate the word "extravagant" and include a citation to the 2000 Advisory Committee's note to Rule 702. The motion was seconded and unanimously approved by all participating Committee members. The Reporter reminded the Committee of the almost six years of work on the amendment to Rule 702 and recognized its approval as a breathtaking moment. He thanked Committee members and liaisons for their important and helpful contributions. The Chair agreed, stating that the amendment would leave evidence law better than the Committee found it.

III. Proposed Amendments for Publication

The Reporter explained that there were several proposals to publish amendments for notice and comment before the Committee.

A. Rule 611(d)/Rule 1006

The Reporter introduced proposals to amend Rule 611 to add a new subsection (d) and to update Rule 1006, explaining that the Committee would be voting on whether to approve these amendments for publication. He reminded the Committee that the amendment to Rule 611 would add a provision regulating the use of illustrative aids at trial, noting that illustrative aids are used routinely but that no provision regulates them specifically. He explained that the separate companion amendment to Rule 1006 would help resolve court confusion about the difference between summaries used as illustrative aids and summaries offered into evidence to prove the content of voluminous records.

1. Illustrative Aids

The Reporter called the Committee's attention to the proposed amendment to Rule 611 appearing on page 234 of the agenda book to note two minor suggested changes to the draft previously reviewed by the Committee. The term "jury" in proposed Rule 611(d)(1)(A) would be changed to "factfinder" because the factfinder might be the judge and not a jury in a bench trial, which would also be governed by the new rule. The verb "are" in line 44 on page 235 of the agenda book would be changed to "is" to conform to the singular tense used earlier in the sentence. A Committee member suggested that the term "trier of fact" be used in subsection (d)(1)(A) instead of factfinder to track the use of that language in Rule 702 and all agreed.

The Reporter explained that there were questions raised at the Standing Committee meeting about the notice provision in the rule that would require advance disclosure of an illustrative aid to the opposing party. The concern was that some lawyers would object to

showing the power point presentation to be used in their closing arguments to their opponents in advance. The Reporter noted that the notice provision was a flexible one that might make 5-minute advance notice adequate in a circumstance such as that, but queried whether the Committee wanted to make notice discretionary to allow the judge to dispense with notice altogether in certain circumstances. He also suggested that the Committee might publish the proposal with the existing notice provision to collect public input on the appropriate notice for illustrative aids. The Reporter also highlighted the bracketed material in the sixth paragraph of the committee note discussing notice "at a jury trial" and queried whether the Committee wished to so limit the reach of the rule. The Chair noted that notice would be appropriate in a bench trial as well and suggested deleting the bracketed material. The Chair also noted that line 82 of the note on page 236 of the agenda book discussed "use of the aid by the jury" and proposed changing it to "consideration of the aid by the jury."

Another participant asked why subsection (d)(3) of the proposed rule would require that an illustrative aid be marked as an exhibit when it is not evidence. The Chair responded that having illustrative aids in the record is crucial for appellate review in case the appellant argues that the trial judge erred by allowing use of the illustrative aid. The participant asked how a trial judge should handle impermanent aids like chalks or dry erase boards or layered aids that change as testimony comes in. She queried how a trial judge would mark aids such as these to be included in the record. The Chair observed that there would be a notice problem with illustrative aids that were created in "real time" (such as writing on a dry erase board), as well as a problem marking them for the record. The Reporter suggested modifying Rule 611(d)(3) to read: "Where practicable, an illustrative aid that is used at trial must be entered into the record." This would allow flexibility for developing aids such as chalk or dry erase drawings. He noted that lines 87-88 of the committee note on page 236 of the agenda Book would also need to be modified to read: "While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record where practicable."

For the same reason, the Reporter opined that the text of the notice provision in Rule 611(d)(1)(b) should also be altered to read: "all parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use, unless the court for good cause orders otherwise." He also noted that the committee note would need to be changed as well, such that lines 65-67 of the note on page 236 of the agenda book would now provide: "The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection unless the court for good cause orders otherwise." The Chair noted that line 30 of the note on page 235 of the agenda book needed a comma inserted after "to study it" and that line 39 should read "a source of evidence" and not "another source of evidence" (as an illustrative aid is not evidence). The Chair also questioned the reference in the note to use of an aid as substantive evidence as "the most likely problem" with illustrative aids, suggesting that misleading the jury might be a bigger problem. The Reporter responded that use of illustrative aids as substantive evidence is certainly a significant problem that the amendment is seeking to correct and suggested that the note say "one problem being" instead of "the most likely problem." Another Committee member pointed out that line 75 of the note on page 236 of the agenda book incorrectly stated that illustrative aids are "admissible only in accompaniment with testimony" when illustrative aids aren't admissible

evidence at all. All agreed that the note should say that illustrative aids are "used only in accompaniment with testimony."

Judge Bates asked whether the amendment as drafted would require lawyers to reveal their closing argument power point presentations to opposing counsel in advance. He explained that his sense was that different judges currently handle that issue differently and inquired whether the rule change would now require all judges to order disclosure. The Reporter suggested that lawyers will still be able to argue about whether a power point is an illustrative aid regulated by the rule. The Chair opined that the amendment would set forth general principles but that it was inevitable that trial judges would differ in the way they interpreted and applied those guiding principles. A Committee member asked whether the term "argument" in the rule text might be interpreted to require advance notice of a closing argument power point. He suggested that such a power point is argument and that perhaps it should not be subject to the guidelines imposed by the amendment. The Reporter observed that such a power point would still qualify as an "illustrative aid" even if it illustrated the closing argument only. The Committee member responded that illustrative aids used with witnesses should be subject to notice, but that lawyers should be able to use a power point in closing without advance clearance. Judge Bates commented that he shared the same concern and did not think that the good cause flexibility added to the notice requirement would be sufficient to address that circumstance.

The Reporter queried whether the Committee wanted to remove the language "or argument" in the text of the rule and the committee note. The Chair noted that the Committee could include the words "or argument" in the amendment published for comment in brackets to solicit input on how best to handle the problem of aids used to illustrate argument. Another Committee member opined that the Committee should determine in advance of publishing the amendment what it is intended to regulate. He stated a preference for eliminating "argument" from the proposal so that it would cover aids used with witnesses but not aids used in opening or closing. The Reporter noted that a visual aid used during closing might summarize evidence and still be regulated by the amendment even if the words "or argument" are eliminated. The Chair agreed, pointing out that something that is an illustrative aid when exhibited to a witness does not cease being an illustrative aid when it is exhibited to the jury during a closing argument. Ultimately, the Committee agreed to take out the words "or argument" and concluded that public comment could help the Committee be more specific in distinguishing illustrative aids that are subject to the rule and summaries of argument that are not.

A Committee member then moved to approve Rule 611(d) for publication with all of the modifications agreed upon. The motion was seconded and unanimously passed.

2. Rule 1006 Summaries

Professor Richter then introduced the proposed amendment to Rule 1006 that would serve as a companion to the amendment to Rule 611 by clarifying the foundation necessary for admitting a summary as evidence of writings, recordings, or photographs too voluminous to be conveniently examined in court. She reminded the Committee that courts often conflate the principles applicable to summaries used only to illustrate testimony or other evidence and those applicable to Rule 1006 summaries that are admitted to prove the content of voluminous records.

Professor Richter called the Committee's attention to the proposed amendment to Rule 1006 on page 256 of the agenda book that would seek to correct the confusion in the cases. She highlighted changes to the draft rule and questions for the Committee. She explained that the Chair and Reporter had agreed that the word "substantive" should be deleted from Rule 1006(a), such that the amendment would simply provide that Rule 1006 summaries are to be admitted "as evidence." She noted that the modifier "substantive" remained in the committee note due to the common use of that term to differentiate evidence offered for a limited purpose from evidence offered to prove a fact. Professor Richter also explained that the proponent of a Rule 1006 summary must demonstrate that it "accurately" conveys the content of the underlying voluminous materials and that it is not argumentative or prejudicial in order to earn an exception to the best evidence rule – a rule that typically requires originals or duplicates of writings, recordings, or photographs to be admitted to prove their content. The terms "accurate and non-argumentative" were included in the text of the proposed amendment because some courts confused Rule 1006 summaries with illustrative summaries and allowed argumentative and inaccurate content. Professor Richter noted that a comma would need to be added after the words "in court" in the final line of proposed Rule 1006(a). Professor Richter also pointed out minor changes to the committee note to eliminate the bracketed paragraph regarding the use of symbols or shortcuts in Rule 1006 summaries and to add the correct tense to the final paragraph of the note.

The Chair stated that he was uneasy about the inclusion of the terms "accurate and non-argumentative" in the text of the amendment due to the concern that they would increase disputes about the admissibility of Rule 1006 summaries. For example, almost all Rule 1006 summaries are "argumentative" in the sense that the proponent summarizes only some, and not all, of the underlying data. The Chair opined that Rule 403 could serve to control the admission of an inaccurate or argumentative Rule 1006 summary. Another Committee member opined that the term "accurate" would introduce a new standard of uncertain meaning to Rule 1006 and that the terms "accurate and non-argumentative" should be removed from rule text and that language about Rule 403 should be added to the committee note. Professor Richter explained that Rule 1006 is a powerful one that permits a "summary" of voluminous writings, recordings, or photographs to be introduced in lieu of originals or duplicates. She noted that the proper foundation for admission of a Rule 1006 summary in the caselaw has long included the requirements that the summary be accurate and non-argumentative. While there may be arguments for judges to resolve in evaluating those elements of the foundation, they are part of the foundation necessary to earn an exception to the best evidence rule and not simply a Rule 403 issue. The Federal Public Defender agreed that Rule 1006 is a potent rule and opined that language should be included in the committee note at the very least to emphasize the proper foundation. The Chair stated that that the terms "accurate and non-argumentative" should be cut from the text of the rule, but that language should be added to the committee note emphasizing that Rule 403 may keep out an inaccurate or prejudicial summary.

A Committee member next inquired about the language of proposed Rule 1006(c), suggesting that its reference to a "summary" that is regulated only by Rule 611(d) seemed circular in a rule about the admission of summaries. Committee members noted that the purpose of subsection (c) was to convey that if a summary does not meet the standards set forth in Rule 1006(a), it is an illustrative aid covered by Rule 611(d). The Chair suggested that subsection (c)

should read: "A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d)." Committee members agreed that this language better conveyed the intent of the provision.

A Committee member pointed out that the proposed draft would require a "written" summary and questioned whether that would include a photographic summary. The Reporter explained that Rule 101(b)(6) provides that any reference to any kind of "written" material or any other medium includes electronically stored information. The Committee member queried whether this would capture photographs.

The Department of Justice representative asked whether limiting Rule 1006 to written summaries would prevent testimony by a case agent helping to organize a case and suggested additional language in the committee note addressing the proper use of a summary witness. Professor Richter pointed out the limited purpose of a Rule 1006 summary to prove the content of material too voluminous to be considered in court. The amendment would prohibit a witness from orally describing voluminous underlying documents to prove their content to the jury and would require a chart or spreadsheet or some sort of accompanying writing to demonstrate that content. Any other use of a summary witness is not regulated by Rule 1006 and would not be regulated under the amendment. Professor Richter explained that litigants often point to Rule 1006 to support other uses of summary witnesses, however, simply because it is the only provision in the existing rules that expressly permits a "summary." The draft amendment was designed to eliminate the use of Rule 1006 for such purposes. She further noted that a writing summarizing voluminous content would likely be more effective than oral testimony about that content alone and could easily be created to comply with a "written" limitation. The Chair suggested that the Committee could publish the proposal with the "written" limitation to determine whether there would be any unforeseen consequences to adding such a restriction. The Reporter suggested that the word "written" might be published in brackets to invite commentary about it.

Another Committee member added that the committee note should discuss the proper use of a summary witness. Judge Bates inquired what the intent of the amendment would be regarding summary witnesses and whether the amendment would change the status quo. He expressed concern that the amendment might foreclose testimony from summary witnesses that is now routinely admitted. A Committee member disagreed that an amendment to Rule 1006 would make any summary witness inadmissible. It would simply provide that a purely testimonial summary could not be offered to prove the content of voluminous documents without a writing and that any other use of a summary witness would have to be justified under other provisions. He opined that this was a helpful clarification. After this discussion, the Chair proposed eliminating the "written" limitation in the draft amendment due to the Committee's concerns, and Committee members agreed.

The Chair then raised the fact that Rule 1006 does not require advance disclosure of the summary to the opponent. The provision requires production of the underlying voluminous materials but not the summary itself, which presumably the opponent needs to review before it is presented. The Chair noted that the lack of notice in Rule 1006 is arguably at odds with the notice requirement in proposed Rule 611(d) governing illustrative aids. One Committee member

suggested that a Rule 1006 summary would have to be disclosed in advance when all trial exhibits are disclosed anyway. The Reporter also suggested that Rule 1006 summaries are different than illustrative aids – because Rule 1006 summaries are "evidence," they will be disclosed when mere aids will not. The Chair pointed out that trial exhibits are often exchanged on the eve of trial, which might give an opponent two days to verify the accuracy of a summary of 500,000 documents. The Reporter stated his preference not to add a new notice provision to Rule 1006 because notice provisions in the evidence rules are generally reserved for significant matters such as Rule 404(b) evidence. The Chair relented.

Judge Bates queried whether the reference to production of the "originals or duplicates" in subsection (b) of the proposed amendment referred to the underlying voluminous documents or the summary. The Reporter responded that it referred to the underlying documents and noted that this had become less clear after the production obligation was put into a new subsection (b). The Reporter suggested adding the term "underlying" to subsection (b) to clarify the "originals or duplicates" intended. The Committee agreed.

A Committee member moved to approve the amendment to Rule 1006 for publication with the deletion of "substantive," "accurate and non-argumentative," and "written" from the text of the rule; with the addition of "underlying" to subsection (b); and with subsection (c) to read: "A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d)." The Committee member also moved to approve a committee note reflecting those changes. The committee note would eliminate any discussion of "accurate and non-argumentative" summaries in favor of language stating that: "A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion." The note would also eliminate any discussion of limiting Rule 1006 to "written" summaries and would eliminate the bracketed paragraph about symbols and shortcuts. The motion was seconded and unanimously approved.

B. Safeguards for Jury Questions: Rule 611(e)

The Reporter introduced the proposal to add a new subsection (e) to Rule 611 to provide procedures and safeguards for judges who wish to allow jurors to pose questions for witnesses. He noted that the practice of allowing juror questions has been somewhat controversial and that the amendment would take no position on whether a judge should allow the practice. Instead, the rule would offer uniform procedures and safeguards that would apply whenever a judge chose to allow juror questions. The Reporter directed the Committee's attention to the working draft of the rule on page 266 of the agenda book. He explained that subsection (e)(1) would better capture the intent of the rule if it stated: "If the court allows jurors to submit questions for witnesses…" instead of "If the court allows jurors to ask questions of witnesses…" This is because the rule would not allow jurors to question witnesses directly and would require that the court or counsel pose the questions. Subsection (e)(1)(C) would also be changed to conform. ("the court may rephrase or decline to ask a question *submitted* by a juror"). The Reporter also noted that lines 45-46 of the committee note on page 269 of the agenda book would prohibit the court from disclosing to the parties or to the jury which juror submitted a particular question. He

explained that there had been a question raised about whether counsel should be permitted to learn which juror asked a particular question. The Reporter voiced concerns that this could lead to mischief and stated his preference to leave the note intact. Finally, the Reporter explained that the new provision regarding illustrative aids would appear in Rule 611(d) and that the safeguards and procedures for jury questions would appear below it in Rule 611(e). He explained that this order is appropriate given how commonly illustrative aids will be used and the relative rarity of juror questions.

One participant at the meeting opined that it would be obvious to all in the courtroom which juror asked a question, such that the prohibition on disclosure in the committee note would mean little. The Chair suggested that whether it is obvious which juror asked a question depends upon how the trial judge handles juror questions; some of his colleagues allow jurors to submit questions in a way that preserves anonymity. The Reporter also suggested that the committee note cautions against disclosure of a questioning juror's identity by the court even if the parties are able to infer that identity on their own.

The Chair suggested several small changes. He suggested that a comma be added after the word "rephrased" in subsection (e)(1)(D). He suggested that the word "neutral" be inserted before the word factfinders in subsection (e)(1)(F). He also voiced concern that the words "appropriate under these rules" in subsection (e)(2)(A) were too imprecise (what is "appropriate"?) and suggested new language stating: "the court must, outside the jury's hearing: (A) review the question with counsel to determine whether it should be asked, rephrased, or not asked."

A Committee member then moved to approve the amendment to add a new subsection 611(e) for publication, with all of the agreed-upon changes to the rule and accompanying committee note. The motion was seconded and unanimously approved.

C. Party Opponent Statements offered against Successors/ Rule 801(d)(2)

The Reporter introduced the proposal to amend Rule 801(d)(2), the hearsay exemption for party opponent statements. The Reporter explained that party opponent statements admissible against a declarant or the declarant's principal are sometimes excluded when a successor party stands in the shoes of the declarant or the declarant's principal due to an assignment of a claim. He offered the example of an individual suing for personal injuries whose own statements would be admissible against her. If the individual dies before trial and her estate pursues the personal injury claim on her behalf, some courts would exclude the decedent declarant's statements when offered against the estate. The amendment would make the statements admissible against a party who stands in the shoes of the declarant or the declarant's principal. The Reporter explained that the amendment would appear at the bottom of Rule 801(d)(2), noting that the style consultants had approved the placement despite their typical disdain for hanging paragraphs.

The Reporter called the Committee's attention to the draft amendment providing for admissibility when "a party's claim or defense is directly derived from a declarant or a declarant's principal." He noted that the Reporter to the Standing Committee had raised a question about the word "defense" in the amendment and invited Professor Cathie Struve to

elaborate. Professor Struve explained that a successor party -- who should be bound by the statements of the predecessor -- might have an independent defense to the claims, such as the successor liability defense. She suggested that the amendment should replace the term "defense" with the terms "potential liability" to provide for admissibility of predecessor statements even in circumstances in which the successor enjoys an independent defense. The Reporter noted that the committee note would not need to be changed if this alteration were made. Committee members agreed to use the terms "potential liability" instead of "defense." The Committee thereafter unanimously voted to approve the amendment to Rule 801(d)(2) as modified for publication.

D. Rule 804(b)(3) and Corroborating Circumstances

Professor Richter introduced the proposal to amend Rule 804(b)(3). The amendment would clarify that, in assessing whether corroborating circumstances clearly indicate the trustworthiness of a statement against penal interest, courts should consider not only the totality of the circumstances under which the statement was made, but also any other evidence corroborating it. She called the Committee's attention to the draft of the proposal circulated in a supplemental memorandum. She explained that the restylists had suggested replacing "corroborating the statement" in subsection (B) of the amendment with "corroborating it." She further noted that Judge Schroeder had suggested a helpful modification to the first sentence of the committee note to make it more direct. Finally, Professor Richter explained that an example had been added to the note to illustrate the type of information the court should consider in evaluating the corroborating circumstances requirement under the amendment.

The Chair pointed out that a judge should consider *all* independent evidence about the credibility of a declarant's statement – i.e., not only evidence that corroborates it, but also evidence that undermines it. He suggested adding language to the first sentence of the note so that it would instruct a judge to consider evidence "corroborating or contradicting" a statement. The Chair also suggested stating in the note that the "court *must* consider not only the totality of circumstances…" He also asked to change "like" in the example in the note to "such as." Judge Bates noted that a comma should be inserted after the citation to the *Donnelly* case in the note. One Committee member suggested that the opening phrase of subsection (B) of the rule text is awkward because it begins with the caveat that a statement must be one that exposes the declarant to criminal liability and must be offered in a criminal case to trigger the corroborating circumstances requirement. The Reporter explained that there was no other place to put that caveat that would make the rule read more smoothly.

The Committee unanimously voted to approve the proposed amendment and committee note to Rule 804(b)(3) as modified for publication.

E. Rule 613(b) and a Prior Foundation for Extrinsic Evidence of a Prior Inconsistent Statement

Professor Richter directed the Committee's attention to the proposal to amend Rule 613(b) to require a prior foundation on cross-examination of a witness before offering extrinsic evidence of the witness's prior inconsistent statement. She explained that the proposed amendment would require a prior foundation but would retain the trial court's discretion to delay

or forgo the foundation under appropriate circumstances. Professor Richter noted that a supplemental draft of the proposal had been circulated that added illustrations of circumstances that might justify departure from the prior foundation requirement in the committee note.

The Federal Public Defender suggested that his only concern with the proposal might be one raised in Professor Richter's Agenda memo that the amendment could be a solution in search of a problem. The Reporter responded that public comment would help clarify that point. And Professor Richter noted that the amendment could help the neophyte trial lawyer who reads the current rule to allow flexible timing for a witness's opportunity to explain or deny a prior inconsistent statement, only to learn after cross-examination has concluded that the trial judge requires a prior foundation. The Chair agreed, noting that every one of the federal judges whom he had asked about this issue reported requiring a prior foundation despite the flexible timing allowed under current Rule 613(b). Judge Bates suggested deleting "Of course" from the second and final paragraph of the committee note. He also recommended deleting the bracketed "in the interests of justice" language in the second paragraph of the note. Finally, Judge Bates expressed concern about citing a concurring opinion in the committee note. The Reporter responded that the concurring opinion cited was the clearest and most persuasive explanation of the virtues of the prior foundation rule and had been included for that reason. The Reporter then suggested that the note could employ a similar defense of the prior foundation requirement without citing the concurrence directly. The Committee agreed to that solution.

The Committee voted unanimously to approve the proposed amendment to Rule 613(b) and accompanying note with the agreed-upon modifications for publication.

IV. Closing Matters

The Chair thanked the Committee and all participants for their patience and for their contributions. He announced that the fall meeting would take place on October 28, 2022 in Phoenix, Arizona.

Respectfully Submitted,

Liesa L. Richter

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 7, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met in a hybrid in-person/virtual meeting in Washington, DC on June 7, 2022, with the public and certain members attending by videoconference. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura B. Bartell,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; H. Thomas Byron III, Rules Committee Chief Counsel-Designate; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Scott Myers and Allison Bruff, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco. Andrew Goldsmith was also present on behalf of the DOJ for a portion of the meeting.

Standing Committee; Dr. Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He noted that Deputy Attorney General Lisa O. Monaco would not be able to attend, but he welcomed Elizabeth Shapiro and thanked her for attending on behalf of the Department of Justice (DOJ). He thanked several members whose terms were expiring following this meeting, including Standing Committee members Judge Frank Hull, Peter Keisler, and Judge Jesse Furman. Judge Bates also thanked Judge Raymond Kethledge and Judge Dennis Dow for their service as chairs of the Criminal Rules and Bankruptcy Rules Advisory Committees respectively. He welcomed Tom Byron, who would be joining the Rules Office as Chief Counsel in July, and Allison Bruff, who had joined as counsel. Judge Bates congratulated Professor Troy McKenzie on his appointment as Dean of New York University Law School. In addition, Judge Bates thanked the members of the public who were in attendance by videoconference for their interest in the rulemaking process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the January 4, 2022 meeting.**

JOINT COMMITTEE BUSINESS

Emergency Rules

Judge Bates introduced this agenda item, which concerned final approval of proposed new and amended rules addressing future emergencies. Specifically, the Appellate, Bankruptcy, Civil, and Criminal Advisory Committees were requesting approval of amendments to Appellate Rules 2 and 4, as well as promulgation of new Bankruptcy Rule 9038, new Civil Rule 87, and new Criminal Rule 62.

Professor Struve thanked all the chairs and reporters of the Advisory Committees for their extraordinary work on this project, and especially Professor Capra for leading the project. This project was in response to Congress's mandate to consider rules for emergency situations. In regard to the uniform aspects of these rules (*i.e.*, who declares an emergency, the basic definition of a rules emergency, the duration of an emergency, provisions for additional declarations, and when to terminate an emergency), most of the public comments focused on the role of the Judicial Conference in declaring a rules emergency. One commentator supported the decision to centralize emergency-declaration authority in the Judicial Conference; others criticized the decision in various ways. The Advisory Committees carefully considered this both before and after public comment. The uniform aspects remain unchanged post-public comment.

Professor Capra noted two minor disuniformities that remained within the emergency rules. Proposed Appellate Rule 2(b)(4), concerning additional declarations, was styled differently than the similar provisions in the proposed Bankruptcy, Civil, and Criminal emergency rules. And proposed Civil Rule 87(b)(1), concerning the scope of the emergency declaration, was worded differently than the similar provisions in the proposed Bankruptcy and Criminal emergency rules.

Proposed Civil Rule 87(b)(1), as published, stated that the declaration of emergency must "adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed Bankruptcy and Criminal rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question.

Appellate Rules 2 and 4. Turning to the point raised by Professor Capra, Professor Hartnett noted that proposed amended Rule 2(b)(4), as set out on lines 27 to 29 of page 89 of the agenda book, used the passive voice ("[a]dditional declarations may be made") instead of the active voice used by the other emergency rules ("[t]he Judicial Conference … may issue additional declarations"). He stated that the Appellate Rules Advisory Committee agreed to change the language to bring it into conformity with the other emergency rules.

A judge member focused the group's attention on proposed Appellate Rule 2(b)(5)(A) (page 90, line 36). In the event of a declared emergency, this provision would authorize the court of appeals to suspend Appellate Rules provisions "other than time limits imposed by statute and described in Rule 26(b)(1)-(2)." The member asked whether the "and" should be an "or." The rule, as drafted, could be read as foreclosing suspension of only those time limits that are both imposed by statute and described in Rule 26(b)(1) or (2). Professor Hartnett stated that the use of "and" was intentional. Current Appellate Rule 2 permits suspension (in a particular case) of Appellate Rules provisions "except as otherwise provided in Rule 26(b)," and Appellate Rules 26(b)(1) and (2) currently bar extensions of the time for filing notices of appeal, petitions for permission to appeal, and requests for review of administrative orders. The proposed Appellate emergency rule, by contrast, is intended to permit extensions of those deadlines, so long as they are set only by rule and not also by statute. Changing "and" to "or" would eliminate that feature of the proposed rule. Professor Struve noted that she is unaware of any deadline set by both statute and an Appellate Rule other than those referenced in Rule 26(b).

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Appellate Rules 2 and 4, with the revision to proposed Appellate Rule 2(b)(4) (lines 27-29) as discussed above.**

New Bankruptcy Rule 9038. Judge Dennis Dow introduced proposed new Bankruptcy Rule 9038. The proposed new rule would authorize extensions of time in emergency situations where extensions would not otherwise be authorized. The Bankruptcy Rules Advisory Committee received only one relevant public comment, which was positive and not specific to the Bankruptcy rule. He requested the Standing Committee give its final approval to proposed new Rule 9038 as published.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Bankruptcy Rule 9038.**

New Civil Rule 87. Judge Robert Dow introduced proposed new Civil Rule 87. The Civil Rules Advisory Committee received a handful of comments. The CARES Act Subcommittee considered these comments and determined that no changes were necessary, and the Advisory Committee agreed. The Advisory Committee made some small changes concerning bracketed

language in the committee note, but otherwise the rule looks similar to the language that came before the Standing Committee prior to publication for public comment.

Professor Cooper noted a pair of changes to the portion of the committee note shown on page 124 of the agenda book. Emergency Rule 6(b)(2)(A) authorizes a court under a declared rules emergency to "apply Rule 6(b)(1)(A) to extend" the deadlines for post-judgment motions. (Ordinarily, Civil Rule 6(b)(2) forbids a court from extending those deadlines.) Rule 6(b)(1)(A) authorizes a court, "for good cause, [to] extend the time … with or without motion or notice if the court acts, or if a request is made, before the original time *or its extension* expires." (emphasis added.) Prior to the Standing Committee meeting, a judge member had pointed out that, as published, the text of the rule, by referring to Rule 6(b)(1)(A), authorizes sequential extensions (that is, a court could grant an extension under Rule 6(b)(1)(A) and, before time expired under that extension, grant a second extension). But, the member observed, the committee note did not reflect this possibility. Professor Cooper agreed with this assessment of the committee note. The Advisory Committee therefore agreed to add language (in the first and fifth sentences of the relevant committee note paragraph) clarifying that such further extensions were possible. Separately, the Advisory Committee had decided to delete the first sentence of the next paragraph of the committee note, and to combine the remainder of that paragraph with the following paragraph to form one paragraph.

Discussion then turned to the wording of proposed Civil Rule 87(b)(1). A practitioner member noted that as he read the proposed Criminal and Bankruptcy emergency rules, if the Judicial Conference failed to specify which emergency provisions it was invoking or exempting, the default was that all the emergency provisions would go into effect. However, proposed new Civil Rule 87(b)(1)(B) by its terms worked differently: "The declaration must … adopt all the emergency rules … unless it excepts one or more of them." Under this wording, the member suggested, if the declaration did not specify which provisions it was adopting, it would be an invalid declaration. Professor Cooper stated that, originally, the relevant portion of Rule 87(b)(1) had said simply that "[t]he declaration *adopts* all the emergency rules unless it excepts one or more of them," thus setting the same default principle as the proposed Bankruptcy and Criminal rules. But in the quest for uniformity in wording across the three proposed emergency rules, the word "must" had been moved up into the initial language in Rule 87(b), which had the effect of inserting "must" into proposed Rule 87(b)(1)(B). Professor Cooper explained that (for the reasons set forth on page 111 of the agenda book) it was not possible for Civil Rule 87(b)(1)(B) to use identical wording to that in the proposed Bankruptcy and Criminal emergency rules. The Bankruptcy and Criminal provisions directed that the emergency declaration "must … state any restrictions on" the emergency authority otherwise granted by the relevant emergency rule—a formulation that would not be appropriate in the Civil rule given the indivisible nature of each particular Civil emergency rule. Professor Cooper expressed the hope that the Judicial Conference would remember to specify which courts were affected and which rules it was adopting by its emergency order. Judge Bates added that if the rule would require the Judicial Conference to make a specific declaration for Civil that need not be made for the other emergency rules, members should consider whether it would cause any problems.

Professor Struve suggested that there were actually two uniformity questions at issue—stylistic uniformity, and a deeper uniformity as to the substance. Uniformity on the substance, she

offered, could be achieved through revisions to Civil Rule 87(b)(1) (on pages 116-17)—namely, deleting the word "must" from line 10 and instead inserting it at the beginning of lines 11 and 15, and changing "adopt" at the beginning of line 12 to "adopts." Under that revised wording, if the declaration failed to specify any exceptions, it would adopt all the emergency rules in Rule 87(c)—thus achieving the same default rule as the Bankruptcy and Criminal provisions.

Professor Capra, however, stated that this proposed revision would deepen rather than alleviate the uniformity problem. He predicted that the good sense of the Judicial Conference would surmount any problem with the language of the rule as published. Professor Coquillette agreed that the Judicial Conference would know what it needed to do to declare a Civil Rules emergency. Judge Bates added that he believed the Rules Office would inform the Judicial Conference of the procedures it needed to follow to declare a Civil Rules emergency. Professor Struve expressed her confidence in the meticulousness of the Rules Office, but she questioned why the rulemakers would want to impose an additional task on the Rules Office in the event of an emergency. Making it as simple as possible for all actors to act in an emergency situation seemed desirable.

Judge Bates highlighted two goals: First, the desire for uniformity. Second, the desire to not have to ask the Judicial Conference to do something unique with respect to the Civil Rules. Judge Bates thought that Professor Struve's suggestion would accomplish the second goal, although it would offend uniformity. And, he suggested, the proposed rule as published already offended uniformity. Therefore, the question under debate was not about *creating* disuniformity but rather fixing one issue while continuing the lack of uniformity.

A practitioner member stated that she agreed with the proposed change. The change would make the rule read more clearly while also safeguarding against something being overlooked in an emergency. Professor Marcus said that the goal of the Advisory Committee was to make it as easy as possible for the Judicial Conference to declare a rules emergency, with all the emergency rules going into effect unless the Judicial Conference explicitly excluded a rule. To the extent the rule as written did not do so, it would be good to make changes to get there. A judge member agreed that the rule should not create more work for people to do in order to declare a rules emergency.

Judge Robert Dow stated that he believed Professor Struve's proposed change was friendly and therefore acceptable to the Advisory Committee. While it would add a disuniformity to the proposed new Rule 87, that disuniformity occurred in a place where the rule already was not uniform in relation to the other emergency rules. He asked the Standing Committee to grant final approval to proposed new Civil Rule 87, with the noted changes both to the committee note and to lines 10 through 15 of the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved proposed new Civil Rule 87.**

New Criminal Rule 62. Judge Kethledge introduced proposed new Criminal Rule 62. The Criminal Rules Advisory Committee received ten or so public comments, some of which were overlapping. He highlighted one change to the committee note plus two of the public comments.

First, the change to the committee note concerned a passage addressing proposed Rule 62(d)(1)'s requirement that courts provide "reasonable alternative access" to the public when conducting remote proceedings. The note as published stated that "[t]he rule creates a duty to provide the public, including victims, with 'reasonable alternative access.'" DOJ requested that the note be revised to mention the Crime Victims' Rights Act (CVRA). A pair of comments opposed this suggestion, and one of those comments requested deletion of the phrase "including victims." The latter phrase had been included to ensure that district courts did not overlook the requirements of the CVRA when holding remote proceedings, not to suggest an order of priority among observers of remote proceedings. Accordingly, the Advisory Committee revised the note as shown on page 161 of the agenda book by deleting the phrase "including victims" and by adding a sentence directing courts to "be mindful of the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act." This language reminds courts to consider both the First and Sixth Amendments' guarantees of public access, in addition to any statutory rights, such as the CVRA. Later in the meeting, an attorney member suggested changing "be mindful of" to "comply with," and Judge Kethledge (on behalf of the Advisory Committee) acquiesced in that change.

Second, one of the public comments concerned proposed new Rule 62(d)(2), which provides that, if "emergency conditions limit a defendant's ability to sign[,] defense counsel may sign for the defendant if the defendant consents on the record." A district judge suggested that this language be revised to allow the court to sign for the defendant as well. The Advisory Committee did not support this suggestion. There was no demonstrated need to have the court sign for the defendant when counsel would be perfectly able to do so. The Advisory Committee was particularly concerned that this would infringe upon the attorney-client relationship. And the Advisory Committee was concerned that this would allow the court to sign a request to hold felony plea or sentencing hearings remotely under proposed new Rule 62(e)(3)(B).

Third, the Advisory Committee received public comments regarding proposed new Rule 62(e)(3)(B), which addresses holding felony plea or sentencing hearings remotely. This is by far the most sensitive subject that Rule 62 addresses. A defendant's decision to plead guilty and the court's decision to send a person to prison are the most important proceedings that happen in a federal court. The Advisory Committee has an institutional perspective that remote proceedings for pleas and sentencing truly should be a last resort; holding such a proceeding remotely is always regrettable, even if it is sometimes necessary. A court does not have as much information when proceeding remotely as it would have in a face-to-face proceeding. The Advisory Committee has a strong concern that there are judges who would want to hold remote sentencing proceedings even when not necessary. These concerns underpinned Rule 62(e)(3)(B), which set as a requirement for a remote felony plea or sentencing that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." The goal of this language was to make sure the decision was unpressured and therefore truly the decision of the defendant. Comments from some judges argued, on logistical grounds, that this provision should be revised to allow the court to sign for the defendant. However, the Advisory Committee rejected those suggestions, noting that counsel for the defendant could sign the request on the defendant's behalf.

At the Advisory Committee meeting, the liaison from the Standing Committee had suggested that the committee note be revised to make clear that the requisite writing could be provided at the outset of the plea or sentencing proceeding itself. Judge Kethledge invited this member of the Standing Committee to discuss his suggestion. The member observed that Rule 62(e)(3)(B) required a "request" from the defendant, but he did not think that the rule required the request be made at any specific time. However, he suggested, it was possible to read the rule as requiring that the request be made *before* the hearing, and the note should be revised to resolve this ambiguity. He suggested (based on the challenges of arranging opportunities for counsel to confer with their clients during the pandemic) that the note say that, while it was preferable to provide the request in advance of the hearing, it could be provided at the hearing if the defendant had an opportunity to confer with counsel.

Judge Bates questioned the use of "requests" in Rule 62(e)(3)(B). If that language required that the idea of proceeding remotely must originate with the defendant, he suggested that could cause practical problems in cases where the remote option is first mentioned by the judge or the prosecutor.

A judge member stated that requiring the request in advance of the hearing could create logistical problems: a need to monitor the docket to check for the required request, and potential last-minute cancellations for lack of the required request. Also, this member suggested, the focus should be on whether the defendant freely consented to the remote proceeding, not on whether it was the defendant who had requested the remote proceeding. Later, Professor Beale stated that the Advisory Committee members recognized that requiring the request in advance of the hearing might not be efficient and could slow things down, but members felt strongly that it was important to protect the ability of the defendant to consult freely with counsel before making the decision to proceed remotely. As to the challenges presented by districts that cover large areas, Professor Beale recalled that the Advisory Committee was persuaded by a member's argument that the rules should not relax standards to accommodate infrastructure failures.

Judge Kethledge noted that the Advisory Committee was not unanimous regarding whether the request in writing must precede the proceeding, although most members of the Advisory Committee (including Judge Kethledge) thought that the request to hold the proceeding remotely must precede the plea or sentencing proceeding. The rule requires that the request be effectuated by a writing—which can only be true if the court has received the writing. Furthermore, another prerequisite for remote proceedings (including felony pleas and sentencings) is Rule 62(e)(2)(B)'s requirement that the defendant have an "opportunity to consult confidentially with counsel both before and during the proceeding." If Rule 62(e)(3)(B) permitted a request to be made midstream in a proceeding (rather than only beforehand), in such midstream instances there would have been no opportunity for consulting prior to the proceeding. Additionally, the contrast between Rules 62(e)(1) and 62(e)(2)(B) (which both require an opportunity for the defendant to consult with counsel "confidentially") and Rule 62(e)(3)(B) (which makes no mention of confidentiality) suggests that the consultation and request under Rule 62(e)(3)(B) must come before the proceeding.

The practical concern, Judge Kethledge explained, was that allowing mid-proceeding requests would open the door to exactly the type of judicial pressure that the request-in-writing

requirement was meant to prevent. During a remote proceeding, the judge could solicit from the defendant a request for the plea or sentencing to proceed remotely. A resulting request from the defendant would not be the unpressured, deliberate decision that the Advisory Committee insisted upon before the defendant gives up the very important right to an in-person proceeding. Permitting the request to occur during rather than before the hearing could greatly undermine the purpose of the writing requirement—namely, to ensure that the emergency rule permits only a narrow exception to the normal in-person requirement. The Advisory Committee was therefore opposed to such a change, which had not been requested by the DOJ and which was opposed by the defense bar.

Professor King reported that defense counsel members of the Advisory Committee had recounted pressure during the pandemic to get their clients to consent to proceed remotely. One noted that two judges in her district had expressed frustration regarding defendants who refused to proceed remotely. Another member reported that CJA members in her district themselves felt pressure to proceed remotely, and having a barrier between the court and the client was important. Another stressed the need for distance between the request in writing and the plea hearing, to give the attorney time to explain the choice to the defendant. It would not be fair to the defendant to be sent to a breakout room with everyone waiting in the main room for the defendant to come back with a "yes," after being asked to proceed remotely by the person with sentencing authority. Not a single member of the Advisory Committee was interested in advancing the proposal to revise the committee note (*i.e.*, to state that the requisite writing could be provided at the outset of the plea or sentencing).

Professor Beale added that to hold a felony plea or sentencing proceeding remotely under Rule 62(e)(3)(C), the court would need to find that "further delay … would cause serious harm to the interests of justice." This would happen only rarely, such as where the defendant faced only a very short sentence.

Judge Bates reiterated his concern that the meaning of "requests" was not entirely clear. Did it require the court to make a finding that the idea of proceeding remotely originated from the defendant and not, for example, some comment the court may have made at a prior proceeding?

Noting that the Standing Committee's membership did not include any criminal defense lawyers, a practitioner member stated that he found compelling the real-world concerns of the defense bar that were credited by the Advisory Committee and expressed by Judge Kethledge, Professor King, and Professor Beale. So he favored requiring that the request come from the defendant before the proceeding begins. But he did not think the rule as drafted was clear on this point, and he stressed the need for clarity so as to avoid future litigation.

Another attorney member agreed as to the timing question, and advocated adding the words "in advance" to reflect that. But, he argued, in the real world the idea will usually not come from the defendant, so he advocated saying "consents" instead of "requests." A judge member predicted that the term "requests" would generate litigation due to the dearth of caselaw on point; by contrast, he said, much caselaw addressed the meaning of "consent." He also suggested that promulgating a form would help to forestall litigation over what was required.

The judge member who had suggested that the committee note be revised to state that the writing could be provided at the outset of the proceeding acknowledged that judges had in the past advocated the use of remote proceedings for what the Advisory Committee had found to be insufficient reasons. He noted, however, that Rule 62 would be in effect only during an emergency—which diminished his concern over the possible misuse of remote proceedings under it. As a data point, this judge member stated he was more often rejecting requests from defendants to proceed remotely than approving them. The member clarified that his concern was not with scenarios in which the idea of holding the plea proceeding comes up midstream during another remote proceeding. Rather, the member's concern was with another possible scenario that was based on his own experiences early in the pandemic: A plea allocution is scheduled to take place remotely, but just prior to the hearing, counsel asks to go into a breakout room to speak with the defendant in order to get the not-yet-provided signature on the request to proceed remotely. The judge does not join the main hearing room until after defendant and counsel return from the breakout room. The member argued that the rule appears to permit the proceeding to go forward in this circumstance, and that this avoids the significant delay that could be entailed in scheduling a new proceeding.

Another judge member noted that defense counsel, not solely judges, may sometimes pressure a defendant to consent to a remote plea or sentencing hearing. Judges, this member suggested, should be alert to this risk. The member noted the difficulty of drafting rules to address emergencies, which may present strange circumstances.

A practitioner member said that the Standing Committee should not make changes that would not have made it through the Advisory Committee. If the Standing Committee wished to make such a change, it should consider remanding the proposal to the Advisory Committee—but that would prevent Rule 62 from proceeding in tandem with the other proposed emergency rules. Both for that procedural reason and on the substance, this member supported the position taken by the Advisory Committee. As to adding language to require that the request in writing occur "in advance," the practitioner member suggested that no such language could foreclose a judge from attempting to streamline the process. For example, a requirement of a request "in advance" could be met by making the request during a status conference in the morning, and reconvening later that day for the plea or sentencing.

A judge member emphasized that judges vary in their ability; in her circuit, there were sometimes even defects in plea colloquies. Given the critical nature of plea and sentencing proceedings, this member thought that the request needs to be in advance of the proceeding. If the request need not be made in advance, it will become routine. The rule should say "in advance," and possibly even state *how far* in advance, such as seven days. She acknowledged, however, that answering the how far question would likely require sending the rule back to the Advisory Committee, so she was not making that suggestion.

A practitioner member agreed with the proposal to insert "in advance." It is inherently important to the integrity of the criminal justice system that plea changes and sentencing hearings be done in-person. As a civil practitioner, this member periodically witnesses criminal sentencing proceedings that occur before the civil matters. The very best judges are those who take the most

care with sentencing proceedings. It gives dignity to the individuals involved in the process, including their families. This does not translate well to videoconferencing.

A judge member who had earlier stated that requiring the request in advance of the hearing could create logistical problems suggested that the rule should be clear about what it requires and that, in her view, it should permit bringing the document to the hearing itself. This member pointed out that efficiency is also important for defendants; a more cumbersome process (requiring a request in advance) may delay closure (and release) for defendants who will receive time-served sentences.

Judge Bates stated that he counted four proposed changes. First, to change "requests" to "consents." Second, to specify that the requisite writing must be signed by the defendant "in advance." Third, and contrary to the second suggestion, to revise the committee note to say that the writing could, if necessary, be provided at the outset of the proceeding. Fourth was the suggestion that the rule be clarified—a suggestion that might be addressed by the decision on the other proposed changes. Judge Bates suggested that it would be helpful to learn the sense of the committee on these proposals. He was not inclined to suggest remanding the proposal to the Advisory Committee unless the latter thought a remand was a good idea—and even then, he surmised, the Advisory Committee would want to know what the Standing Committee thought on each of these issues. Judge Kethledge said he believed the Advisory Committee would be fine with the second suggestion (inserting "in advance"). As to the first suggestion, the Advisory Committee's choice of "requests" would not foreclose situations where the idea itself came from someone other than the defendant, it simply required that the defendant come forward to trigger the remote proceeding—that is, the rule was meant to protect against situations where the decision to proceed remotely came after a discussion with the *judge*.

Professor Capra suggested that a compromise might be to insert "in advance" but also change "requests" to "consents." He urged the Standing Committee not to remand the entire proposal over this issue, and he suggested that his proposed compromise would not require republication. Professor Coquillette agreed with Professor Capra concerning the lack of need for republication.

A judge member noted that during the colloquy at the start of the hearing, the judge will make sure the defendant consents to proceeding remotely. Therefore, she recommended keeping the word "requests." The request would come in advance, and the consent would be confirmed via the colloquy at the hearing. Citing a recent example of a case in which the defendant challenged the voluntariness of his consent to proceed remotely, Judge Kethledge reiterated the importance of foreclosing the option of deciding midstream in a remote proceeding to convert the proceeding into a remote plea or sentencing proceeding.

Upon motion by a member, seconded by another: **The Standing Committee voted 10-3 to insert "before the proceeding and" in proposed new Criminal Rule 62(e)(3)(B)** on line 109 (page 154 in the agenda book). ("Before" and "proceeding" were substituted for "in advance of" and "hearing" for reasons of style and internal consistency.)

Upon motion by a member, seconded by another: **The Standing Committee voted 7-6 to change "requests" to "consents" in proposed new Criminal Rule 62(e)(3)(B) (p. 154, line 110), with conforming changes to be made to the committee note (p. 168).**

Judge Bates then invited the Standing Committee to vote on whether to give final approval to proposed new Criminal Rule 62, with the changes to Rule 62(e)(3)(B) that the Committee had just voted to make, conforming changes to the committee note (p.168), and the substitution of "comply with" for "be mindful of" in the Advisory Committee's revised note language concerning Rule 62(d)(1) (p.161).

Upon motion by a member, seconded by another: **The Standing Committee unanimously approved proposed new Criminal Rule 62.**

Judge Bates thanked the Standing Committee and the Advisory Committees, including the chairs and reporters, and specifically thanked Professor Capra and Professor Struve, for their work on all the emergency rules. He noted that the rules have now reached the Judicial Conference, and have done so particularly quickly.

Due to scheduling constraints, the Criminal Rules Advisory Committee provided its report (described infra p. 13) prior to the lunch break. After the lunch break, the Standing Committee resumed its discussion of joint committee business.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerned the proposal to add Juneteenth National Independence Day to the lists of specified legal holidays in Appellate Rules 26(a)(6)(A) and 45(a)(2), Bankruptcy Rule 9006(a)(6)(A), Civil Rule 6(a)(6)(A), and Criminal Rules 45(a)(6)(A) and 56(c).

A practitioner member suggested that the semi-colon in the proposed amendment to Bankruptcy Rule 9006 was a typo, and the Bankruptcy Rules Advisory Committee agreed to substitute a comma.

Professor Capra noted that the committee notes were not uniform between the rule sets. He suggested that the reporters confer after the meeting to achieve uniformity.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval (as technical amendments) to the proposed amendments to Appellate Rules 26 and 45, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rules 45 and 56, subject to the committee notes being made uniform.**

Pro Se Electronic Filing Project

Professor Struve introduced this item. She thanked the Federal Judicial Center (FJC) for its superb research work and its report ("Federal Courts' Electronic Filing By Pro Se Litigants") which was available online. Judge Bates had asked Professor Struve to convene the reporters for

the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees, along with members from the FJC, to discuss suggestions relating to electronic filing by self-represented litigants, and this working group had met in December 2021 and March 2022. One issue is whether self-represented litigants have access to the court's case management / electronic case filing ("CM/ECF") system. Among the findings by the FJC is that such access varies by type of court, with the courts of appeals most willing to grant such access to self-represented litigants, the district courts less so, and the bankruptcy courts least of all. On the other hand, a number of bankruptcy courts are using an "electronic self-representation" system. This raises the question of whether the four Advisory Committees may select different approaches for differing levels of courts.

Another question is that of service on persons who receive notice through CM/ECF. When a non-CM/ECF user files a document, the clerk's office will subsequently enter it into CM/ECF; the system then sends a notice of electronic filing to parties that are CM/ECF users. Yet many courts continue to require the non-CM/ECF filer to nonetheless serve the filing on other parties, whether or not those parties are CM/ECF users.

Professor Struve noted that the working group was planning a further discussion sometime in the summer with the hope of teeing up topics for discussion by the four Advisory Committees at their fall meetings.

Dr. Reagan noted that in the civil context there are two different groups of self-represented people who file—prisoners and non-prisoners—and these groups represent significantly different concerns and challenges. Additionally, the concept of electronic filing does not necessarily mean using CM/ECF; other methods include email or electronic upload, but these methods can pose cybersecurity issues. CM/ECF is difficult even for attorneys to use, and at least one district requires attorneys to initiate cases via paper filings rather than via CM/ECF.

Electronic Filing Deadline Study

Judge Bates provided a brief introduction to this information item concerning electronic filing times in federal courts. He noted that an excerpt from the FJC's recently-completed report on this topic appeared in the agenda book starting at page 185. The report had not yet been reviewed by the subcommittee that had been formed to consider whether the time-computation rules' presumptive electronic-filing deadline of midnight should be altered.

Dr. Reagan noted that the FJC studied the frequency of filings at different times of day. While results varied from court to court, the FJC found that most filing occurred during business hours, but that a significant amount did occur outside of business hours. He noted that in the bankruptcy courts, there were a significant number of notices filed robotically overnight.

The FJC began a pilot survey of judges and attorneys, but it gathered limited data because it closed the survey due to the pandemic. Continuing the survey under current conditions would be unproductive because opinions and experiences during the pandemic would not be representative of future non-emergency practice. But the limited pilot-study data did show a distinction between the views of sole practitioners and those of big-firm lawyers. The latter were more likely to favor moving the presumptive deadline to a point earlier than midnight.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge provided the report of the Advisory Committee on Criminal Rules, which met in Washington, DC on April 28, 2022. For the sake of brevity, Judge Kethledge highlighted only the Juneteenth-related amendments to Criminal Rules 45 and 56 (pp. 11–12, supra) and one other technical amendment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 810.

Action Item

Final Approval

Rule 16(b)(1)(C)(v). Judge Kethledge introduced the only action item, which was a proposed technical amendment (p. 814) to fix a typographical error in a cross-reference in Rule 16(b)(1)(C)(v), addressing defense disclosures. The version of the rule with the typo is set to take effect on December 1, 2022, absent contrary action by Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously gave final approval to the proposed amendment to Rule 16(b)(1)(C)(v) as a technical amendment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which met in Washington, DC on May 6, 2022. The Advisory Committee presented nine action items: three rule amendments for which it was requesting final approval and six rule amendments for which it was requesting publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 866.

Action Items

Final Approval

Rule 106. Judge Schiltz introduced the proposed amendment to Rule 106 shown on page 879 of the agenda book. Rule 106 is the rule of completeness. When a party introduces part of a statement at trial, and that partial statement may be misleading, another party can introduce other parts of the statement that in fairness ought to be considered. The proposed amendment would fix two problems with the existing rule.

First, suppose a prosecutor introduces part of a hearsay statement and the completing portion does not fall within a hearsay exception. There is a circuit split as to whether the completing portion can be excluded under the hearsay rules. This amendment would resolve the split by making explicit that the party that introduced the misleading statement could not object to

completion on grounds of hearsay. But the completing statement could still be excluded on other grounds.

Second, current Rule 106 only applies to "writings" and "recorded statements," not oral statements. This means that for an oral statement, the court needs to turn to the common law. Unlike other evidentiary questions, here the common law has only been partially superseded by the Federal Rules of Evidence. This is particularly problematic because completeness issues will generally arise during trial when there is no opportunity for research and briefing.

The Advisory Committee received a handful of comments, all but one of which were positive. One public comment spurred a change to the rule text. The proposal as published would have provided for the completion of "written or oral" statements, a phrase that the Advisory Committee had thought would cover the field. But as a public comment pointed out, that phrase failed to encompass statements made through conduct or through sign language. As a result, the Advisory Committee decided to delete the current rule's phrase "writing or recorded" so that the rule will refer simply to a "statement."

A judge member asked whether there would be Confrontation Clause issues if a criminal defendant introduced part of a statement and the government was allowed to introduce the completing portion over a hearsay objection. Professor Capra stated that for a Confrontation Clause issue to arise the completing portion would have to be *testimonial* hearsay, which would be quite rare. If the issue did arise, the Supreme Court in *Hemphill v. New York*, 142 S. Ct. 681, 693 (2022), left open the possibility a forfeiture might apply. The idea would be that the rule of completeness might be applicable as a common law rule incorporated into the Confrontation Clause's forfeiture doctrine. Judge Schiltz added that the proposed amendment did not purport to close off a potential Confrontation Clause objection.

Another judge member stated that the proposed amendment was helpful because a judge at trial should not have to look to the common law to resolve issues of completion.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 106.**

Rule 615. Judge Schiltz introduced the proposed amendment to Rule 615. Rule 615 requires that upon motion, the judge must exclude from the courtroom witnesses who have yet to testify, unless they are excepted from exclusion by current subdivisions (a) through (d). Rule 615 is designed to prevent witnesses who have not yet been called from listening to others' testimony and tailoring their own testimony accordingly. The current rule does not speak to instances where a witness learns of others' testimony from counsel, a party, or the witness's own inquiries. Thus, in some circuits, if the court enters a Rule 615 order without spelling out any additional limits, the sole effect is to physically exclude the witness from the courtroom. But other circuits have held that a Rule 615 order automatically forbids recounting others' testimony to the witness, even when the order is silent on this point. In those circuits, a person could be held in contempt for behavior not explicitly prohibited by either rule or court order. The proposed amendment would add a new subdivision (b) stating that the court's order can cover disclosure of or access to testimony, but it must do so explicitly (thus providing fair notice).

The proposed amendment also makes explicit that when a non-natural person is a party, that entity can have only one representative at a time excepted from Rule 615 exclusion under the provision that is now Rule 615(b) and would become Rule 615(a)(2). This would put natural and non-natural persons on an even footing. Under the current rule, some courts have allowed entity parties to have two or more witnesses excepted from exclusion under Rule 615(b). The amended rule would not prevent the court from finding these additional witnesses to be essential (see current Rule 615(c)), or statutorily authorized to be present (see current Rule 615(d)).

The Advisory Committee received only a handful of public comments on the proposal, all of which were positive.

Focusing on proposed Rule 615(b)(1)'s statement that "the court may … by order … prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom," a judge member asked whether there was any consideration of specifying whom the prohibition runs against? Judge Schiltz answered that trial testimony might be disclosed by a range of people, such as an attorney, a paralegal, or even the witness's spouse. It would be tricky to delineate in the rule. Professor Capra added that it would be a case-by-case issue, and the judge would specify in the Rule 615 order who was subject to any Rule 615(b)(1) prohibition.

A practitioner member noted that in longer trials, there may be situations where a corporate party needs to change who its designated representative is. Professor Capra responded that the committee note recognizes the court's discretion to allow an entity party to swap one representative for another during the trial.

The same practitioner member echoed the judge member's previous suggestion that Rule 615(b)(1) should explicitly state who is prohibited from disclosing information to the witness. Professor Capra stated that the rule does not need to say that; rather, that is an issue that the court should address in its order. Judge Schiltz added that the judge in a particular case is in the best position to determine in that case who must not disclose trial testimony to a witness.

The practitioner member turned to a different concern, focusing on the portion of the committee note (the last paragraph on page 888) that dealt with orders "prohibiting counsel from disclosing trial testimony to a sequestered witness." The committee note acknowledged that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions" of professional responsibility, assistance of counsel, and the right to confrontation in criminal cases. The member expressed concern that the proposed rule would permit such orders without setting standards or limits to govern them. The member acknowledged that this vagueness was a conscious choice, but argued that it gave the judge too much discretion. Judge Schiltz responded that such discretion already exists today under the current rule. And specifying standards for such orders in the rule would be nightmarishly complicated. Judge Bates added that all the proposed rule would do is tell judges that if they want to do anything more than exclude a witness from the courtroom, the order needs to explicitly spell that out.

Another practitioner member stated he supports the proposed rule change. The proposal gives clarity, while leaving discretion to the judge to tailor an order on a case-by-case basis.

However, he questioned whether the language in the committee note was too strong in stating that an order governing disclosure of trial testimony "raises" the listed issues. Based on suggestions from this member and the other practitioner member who had raised concerns about the passage, Professor Capra agreed to redraft the paragraph's second sentence to read: "To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis."

Ms. Shapiro turned the Committee's attention to the committee note's discussion (page 889) of proposed Rule 615(a)(3). She suggested that the words "to try" be removed from the note's statement that an entity party seeking to have more than one witness excepted from exclusion at one time is "free to try to show" that a witness is essential under Rule 615(a)(3). "Free to try" suggests that the showing is a difficult one, when really it is routine for courts to allow the United States to except from exclusion additional necessary witnesses such as case agents. A judge member questioned whether "is free to show" is the correct phrase. Should the note say "must show" or "may show" instead? Discussion ensued concerning the relative merits of "must," "may," "should," and "needs to." Professor Capra and Judge Schiltz agreed to revise the note to say "needs to show."

Professor Bartell suggested that a committee note reference to "parties subject to the order" (page 888) be revised to say "those" instead of "parties" (since a Rule 615(b) order can also govern nonparties). Professor Capra agreed and thanked Professor Bartell.

The Advisory Committee renewed its request for final approval of Rule 615, with the three amendments to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 615.**

Rule 702. Judge Schiltz introduced this action item. Rule 702 deals with expert testimony and the proposed amendment would address two problems. The first relates to the standard the judge should apply when deciding whether to admit expert testimony. Current Rule 702 sets requirements that must be met before a witness may give expert testimony. It is clear under the caselaw and the current Rule 702 that the judge should not admit expert testimony until the judge—not the jury—finds by a preponderance of the evidence that the requirements of Rule 702 are met. However, there are a lot of decisions from numerous circuits that fail to follow that requirement, and the most common mistake is that the judge instead asks whether *a jury* could find by a preponderance of the evidence that the requirements of Rule 702 are met. As a result, very often jurors are hearing expert testimony that they should not be permitted to hear. Under a correct interpretation of current Rule 702, the proposed amendment does not change the law; it merely makes clear what the rule already says.

Second, the proposed amendment addresses the issue of overstatement, *i.e.*, where a qualified expert expresses conclusions that go beyond what a reliable application of the methods to the facts would allow. Overstatement issues typically arise with respect to forensic testimony in criminal cases. For example, the expert may say the fingerprint on the gun *was* the defendant's, or

the bullet *came from* the defendant's gun, when that level of certainty is not supported by the underlying science. For some time, the Advisory Committee has been debating and considering whether to address this issue via a rule amendment. Some members thought current Rule 702 gives attorneys all the tools they need to attack issues of overstatement, but that they were not using them. Other members thought that amending the rule would serve an educational goal and draw attention to this problem. After considerable debate, the Advisory Committee decided to amend Rule 702(d). Currently, the subdivision requires that "the expert has reliably applied the principles and methods to the facts of the case." The proposed amendment would require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The hope is that this change in rule language, alongside the guidance in the committee note, will shift the emphasis and encourage judges and parties to focus on the issue of overstatement, particularly concerning forensic evidence in criminal cases.

The Advisory Committee received over 500 public comments regarding the proposed amendments to Rule 702. Additionally, about two dozen witnesses spoke on the proposal at the Advisory Committee's hearing.

Professor Capra summarized the public comments. Viewed quantitatively, they were mostly negative. There was a perceptible difference of opinion between plaintiffs' and defendants' lawyers. Many comments used identical idiosyncratic language. If commenters were copying and pasting language from others' comments, that could explain some of the volume. A number of comments evinced a misunderstanding of current law. For example, many comments said the proposed amendment would shift the burden from the opponent to the proponent—an assertion premised on the incorrect idea that the burden is now on the opponent to show that proposed expert testimony is unreliable. Such misunderstandings support the need for the proposed amendment.

Additionally, many comments criticized the published proposal's use of the "preponderance of the evidence" standard. Particularly, parties were concerned that the standard meant that judges could only rely on *admissible* evidence. However, Rule 104(a) explicitly states that the court can consider inadmissible evidence. The Advisory Committee therefore did not think that these critiques had merit. Nonetheless, because the published language had proven to be a lightning rod, the Advisory Committee chose to change the language, but not the meaning, of the proposed rule text, which (as presented to the Standing Committee) requires that the "proponent demonstrates to the court that it is more likely than not" that the Rule's requirements are met.

The phrase "to the court" in that new language responded to another set of concerns voiced in the comments—namely, *who* needed to find that the preponderance of the evidence standard was met. The proposed Rule 702 as published for public comment did not specify who—whether the judge or the jury—was tasked with making this finding. Implicitly, the judge must make the finding, as all decisions of admissibility under the Federal Rules of Evidence are made by the judge. However, because of all the uncertainty in practice as to who has to make this finding, there was significant sentiment on the Advisory Committee to specify in the rule text that it is the court that must so find. The Advisory Committee explored various ways to phrase this before landing on "if the proponent demonstrates to the court that it is more likely than not" that the checklist in Rule 702 is met.

Judge Schiltz noted a change the Advisory Committee would like to make to the committee note (page 893). At the Advisory Committee meeting, a member expressed concern that the rule could be read as requiring that the judge make detailed findings on the record that each of the requirements of Rule 702 is met, even if no party objects to the expert's testimony. To alleviate that concern, the Advisory Committee added a statement in the note that "the rule [does not] require that the court make a finding of reliability in the absence of objection." Prior to the Standing Committee meeting, a judge member had expressed concern that this statement in the note was problematic. Judge Schiltz shared this concern. On the one hand, judges typically do not rule on admissibility questions unless a party objects. But on the other hand, judges are responsible for making sure that plain error does not occur. So it was not exactly right to say that "the rule" did not require a finding. Judge Schiltz accordingly proposed to change "rule" to "amendment" so that the note would say, "Nor does the amendment require that the court make a finding." Thus revised, the note would observe that the amendment was not intended to change current practice on this issue but would avoid taking a position on what Rule 702 already does or does not require. Professor Capra agreed that it was better to skirt the topic; if one were to state in Rule 702 that "there must be an objection, but even if not, there's always plain error review," then one might also need to add that caveat to all the other rules.

A judge member stated her appreciation for the changes: although they are somewhat minor, they help clarify perennial issues.

Judge Bates noted that the language regarding the preponderance of the evidence standard ("more likely than not") comes from the Supreme Court in *Bourjaily v. United States*, 483 U.S. 171 (1987). It therefore is already the law.

A practitioner member asked why the statement "if the proponent demonstrates to the court that it is more likely than not" was written in the passive tense, as opposed to active tense language, such as "if the court finds that it is more likely than not." Judge Schiltz stated that some members of the Advisory Committee were concerned that if the rule used the word "finding," that could be read as requiring the judge to make findings on the record even in the absence of an objection. The language may be awkward, but the Advisory Committee arrived at it as consensus language after years of debate.

A judge member raised a question from a case-management perspective: whether there is any difficulty combining a Rule 702 analysis with a Daubert hearing, and in what sequence these issues would arise. Professor Capra responded that the overall hearing should be thought of as a Rule 702 hearing. Rule 702 is broader than *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which only concerned methodology. Methodology falls under current Rule 702(c). The judge member thanked Professor Capra for his answer and emphasized the importance of educating the bar and bench about that fact. Citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), *as amended* (Jan. 16, 2009), Professor Marcus observed that Rule 702 issues can come up at junctures prior to trial, such as in connection with class certification.

A judge member applauded the Advisory Committee for drafting a very helpful amendment that does exactly what the Advisory Committee said it was trying to do: not change anything, but rather make clear what the law is.

Professor Capra thanked Judge Kuhl for formulating the language in proposed amended Rule 702(d). The Advisory Committee then renewed its request for final approval of Rule 702, with the one change to the committee note documented above.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 702.**

Judge Bates thanked—and members of the Standing Committee applauded – Professor Capra, Judge Schiltz, and the Advisory Committee for all their work on the proposed amendments to Rules 106, 615, and 702.

Publication for Public Comment

Judge Schiltz stated that the Advisory Committee had six proposed amendments that it was requesting approval to publish for public comment. Every few years, usually coinciding with the appointment of a new Advisory Committee chair, the Advisory Committee reviews circuit splits regarding the Federal Rules of Evidence. The Advisory Committee lets most of those splits lie, but it found that these six proposed amendments—which came as a result of that study—were worth pursuing.

Rule 611(d)—Illustrative Aids. Judge Schiltz introduced this action item. Illustrative aids are used in almost every jury trial. Nonetheless, there is a lot of confusion regarding their use, especially as to the difference between demonstrative evidence and illustrative aids; the latter are not evidence but are used to assist the jury in understanding the evidence. There also are significant procedural differences in how judges allow illustrative aids to be used, including (i) whether a party must give notice, (ii) whether the illustrative aid may go to the jury, and (iii) whether illustrative aids are part of the record. This proposed new rule, which would be Rule 611(d), was designed to clarify the distinction between illustrative aids and demonstrative evidence. The Advisory Committee is hoping that the public comments will assist it in refining the proposal. It is likely impossible to get a perfect dictionary definition of the distinction, but the Advisory Committee hoped to end up at a framework that would assist judges and lawyers in making the distinction.

The proposed new rule sets various procedural requirements for the use of illustrative aids. It would require a party to give notice prior to using an illustrative aid, which would allow the court to resolve any objections prior to the jury seeing the illustrative aid. It would prohibit jurors from using illustrative aids in their deliberations, unless the court explicitly permits it and properly instructs the jury regarding the jury's use of the illustrative aid. Finally, it would require that to the extent practicable, illustrative aids must be made part of the record. This would assist the resolution of any issues raised on appeal regarding use of an illustrative aid.

Professor Capra noted a few changes to the rule and committee note. First, Professor Kimble had pointed out that by definition notice is in advance. Therefore, the word "advance" was deleted from line 13 of the rule text (p. 1010). Second, Rule 611(d)(1)(A) sets out the balancing test the court is to use in determining whether to permit use of an illustrative aid. The provision is

intended to track Rule 403 but is tailored to the particularities of illustrative aids. In advance of the Standing Committee meeting, a judge member asked why the proposed rule in line 9 said "substantially outweighed," as opposed to just "outweighed." "Substantially outweighed" is the language in Rule 403, but the member questioned why there should be such a heavy presumption in favor of permitting use of illustrative aids. The Advisory Committee welcomes public comment on this question, and thus proposes to include the word "substantially" in brackets. Third, the same judge member had pointed out prior to the Standing Committee meeting that the committee note was incorrect in saying that illustrative aids "ordinarily are not to go to the jury room unless all parties agree" (p. 1014). Rather, he suggested "unless all parties agree" be changed to "over a party's objection." The Advisory Committee agreed to this change. Finally, Professor Capra stated that the "[s]ee" signal at the end of the carryover paragraph on page 1013 of the agenda book should be a "[c]f." signal. Rule 105 deals with evidence admitted for a limited purpose, and therefore is not directly applicable since illustrative aids are not evidence. A further change was made to the sentence immediately preceding the citation to Rule 105. Because Rule 105 does not apply, the statement that an "adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used" is not correct. Rather, the adverse party "may ask to have the jury" so instructed. Professor Capra expressed agreement with this change. Later in the discussion, an academic member asked why a judge would refuse a request for such an instruction. Judge Schiltz suggested, for example, that if the judge has already given the jury many instructions on illustrative aids, she may feel that a further instruction is unnecessary. But he agreed that almost always the judge will give a limiting instruction.

Judge Bates asked about a comment in the Advisory Committee's report that it was "important to note" that the proposed rule "was not intended to regulate" PowerPoint slide presentations or other aids that counsel may use to help guide the jury in opening or closing arguments. This topic, Judge Bates noted, was a particular focus in the Advisory Committee's discussions, and he asked why it was not mentioned in the committee note. Judge Schiltz stated that the Advisory Committee was aware that likely more language would need to be added to the note, but that it wanted to receive public comments first. The debate at the Advisory Committee meeting centered around whether opening or closing slides even are illustrative aids. Participants asserted that such PowerPoints are just a summary of argument. But the rejoinder was, what if a party builds an illustrative aid into its slide presentation? Professor Capra added that the problem with adding a sentence that says that the rule does not regulate materials used during closing argument is that where an illustrative aid is built into the slide presentation, this would not be an accurate statement.

A judge member suggested that Rule 611(d)(2) should set a default rule as to whether the illustrative aid should go to the jury. As currently worded, that provision only addressed what would happen in the event of an objection. Judge Schiltz suggested setting as the default rule that it does not go to the jury. Based on this suggestion, Rule 611(d)(2) was revised to provide that "[a]n illustrative aid must not be provided to the jury during deliberations unless: (A) all parties consent; or (B) the court, for good cause, orders otherwise." Professor Capra undertook to make conforming changes to the relevant portion of the committee note.

A practitioner member stated that this proposal could turn out to be one of the most important rule changes during his time on the Standing Committee. Trials nowadays are as much

a PowerPoint show as anything else. If you are going to address the jury in opening or closing, you should be forced to share the PowerPoints in advance. Most judges require this because, otherwise, an inappropriate statement in a slide presentation could cause a serious problem. But also, slide presentations are being used in direct and cross-examination of witnesses, and with expert witnesses sometimes the entirety of the examination is guided by the slide presentation. In listing categories covered by the proposed rule, the note refers to blackboard drawings. Blackboard drawings are often created on the fly based on the answers the witness gives. There is no way to give the other party the opportunity to review such a drawing in advance. Taken literally, the member suggested, the proposed rule would basically require the judge to preview the trial testimony in advance of trial because the whole trial is being done with PowerPoints. Summing up, the member stressed the real-world importance of the proposed rule. He advised giving attention to the distinction between experts and fact witnesses. A requirement for notice would play out differently as applied to openings and closings, versus direct examination, versus cross-examination. If a lawyer must give opposing counsel the direct-examination PowerPoints in advance, opposing counsel can use those slides in preparing the cross-examination. The rulemakers should think about how that would change trials. The member advocated seeking comment from thoughtful practitioners such as members of the American College of Trial Lawyers.

Professor Capra agreed that these are important questions, and he hoped that practitioner input at the upcoming Advisory Committee meeting and hearings will provide guidance. He stated that the goal of the rule is not to touch on every issue that may come up but rather to create a framework for handling illustrative aids. How far to go into the details is still an open question. Judge Schiltz acknowledged that the proposal presents challenging issues, and observed that the Advisory Committee's upcoming fall symposium would provide helpful input. He noted that the notice requirement can be met by disclosing the illustrative aid minutes prior to presenting it to the jury. This allows the court to resolve any objections before the jury sees the aid. The same practitioner member reiterated that although opening and closing slides should be disclosed before use, he does not think that will work with illustrative aids used with witnesses. Judge Schiltz said the views of practitioner members of the Advisory Committee were the exact opposite: opening and closing slides are sacrosanct, but items to be shown to a witness can be disclosed prior to use.

Another practitioner member agreed with the description of current trial practice provided by the first practitioner member. He stated that the broader the scope of the rule, the more the word "substantially" needs to be retained. Additionally, when you use a slide presentation with a witness, you are trying to synthesize what you think the witness will say. When you use a slide presentation for opening or closing, it is in essence your argument. Disclosing that feels strategically harmful. Once the Advisory Committee receives the public comments, it will be critical to explain when the rule applies and when it does not. For example, the rule refers to using illustrative aids to help the factfinder "understand admitted evidence." Judges who think that PowerPoints are illustrative aids might bar their use in opening arguments because no evidence has yet been admitted.

The Advisory Committee requested approval to publish for public comment proposed new Rule 611(d), with the changes as noted above to both the rule and committee note.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 611.**

Rule 1006. Judge Schiltz introduced this action item as a companion item to the Rule 611(d) proposal. Rule 1006 provides that a summary of voluminous records can itself be admitted as evidence if the underlying records are admissible and too voluminous to be examined in court. Many courts fail to distinguish between summaries of evidence that are themselves evidence, which are covered by Rule 1006, and summaries of evidence that are merely illustrative aids. Judges often mis-instruct juries that Rule 1006 summaries are not evidence when they are in fact evidence. And some courts have refused to allow Rule 1006 summaries when any of the underlying records have been admitted as evidence, while other courts have refused to allow Rule 1006 summaries *unless* the underlying records are also admitted into evidence, neither of which is a correct application of the rule. Rather, Rule 1006 allows parties to use these summaries in lieu of the underlying records regardless of whether any of the underlying records have been admitted in their own right.

A practitioner member stated he thought this was a good rule. He queried whether the rule should mention "electronic" summaries, but he concluded that it was probably unnecessary because that would be covered by the general term "summary." Professor Capra noted that under Rule 101(b)(6), the Rule's reference to "writings" includes electronically stored information.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1006.**

Rule 611(e)—Juror Questions. Judge Schiltz introduced this action item. This proposed new rule subdivision does not take a position on whether judges should permit jurors to ask questions. Instead, the rule sets a floor of protection that a judge must follow if the judge determines that juror questions are permissible in a given case. These protections were pulled together from a review of the caselaw regarding juror questions.

A practitioner member stated that he cannot recall ever having a jury trial where a judge permitted juror questioning. He asked whether there is a sense as to how prevalent the practice is. He noted that once this is in the rulebook, it has the potential to come in in every case, and that could transform the practice in the country. Judges who do not allow the practice may feel compelled to permit it. Judge Schiltz stated that he does not permit juror questions but another judge in his district does so in civil cases. Another district judge reported that some judges in the Northern District of Illinois permit the practice, though he does not, and it is controversial. Judge Bates reported similar variation in the District of Columbia, although he does not permit juror questions. Judge Schiltz acknowledged that having a rule in the rulebook would appear to give an imprimatur to the practice. But the practice is fairly widespread and is not going away.

A judge member stated that the practice is prevalent in her district, in part because many of the judges previously were state-court judges and Arizona allows juror questions. She did not take a position on whether to adopt the rule, but she offered some suggestions on its drafting. She

thought proposed Rule 611(e)(1) did an excellent job of covering instructions to the jurors. However, Rule 611(e)(1)(F)'s requirement of an instruction that "jurors are neutral factfinders, not advocates," gave her pause. Jurors may be confused as to how to incorporate that instruction into what they may or may not ask. She suggested that this might be explained in the committee note. Additionally, she suggested considering whether the rule should address soliciting the parties' consent to jurors asking questions. Finally, she noted that Rule 611(e)(3) uses two different verbs: the judge must *read* the question, or allow a party to *ask* the question. Professor Capra responded that "ask" is meant to reflect that one of the counsel may want to ask the question, that is, make it their own question. A judge would do nothing more than read it. Another judge member stated that though he did not permit juror questions himself, the practice was sufficiently prevalent that it made sense to have a rule on point. He pointed out a discrepancy between the rule text and note (the note said that the judge should not disclose which juror asked the question, but the rule itself did not so provide). He also questioned the read / ask distinction in Rule 611(e)(3). Responding to a suggestion by Judge Schiltz, this member agreed that this concern could be addressed by revising the provision to state, "the court must ask the question or permit one of the parties to do so." A bit later, discussion returned to the read / ask distinction, and it was suggested that "read" was a better choice than "ask" because the judge might wish to emphasize to jurors that questions should not be asked extemporaneously. Another judge member then used the term "pose," and Professor Capra agreed that "pose" was a better choice than "read" or "ask."

Professor Bartell noted that subsection (3) only mentions questions that are "asked," while other subsections distinguish "asked, rephrased, or not asked." While it seems subsection (3) is meant to apply both to questions that are asked and those that are first rephrased, it is ambiguous, and subsection (3) could be read as not applying to questions that are rephrased.

A practitioner member asked whether this rule was modeled after a particular judge's standing order, and whether such resources could be cited in the committee note to illustrate that the practice already exists. Professor Capra stated that he reviewed the caselaw and included all the requirements found in the caselaw that were appropriate to include in a rule. But he agreed that it would be useful to cite other resources, such as the Third Circuit's model civil jury instruction, in the committee note.

Another practitioner member reiterated his concern that by putting this out for public comment, the Standing Committee is in essence putting its imprimatur on this practice. This is a controversial practice, and there are a number of judges who do not allow it. This member suggested revising Rule 611(e)(1) to state that the court has discretion to refuse to allow jurors to ask questions. Professor Capra stated that this suggestion gave him pause. There may be requirements in some jurisdictions that courts must permit the practice, or there may be such requirements in the future. The Advisory Committee did not want to take a stand either way.

Judge Bates asked whether Judge Schiltz and Professor Capra would consider taking the Rule 611(e) proposal back to the Advisory Committee to consider the comments of the Standing Committee. Professor Capra stressed the value of sending proposals out for comment in one large package rather than seriatim. Judge Bates noted, however, that the Rule 611(d) and 611(e) amendments are both new subdivisions that deal with entirely different matters.

A judge member stated that although she herself is "allergic" to the practice of jurors asking questions, the practice exists and the rules should account for it. But this member expressed agreement with Judge Bates's suggestion that the Advisory Committee consider these issues further before putting the rule out for public comment.

An academic member stated that his instinct was not to delay publication. By contrast to the Bankruptcy Rules, which are frequently amended, the tradition with the Evidence Rules has always been to try to avoid constant changes and—instead—to make amendments only periodically, in a package. The comments from the Standing Committee were important, and it was possible the Advisory Committee would decide not to go forward with the proposal after public comment; but this member favored sending the proposal forward for public comment.

Another judge member stated she agreed with Judge Bates. She could not recall there ever being an appellate issue regarding juror questions, and she favored waiting for the issue to percolate before adopting a rule on the issue. Additionally, judges who do allow juror questioning are very careful already. The judge member also questioned whether the rule should distinguish between the practice in civil and criminal cases. Had the Advisory Committee received any feedback from the criminal defense bar? What about from the government? This member agreed with the prediction that if the rule were to go forward without a caveat up front, it would be a signal to judges that they should be permitting the practice. Professor Capra stated that there has been a case in every circuit so far. He added that the public defender on the Advisory Committee voted in favor of the rule.

A judge member stated that if and when the rule did go out for public comment, the Advisory Committee should ask for comment on whether the practice should be allowed, not allowed, or left to the judge's discretion. Judge Bates added that even if the Advisory Committee did not specifically ask for it, the public comments would likely state whether that commentator thought the practice should be permitted.

Another judge member suggested that the rulemakers should be open to regional variations. The practice arose in Arizona state court and was adopted in the California state courts, and then as the state judges have moved on to the federal bench, they have taken the practice with them. The practice, this member suggested, is not as rare as it might seem to those on the East coast. Another judge member pointed out that the Ninth Circuit's model jury instruction addressing juror questions is presented in a way that makes clear that the judge has the option to allow or not allow juror questions. This has the benefit of clarifying that it is discretionary while still providing guidance.

As a result of the comments and suggestions received from the Standing Committee, the Advisory Committee withdrew the request for publication for public comment.

Rule 613(b). Judge Schiltz introduced this action item as an item that would conform Rule 613(b) to the prevailing practice. At common law, prior to introduction of extrinsic evidence of a prior inconsistent statement for impeachment purposes, the witness must be given an opportunity to explain or deny the statement. By contrast, current Rule 613(b) allows this opportunity to be given at any time, whether prior or subsequent to introduction of extrinsic evidence of the

statement. However, judges tend to follow the old common law practice, and the Advisory Committee agrees with that practice as a policy matter. Most of the time, the witness will admit to making the statement, obviating the need to introduce the extrinsic evidence in the first place. The proposed amendment would still give the judge discretion in appropriate cases to allow the witness an opportunity to explain or deny the statement after introduction of extrinsic evidence, such as when the inconsistent statement is only discovered after the witness finishes testifying and has been excused.

Professor Capra noted one style change to the rule, which moves the phrase "unless the court orders otherwise" to the beginning of the rule.

A practitioner member stated that he thought this was an excellent proposal.

Professor Kimble suggested changing "may not" to "must not." The style consultants tend to prefer "must not" in most situations. Professor Capra thought this suggestion would substantively change the rule. A party may not introduce the evidence unless the court orders otherwise, but the judge could allow it. It is not a command to the judge to not admit the evidence. Judge Schiltz stated he did not feel strongly one way or another, but based on Professor Capra's objection would keep the language as "may not."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 613(b).**

Rule 801(d)(2). Judge Schiltz introduced this action item, which concerns an amendment to the hearsay exemption for statements by a party-opponent. There is a split of authority on how the rule applies to a successor in interest of a declarant. Suppose, for example, that the declarant dies after making the statement; is the statement admissible against the declarant's estate? The Advisory Committee was unanimous in thinking the answer should be yes.

A judge member highlighted the statement in the committee note that the exemption only applies to a successor in interest if the statement was made prior to the transfer of interest in the claim. The member observed that this was obvious as a matter of principle, but it was not obvious from the text of the rule itself. He suggested that this is a sufficiently important limitation that it ought to be in the rule itself. Professor Capra undertook to consider this suggestion further during the public comment period; he suggested that writing the limit explicitly into the rule text might be challenging and also that the idea might already be implicit in the rule text.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 801(d)(2).**

Rule 804(b)(3). Judge Schiltz introduced the proposed amendment to Rule 804(b)(3)(B) set out on page 1029 of the agenda book. Rule 804(b)(3) provides a hearsay exception for declarations against interest. Rule 804(b)(3)(B) deals with the situation in a criminal case when a statement exposes the declarant to criminal liability. This tends to come up when a criminal

defendant wants to introduce someone else's out-of-court statement admitting to committing the crime. Rule 804(b)(3)(B) requires that defendant to provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. The circuits are split concerning the meaning of "corroborating circumstances." Some circuits have said the court may only consider the guarantees of trustworthiness inherent in the statement itself. Other circuits allow the judge to additionally consider other evidence of trustworthiness, even if extrinsic to the statement. The proposed amendment would direct judges to consider all the evidence, both that inherent in the statement itself and any evidence independent of the statement.

A judge member noted that the rule only talks about corroborating evidence, not conflicting evidence, while the note speaks both to corroborating and conflicting evidence. Judge Schiltz stated that he made this point at the Advisory Committee meeting, but the response was that mentioning conflicting evidence in the text of Rule 804(b)(3) would necessitate a similar amendment to the corresponding language in Rule 807(a)(1). Professor Capra stated that courts applying Rule 807 do consider conflicting evidence, even though the rule text only says "corroborating." It is better to keep the two rules consistent than to have people wondering why Rule 804(b)(3) mentions conflicting evidence while Rule 807 does not. The judge member observed that one way to resolve the problem would be to make a similar amendment to Rule 807. Judge Bates noted that this could be considered during the public comment period.

A practitioner member asked why, in line 25, it says "the totality of the circumstances," but in the next line it does not say *the* "evidence." Should the word "the" be added on line 26? Professor Capra undertook to review this with the style consultants during the public comment period.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 804(b)(3).**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met in San Diego on March 30, 2022. The Advisory Committee presented an action item and briefly discussed one information item. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 199.

Action Item

Publication for Public Comment

Amendments to Appendix of Length Limits. Judge Bybee introduced this action item. The Standing Committee had already approved for publication for public comment proposed amendments to Rules 35 and 40 regarding petitions for panel rehearing and hearing and rehearing en banc, as well as conforming amendments to Rule 32 and the Appendix of Length Limits (Appendix). Subsequent to that approval, the Advisory Committee noticed an additional change that needed to be made in the Appendix. Namely, the third bullet point in the introductory portion

of the Appendix refers to Rule 35, but the proposed amendments to Rules 35 and 40 would transfer the contents of Rule 35 to Rule 40. As the amendment to the Appendix has not yet been published for public comment, the Advisory Committee would like to delete this reference to Rule 35 in the Appendix and to include that change along with the other changes approved in January for publication for public comment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to the Appendix of Length Limits.**

Information Items

Amicus Curiae Disclosures. Professor Hartnett introduced the information item concerning potential amendments to Rule 29's amicus curiae disclosure requirements. The Advisory Committee was seeking feedback from the Standing Committee regarding four questions. Due to time constraints, Professor Hartnett chose to ask just two of the questions at the meeting. The first question asked concerned the relationship between a party and an amicus. The Advisory Committee was trying to get a sense of whether disclosure of non-earmarked contributions by a party to an amicus should be disclosed, and, if so, at what percentage. The competing views ranged from those who say these should not be disclosed at all because a contributor does not control what an amicus says, to those who say significant contributors (*i.e.*, at least 25 or 30 percent of the amicus's revenue) have such a significant influence over an amicus that the court and the public should know about it. Second, regarding the relationship between an amicus and a non-party, the Advisory Committee sought feedback on whether an amended rule should retain the exception to disclosure for contributions by members of the amicus that are earmarked for a particular amicus brief. A point in support of retaining the exception was that an amicus speaks for its members, and therefore these contributions need not be disclosed. Points against retaining the exception were that there is a big difference between being a general contributor to an amicus and giving money for the purpose of preparing a specific brief, and it is easy to evade disclosure requirements by first becoming a member of the amicus and then giving money to fund a particular brief.

Judge Bates stated these are important questions and ones that the Standing Committee should focus on. He encouraged members to share any comments with Professor Hartnett and Judge Bybee after the meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow, Professor Gibson, and Professor Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on March 31, 2022. The Advisory Committee presented eleven action items: seven for final approval, and four for publication for public comment. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 250.

Action Items

Final Approval

Restyled Rules for the 3000-6000 Series. Judge Dow introduced this action item, which presented for final approval the restyled Rules in the 3000 to 6000 series. The Standing Committee already gave final approval for the 1000 and 2000 series. The Advisory Committee received extensive public comments from the National Bankruptcy Conference on these rules, in addition to a few other public comments. Some of these comments led to changes. Professor Bartell noted that the Advisory Committee was not asking to send these rules to the Judicial Conference quite yet; rather, like the 1000 and 2000 series, they should be held until the remainder of the restyling project is completed.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed restyled Rules for the 3000-6000 series.**

Rule 3011. Judge Dow introduced this action item, which would add a subsection to Rule 3011 to require clerks to provide searchable access on each bankruptcy court's website to information about funds deposited under Section 347 of the Bankruptcy Code. This is part of a nationwide effort to reduce the amount of unclaimed funds. He noted that the Advisory Committee received one public comment, which led it to substitute the phrase "information about funds in a specific case" for the phrase "information in the data base for a specific case."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 3011.**

Rule 8003. Judge Dow introduced this action item to conform the rule to recent amendments to Appellate Rule 3. No public comments were received on this proposed rule amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 8003.**

Official Form 101. Judge Dow introduced this action item. Questions 2 and 4 of the individual debtor petition form, which concern other names used by the debtor over the past 8 years, would be amended to clarify that the only business names that should be reported are those the debtor actually used in conducting business, not the names of separate legal entities in which the debtor merely had an interest. This change would avoid confusion and make this form consistent with other petition forms. The Advisory Committee received one public comment; it made no changes based on this comment.

Judge Bates clarified for the Standing Committee that in contrast to some other forms, Official Bankruptcy forms must be approved by the Judicial Conference through the Rules Enabling Act process.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 101.**

Official Forms 309E1 and 309E2. Judge Dow introduced this action item regarding forms that are used to give notice to creditors after a bankruptcy filing. The Advisory Committee improved the formatting and edited the language of these forms in order to clarify the applicability of relevant deadlines. The Advisory Committee did not receive any comments, and its only post-publication change was to insert a couple of commas.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Forms 309E1 and 309E2.**

Official Form 417A. Judge Dow introduced this action item. This form amendment is to conform the form to the amendments to Rule 8003. There were no public comments on this proposed form amendment.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Form 417A.**

Publication for Public Comment

Restyled Rules for the 7000-9000 Series. Judge Dow introduced this action item, which sought approval to publish for public comment the next portion of the proposed restyled rules. The Advisory Committee applied the same approach to these rules as it did when restyling the first six series.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed restyled Rules for the 7000 to 9000 series.**

Rule 1007(b)(7). Judge Dow introduced this action item. Under the current rule, debtors are required to complete an approved debtor education course and file a "statement" on an official form evidencing completion of that course before they can get a discharge in bankruptcy. As revised, the rule would instead require filing the certificate of completion from the course provider, as that is the best evidence of compliance. The amendment would also remove the requirement that those who are exempt must file a form noting their exemption. This requirement is redundant, as in order to get an exemption, the debtor would have to file a motion, and the docket will therefore already contain an order approving the exemption.

The Advisory Committee also sought approval to publish conforming amendments changing "statement" to "certificate" in another subsection of Rule 1007 and in Rules 4004, 5009, and 9006.

A judge member noted, and the Advisory Committee agreed to remedy, a typo on page 666, line 14 of the agenda book ("if" should be "is").

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 1007(b)(7) and conforming amendments to Rules 1007(c)(4), 4004, 5009, and 9006.**

New Rule 8023.1. Judge Dow introduced this action item, which concerned a proposed new rule dealing with substitution of parties. While Civil Rule 25 (Substitution of Parties) applies to adversary proceedings, the Part VIII rules (which govern appeals in bankruptcy cases) do not currently mention substitution. Proposed new Rule 8023.1 is based on, and is virtually identical in language to, Appellate Rule 43.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed new Rule 8023.1.**

Official Form 410A. Judge Dow introduced this action item to amend the attachment to the proof-of-claim form that a creditor with a mortgage claim must file. The amendment revises Part 3 of the attachment (regarding the calculation of the amount of arrearage at the time the bankruptcy proceeding is filed) to break out principal and interest separately.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Official Form 410A.**

Information Items

Judge Dow briefly noted that the Bankruptcy Threshold Adjustment and Technical Correction Act had not yet been enacted by Congress, but if and when it were to be enacted, the Advisory Committee would seek final approval of technical amendments to a couple of forms and would ask the Administrative Office to repost an interim version of Rule 1020 for adoption by bankruptcy courts as a local rule. He also mentioned, but did not discuss at length, three other information items in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow, Professor Cooper, and Professor Marcus provided the report of the Advisory Committee on Civil Rules, which last met in San Diego on March 29, 2022. The Advisory Committee presented two action items and five information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 722.

Action Items

Final Approval

Rule 15(a)(1). Judge Dow introduced this action item, a proposed amendment to Rule 15(a)(1) for which the Advisory Committee was requesting final approval. The proposed amendment would replace the word "within" with the phrase "no later than." This change clarifies that where a pleading is one to which a responsive pleading is required, the time to amend the pleading as of right continues to run until 21 days after the earlier of the events delineated in Rule 15(a)(1)(B). The Advisory Committee received a few comments, but it made no changes based on these comments. In the committee note, it deleted one sentence that had been published in brackets and that appeared unnecessary.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 15(a)(1).**

Rule 72(b)(1). Judge Dow introduced this action item, which presented for final approval a proposed amendment to Rule 72(b)(1) (concerning a recommended disposition by a magistrate judge). The proposed amendment would bring the rule into conformity with the prevailing practice of district clerks with respect to service of the recommended disposition. Most parties have CM/ECF access, so the current rule's requirement of mailing the magistrate judge's recommendations is unnecessary. The amendment permits service of the recommended disposition by any means provided in Rule 5(b). The Advisory Committee received very few public comments. In the committee note, it deleted as unnecessary one sentence that had been published in brackets.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 72(b)(1).**

Information Items

Rule 12(a)(4). Judge Dow introduced this information item, which concerned a proposed amendment to Rule 12(a)(4) that was initially suggested by the DOJ and had been published for comment in August 2020. The Advisory Committee received only a handful of public comments, but two major comments were negative. Rule 12(a)(4) sets a presumptive 14-day time limit for filing a responsive pleading after denial of a motion to dismiss. This means that the DOJ only has 14 days after denial of a motion to dismiss on immunity grounds in which to decide whether to appeal the immunity issue; but courts frequently grant it an extension. The proposed amendment would have flipped the presumption, giving the DOJ 60 days as opposed to 14 unless the court shortened the time. The Advisory Committee considered a number of options, including a compromise time between 14 and 60 days, as well as providing the longer 60-day period only for cases involving an immunity defense.

The DOJ was unable to collect quantitative data as to how often it sought and received extensions. As a result, and based on the comments received and the views of both the Standing

and Advisory Committees members, the Advisory Committee voted not to proceed further with the proposed amendment to Rule 12(a)(4).

Judge Bates clarified that because the proposed amendment had not emerged from the Advisory Committee, this was not an action item, and therefore no vote of the Standing Committee was required.

Rule 9(b). Judge Dow introduced this information item, which concerned a proposal to amend the second sentence of Rule 9(b) in light of the Supreme Court's interpretation of that provision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The Advisory Committee had appointed a subcommittee to study the proposal. However, the subcommittee found that there were not many cases coming up that indicated a problem. Moreover, a number of Advisory Committee members thought *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal* were working pretty well in their cases. Therefore, the Advisory Committee chose not to proceed further.

Rule 41. Judge Dow noted this project, which was prompted by a suggestion from Judge Furman to study Rule 41(a)(1)(A). The initial question is whether that provision authorizes voluntary dismissal only of an entire action, or whether it also authorizes voluntary dismissal as to fewer than all parties or claims. The Advisory Committee appointed a subcommittee, which will study this issue and probably also Rule 41 more generally.

Discovery Subcommittee. Judge Dow provided an update on the Discovery Subcommittee, which is focused primarily on privilege log issues. The subcommittee met with bar groups and attended a two-day conference. There seems to be some common ground between the plaintiff and defense bar for procedures for privilege logs. There may be some forthcoming proposals to amend Rules 16 and 26 to deal with these procedural issues, particularly to encourage parties to hash out privilege-log issues early on.

The Discovery Subcommittee has paused its research into sealing issues pending an Administrative Office study of filing under seal.

MDL Subcommittee. Judge Dow introduced this information item. About fifty percent of federal civil cases are part of an MDL. The subcommittee's thinking continues to evolve as it receives input from the bench, the bar, and academics. About a year ago, the subcommittee was looking at the possibility of proposing a new Rule 23.3 (addressing judicial appointment and oversight of leadership counsel). The subcommittee then shifted and thought about revising Rules 16 and 26 to set prompts concerning issues that MDL judges ought to think about. Now, the subcommittee has begun to consider a sketch of a proposed Rule 16.1, which would contain a list of topics on which parties in an MDL could be directed to confer. Flexibility is critical, and any rule will just offer the judge tools to use in appropriate instances.

At a March 2022 conference at Emory Law School, the subcommittee heard from experienced transferee judges that lawyers can do a great service to the transferee judge by explaining their views of the case early on. The judge could then decide which of the prompts in the proposed rule fits the case. The rule would list issues on which the judge could require the lawyers to give their input.

The subcommittee has been focusing closely on the importance of an initial census. The initial census is key because it can tell the judge and parties who has the cases and what kinds of cases there are, and can help the judge make decisions on leadership counsel.

The subcommittee will work over the summer on the sketch of Rule 16.1 so as to tee up the question of whether or not to advance it. Judge Dow expressed a hope that the subcommittee would complete its work in the coming year.

Jury Trials. Judge Bates highlighted the portion of the Advisory Committee's report (pages 751–72) concerning the procedures for demanding a jury trial. Though the Advisory Committee has deferred consideration of this issue for the moment, Judge Bates suggested that it may be important to deal with it at some point. Judge Dow and Professor Cooper explained that Congress enacted legislation directing the FJC to study what factors contribute to a higher incidence of jury trials in jurisdictions that have more of them. Dr. Lee has launched that study, and predicts that he will have a short report on the topic ready for the Advisory Committee's fall agenda book.

OTHER COMMITTEE BUSINESS

Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002. Professor Struve presented this item, which concerned a report required under the E-Government Act of 2002. She thanked all the Advisory Committee chairs and reporters, Judge Bates, and the Rules Office staff for their work on this report. The privacy rules, which impose certain redaction requirements, took effect in 2007. The idea of the report is to evaluate the adequacy of these rules to protect privacy and security. The report does so in three ways: it discusses amendments (relevant to the privacy rules) that have been adopted since 2011 (the date of the last report); it notes privacy-adjacent items that are pending on the rules committees' dockets; and it discusses other privacy-related concerns discussed since 2011 that did not give rise to rule amendments because the rules committees determined that rule amendments were not the way to address those concerns. A new report to Congress will be prepared every two years going forward.

Professor Struve noted that the Standing Committee was asked to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, and to recommend that the Judicial Conference forward the report to Congress.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously voted to approve the proposed Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002 and to recommend that the Judicial Conference forward the report to Congress.**

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 1051 summarized legislation currently pending before Congress, as well as the Juneteenth National Independence Day Act, which passed and was signed into law by President Biden in 2021.

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 1061. The Judicial Conference requires the Standing Committee to submit a report on its strategic initiatives. He asked the Standing Committee for approval to submit the report.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the Judiciary Strategic Planning report for submission to the Judicial Conference.**

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their attention and insights. The Standing Committee will next meet on January 4, 2023. The location of the meeting had not yet been confirmed. Judge Bates expressed the hope that the meeting would take place somewhere warm.

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 4-6

2. a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

   b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date..... pp. 7-10

3. Approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 14-17

4. Approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 18-21

5. Approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 22-24

6. Approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law ..... pp. 28-29

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 7, 2022. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Allison Bruff, Bridget Healy, and Scott Myers, Rules Committee Staff Counsel; Burton S. DeWitt, Law Clerk to the Standing Committee; Dr. Tim Reagan and Dr. Emery Lee, Senior Research Associates, Federal Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives,

representing the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. Among other things, the advisory committee reports discussed two items that affect multiple rule sets: (1) recommendations from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees for final approval of rules addressing future emergencies; and (2) recommended technical amendments to those four rule sets addressing Juneteenth National Independence Day.

The Committee also received an update on two items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) consideration of suggestions to allow electronic filing by pro se litigants; and (2) consideration of suggestions to change the presumptive deadline for electronic filing. Finally, the Committee approved the proposed 2022 Report on the Adequacy of the Privacy Rules Prescribed Under the E-Government Act of 2002, was briefed on the judiciary's ongoing response to the COVID-19 pandemic, and approved a draft report regarding judiciary strategic planning.

PROPOSED EMERGENCY RULES

The proposals recommended for the Judicial Conference's approval include a package of rules for use in emergency situations that substantially impair the courts' ability to function in compliance with the existing rules of procedure. These rules were developed in response to Congress's directive in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") that rules be considered, under the Rules Enabling Act, to address future emergencies. The set of proposed amendments and new rules developed in response to this charge includes an

amendment to Appellate Rule 2 (and a related amendment to Appellate Rule 4); new Bankruptcy Rule 9038; new Civil Rule 87; and new Criminal Rule 62. The proposed amendments and new rules were published for public comment in August 2021.

Although there are some differences in the four proposed emergency rules – the Appellate rule is much more flexible, and the Bankruptcy, Civil, and Criminal rules provide for different types of rule deviations in a declared emergency – they share some overarching, uniform features. Each rule places the authority to declare a rules emergency solely in the hands of the Judicial Conference. Each rule uses the same basic definition of a "rules emergency" – namely, when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules." The Bankruptcy, Civil, and Criminal rules take a roughly similar approach to the content of the emergency declaration, setting ground rules to make clear the scope of the declaration. Each emergency rule limits the duration of the declaration; provides for additional declarations; and accords the Judicial Conference discretion to terminate an emergency declaration before the declaration's stated termination date. The Bankruptcy, Civil, and Criminal rules each address what will happen when a proceeding that has been conducted under an emergency rule continues after the emergency has terminated, though each rule does so with provision(s) tailored to take account of the different contexts and subject matters addressed by the respective emergency provisions.

To the extent that public comments touched on uniform aspects of the emergency rules, those comments focused on the role of the Judicial Conference. Some commentators criticized the decision to place in the hands of the Judicial Conference the authority to declare or terminate a rules emergency, though another commentator specifically supported the decision to centralize authority in the Judicial Conference. One commentator argued that there should be a backup

plan in case the emergency prevents the Judicial Conference from acting. The Advisory Committees reviewed these comments and uniformly concluded that the Judicial Conference was fully capable of responding to rules emergencies, and that the uniform approach of the Judicial Conference was preferable to other approaches involving more decisionmakers. Accordingly, the Advisory Committees voted to retain, as published, the substance of all of the uniform features of the set of proposed emergency rules. A few post-publication changes to the Appellate Rule's text, the Civil Rule's text and note, and the Criminal Rule's text and note are discussed below in connection with the recommendations of the respective Advisory Committees.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Appellate Rules 2, 4, 26, and 45.

Rule 2 (Suspension of Rules)

The proposed amendment to Appellate Rule 2 is part of the set of proposed rules, mentioned above, that resulted from the CARES Act directive that rules be considered to address future emergencies. The proposal adds a new subdivision (b) to Appellate Rule 2. Existing Rule 2, which would become Rule 2(a), empowers the courts of appeals to suspend the provisions in the Appellate Rules "in a particular case," except "as otherwise provided in Rule 26(b)." (Rule 26(b) provides that "the court may not extend the time to file: (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or (2) a notice of appeal from or a [petition to review an order of a federal administrative body], unless specifically authorized by law.") New Rule 2(b) would come into operation when the Judicial Conference declares an Appellate Rules emergency and would empower the court of appeals to "suspend in

all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2)."

In the event of a Judicial Conference declaration of an Appellate Rules emergency, a court of appeals' authority under Rule 2(b) would be broader in two ways than a court of appeals' everyday authority under Rule 2(a). First, the suspension power under Rule 2(b) reaches beyond a particular case. Second, the Rule 2(b) suspension power reaches time limits to appeal or petition for review, so long as those time limits are established only by rule. (Rule 2(b) does not purport to empower the court to suspend time limits to appeal or petition for review set by statute.)

Rule 4 (Appeal as of Right—When Taken)

The proposed amendment to Appellate Rule 4 is designed to make Appellate Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) (discussed below) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Appellate Rule 4 at any other time.

It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59." When Emergency Civil Rule 6(b)(2) is not in effect, this amendment makes no change at all. But if Emergency Civil Rule 6(b)(2) is ever in effect, a district court might extend the time to file a motion under Rule 59. If that happens, the amendment to Appellate Rule 4(a)(4)(A)(vi) would allow Appellate Rule 4 to properly take that extension into account.

Rule 26 (Computing and Extending Time) and Rule 45 (Clerk's Duties)

In response to the enactment of the Juneteenth National Independence Day Act (Juneteenth Act), Pub. L. No. 117-17 (2021), the Advisory Committee made technical amendments to Rules 26(a)(6)(A) and 45(a)(2) to insert "Juneteenth National Independence

Day" immediately following "Memorial Day" in the Rules' lists of legal holidays. Because of the technical and conforming nature of the amendments, the Advisory Committee recommended final approval without publication.

The Standing Committee unanimously approved the Advisory Committee's recommendations, after making a stylistic change to Appellate Rule 2(b)(4) to conform that Rule's language to the language used in the other Emergency Rules.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 2, 4, 26, and 45, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to the Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure with a recommendation that they be published for public comment in August 2022. The proposed amendments to the Appendix would conform with proposed amendments to Rules 35 and 40, which were approved for publication for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met on March 30, 2022. In addition to the matters noted above, the Advisory Committee discussed whether to propose an amendment to Rule 39 clarifying the process for challenging the allocation of costs on appeal and whether to propose amending Form 4 to simplify the disclosures required in connection with a request for in forma pauperis status. It referred to a subcommittee a new suggestion that Rule 29 be amended to require identification of any amicus or counsel whose involvement triggered the striking of an amicus brief. The Advisory Committee also continued its discussion of whether to propose amendments to Rule 29

with respect to disclosures concerning the relationship between an amicus and either parties or nonparties.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended for final approval the following proposals: Restyled Bankruptcy Rules for the 3000-6000 series; amendments to Bankruptcy Rules 3011, 8003, and 9006; new Bankruptcy Rule 9038; and amendments to Official Forms 101, 309E1, 309E2, and 417A. The Advisory Committee also recommended all of the foregoing for transmission to the Judicial Conference other than the restyled rules; the latter will be held for later transmission once all the bankruptcy rules have been restyled.

Restyled Rules Parts III, IV, V, and VI (the 3000-6000 series of Bankruptcy Rules)

The National Bankruptcy Conference submitted extensive comments on the restyled rules, and several others submitted comments as well. After discussion with the style consultants and consideration by the Restyling Subcommittee, the Advisory Committee incorporated some of those suggested changes into the revised rules and rejected others. (Some of the rejected suggestions were previously considered in connection with the 1000-2000 series of restyled rules, and the Advisory Committee adhered to its prior conclusions about those suggestions as noted at pages 10-11 in the Standing Committee's September 2021 report to the Judicial Conference.)

The Advisory Committee recommended final approval for this second set of restyled rules, but, as with the first set, suggested that the Standing Committee not submit the rules to the Judicial Conference until all remaining parts of the Bankruptcy Rules have been restyled, published, and given final approval, so that all restyled rules can go into effect at the same time.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System, redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) requiring the clerk of court to provide searchable access on the court's website to information about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). There was one comment on the proposed amendment, and the language of subdivision (b) was restyled and modified to reflect the comment. The Advisory Committee recommended final approval as amended.

Rule 8003 (Appeal as of Right – How Taken; Docketing the Appeal)

The proposed amendments to Rule 8003 conform to amendments recently made to Federal Rule of Appellate Procedure 3, which stress the simplicity of the Rule's requirements for the contents of the notice of appeal and which disapprove some courts' "expressio unius est exclusio alterius" approach to interpreting a notice of appeal. No comments were submitted, and the Advisory Committee gave its final approval to the rule as published.

Rule 9006 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee proposed a technical amendment to Rule 9006(a)(6)(A) to include Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 9038 (Bankruptcy Rules Emergency)

New Rule 9038 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of the rule are similar to the Appellate, Civil, and Criminal Emergency Rules in the way they define a rules emergency, provide authority to

the Judicial Conference to declare such an emergency, and prescribe the content and duration of a declaration.

Rule 9038(c) expands existing Bankruptcy Rule 9006(b), which authorizes an individual bankruptcy judge to enlarge time periods for cause. Although many courts relied on Rule 9006(b) to grant extensions of time during the COVID-19 pandemic, the rule does not fully meet the needs of an emergency situation. First, it has some exceptions—time limits that cannot be expanded. Also, it arguably does not authorize an extension order applicable to all cases in a district. Rule 9038 is intended to fill in these gaps for situations in which the Judicial Conference declares a rules emergency. The chief bankruptcy judge can grant a district-wide extension for any time periods specified in the rules, and individual judges can do the same in specific cases. There were no negative comments addressing Rule 9038, and the Advisory Committee recommended final approval as published.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

The amendments to Questions 2 and 4 in Part 1 of Form 101 clarify how and where to report business names used by the debtor. These changes clarify that the only names to be listed are names that were used by the debtor personally in conducting business, not names used by other legal entities. The changes also bring Form 101 into conformity with the approach taken in Forms 105, 201, and 205 in involuntary bankruptcy cases and in non-individual cases. A suggestion unrelated to the proposed change was rejected, and the Advisory Committee recommended final approval as published.[1]

[1] The version of Official Form 101 in Appendix B includes an unrelated technical conforming change to line 13 which went into effect on June 21, 2022, after the Standing Committee's meeting. The change was approved by the Advisory Committee on Bankruptcy Rules pursuant to its authority to make such changes subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. It conforms the form to the Bankruptcy Threshold Adjustment and Technical Corrections Act (the "BTATC" Act), Pub. L. No. 117-151, which went into effect on the same date. The Standing Committee will review the BTATC Act changes to Official Form 101 and another form at its January 2023 meeting, and will update the Judicial Conference on the changes in its report of that meeting.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The amendments clarify the deadline for objecting to a debtor's discharge and distinguish it from the deadline to object to discharging a particular debt. There were no comments, and the Advisory Committee recommended final approval as published with minor changes to punctuation.

Official Form 417A (Notice of Appeal and Statement of Election)

The amendments conform the form to proposed changes to Rule 8003. No comments were submitted, and the Advisory Committee recommended final approval with a proposed effective date of December 1, 2023, to coincide with the Rule 8003 amendment.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 3011, 8003, and 9006, and proposed new Bankruptcy Rule 9038, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve, effective December 1, 2022, the proposed amendments to Bankruptcy Official Forms 101, 309E1, and 309E2, and effective December 1, 2023, the proposed amendment to Bankruptcy Official Form 417A, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules and Forms Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted the proposed restyled Bankruptcy Rules for the 7000-9000 Series; proposed amendments to Rules 1007, 4004, 5009, and 9006; proposed new Rule 8023.1; and a proposed amendment to Official Form 410A with a

recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Restyled Rules Parts VII, VIII, and IX

The Advisory Committee sought approval for publication of Restyled Rules Parts VII, VIII, and IX (the 7000-9000 series Bankruptcy Rules). This is the third and final set of restyled rules recommended for publication.

Rule 1007(b)(7) (Lists, Schedules, Statements, and Other Documents; Time Limits) and conforming amendments to Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3), and 9006(c)(2)

The amendments to Rule 1007(b)(7) would eliminate the requirement that the debtor file a "statement" on Official Form 423 upon completion of an approved debtor education course, and instead require filing the certificate of completion provided by the approved course provider. The six other rules would be amended to replace references to a "statement" required by Rule 1007(b)(7) with references to a "certificate."

Rule 8023.1 (Substitution of Parties)

Proposed new Rule 8023.1, addressing the substitution of parties, is modeled on Appellate Rule 43, and would be applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel.

Official Form 410A (Mortgage Proof of Claim Attachment)

Amendments are made to Part 3 (Arrearage as of Date of the Petition) of the form, replacing the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest." Because under 11 U.S.C. § 1322(e) the amount necessary to cure a default is "determined in accordance with the underlying agreement and applicable nonbankruptcy law," it may be necessary for a debtor who is curing arrearages to know which portion of the total arrearages is principal and which is interest.

Information Items

The Advisory Committee met on March 31, 2022. In addition to the recommendations discussed above, the Advisory Committee considered (among other matters) a proposed amendment to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and five related forms that were published for comment. It also considered a suggestion from the Court Administration and Case Management (CACM) Committee concerning electronic signatures.

Rule 3002.1

The proposed amendments to Rule 3002.1 were designed to encourage a greater degree of compliance with the rule and to provide a new midcase assessment of the mortgage claim's status in order to give a chapter 13 debtor an opportunity to cure any postpetition defaults that may have occurred.

Twenty-seven comments were submitted on the proposed amendments. Some of the comments were lengthy and detailed; others briefly stated an opinion in support of or opposition to the amendments. The comments generally fell into three categories: (1) comments opposing the amendments, or at least the midcase review, submitted by some chapter 13 trustees; (2) comments favoring the amendments, submitted by some consumer debtor attorneys; and (3) comments favoring the amendments but giving suggestions for improvement, submitted by trustees, debtors, judges, and an association of mortgage lenders.

The Consumer Subcommittee concluded that there is a need for amendments to Rule 3002.1, and that there is authority to promulgate them. The Advisory Committee agreed. The Consumer Subcommittee was sympathetic, however, with the desire expressed in several comments for simplification, and it has begun to sketch out revisions. It hopes to present a revised draft to the Advisory Committee at the fall meeting. The Forms Subcommittee will

await decisions about Rule 3002.1 before considering any changes to the proposed implementing forms.

Electronic Signatures

The Advisory Committee has been considering a suggestion by the CACM Committee regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account. At the fall 2021 meeting, the Technology Subcommittee presented for discussion a draft amendment to Rule 5005(a)(2)(C) that would have permitted a person other than the electronic filer of a document to authorize the person's signature on an electronically filed document. The discussion raised several questions and concerns. Among the issues raised were how the proposed rule would apply to documents, such as stipulations, that are filed by one attorney but bear the signature of other attorneys; how it would apply if a CM/ECF account includes several subaccounts; and whether there is really a perception among attorneys that the retention of wet signatures presents a problem that needs solving.

After the fall 2021 meeting, the Advisory Committee's Reporter followed up with the bankruptcy judge who had raised the issue of electronic signatures with the CACM Committee, and learned that this judge is working on a possible local rule for his district modeled on a state-court rule that allows for electronic signatures rather than requiring the retention of wet signatures. In its suggestion, the CACM Committee had questioned whether the lack of a provision in Rule 5005 addressing electronic signatures of individuals without CM/ECF accounts may make courts "hesitant to make such a change without clarification in the rules that use of electronic signature products is sufficient for evidentiary purposes." The Technology Subcommittee concluded that current Rule 5005 does not address the issue of the use of electronic signatures by individuals who are not registered users of CM/ECF and that it therefore does not preclude local rulemaking on the subject. The Bankruptcy Court for the District of

Nebraska already has such a rule (L.B.R. 9011-1). The Technology Subcommittee concluded that a period of experience under local rules allowing the use of e-signature products would help inform any later decision to promulgate a national rule. Electronic signature technology will also likely develop and improve in the interim. The Advisory Committee agreed with the Technology Subcommittee's recommendation and voted not to take further action on the suggestion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed amendments to Civil Rules 6, 15, and 72, and new Civil Rule 87.

Rule 6 (Computing and Extending Time; Time for Motion Papers)

In response to the enactment of the Juneteenth Act, the Advisory Committee made a technical amendment to Rule 6(a)(6)(A) to include the Juneteenth National Independence Day in the list of legal public holidays in the rule. The Advisory Committee recommended final approval without publication because this is a technical and conforming amendment.

Rule 15 (Amended and Supplemental Pleadings)

The amendment to Rule 15(a)(1) would substitute "no later than" for "within" to measure the time allowed to amend a pleading once as a matter of course. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

A literal reading of the existing rule could suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion, creating an

unintended gap period (prior to service of the responsive pleading or pre-answer motion) during which amendment as of right is not permitted. The proposed amendment is intended to remove that possibility by replacing "within" with "no later than."

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 15(a)(1) as published. The Advisory Committee made one change to the committee note after publication, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 72 (Magistrate Judges: Pretrial Order)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

After public comment, the Advisory Committee made no changes to the proposed amendment to Rule 72(b)(1) as published. The Advisory Committee made one change to the committee note, deleting an unnecessary sentence that was published in brackets. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 87 (Civil Rules Emergency)

Proposed Civil Rule 87 is part of the package of proposed emergency rules drafted in response to the CARES Act directive. Subdivisions (a) and (b) of Rule 87 contain uniform provisions shared by the Appellate, Bankruptcy, and Criminal Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

In form, Civil Rule 87(b)(1) diverges from the Bankruptcy and Criminal Rules with regard to the Judicial Conference declaration of a rules emergency; but in function, Rule 87(b)(1) takes a similar approach to those other rules. While the Bankruptcy and Criminal Rules provide that the declaration must "state any restrictions on the authority granted in" their emergency provisions, Rule 87(b)(1)(B) provides that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The character of the different emergency rules provisions accounts for the difference. Rule 87 authorizes Emergency Rules 4(e), (h)(1), (i), (j)(2), and for serving a minor or incompetent person (referred to as "Emergency Rules 4"), each of which allows the court to order service of process by a means reasonably calculated to give notice. Rule 87 also authorizes Emergency Rule 6(b)(2), which displaces the prohibition on the extension of the deadlines for making post-judgment motions and instead permits extension of such deadlines. The Advisory Committee determined that, while it makes sense for the Judicial Conference to have the flexibility to decide not to adopt a particular Civil Emergency Rule when declaring a rules emergency, it would not make sense to invite other, undefined, "restrictions" on the Civil Emergency Rules. Accordingly, the Advisory Committee's proposed language in Civil Rule 87(b)(1)(B) stated that the Judicial Conference's emergency declaration "must … adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." (The inclusion of the word "must" was the result of a stylistic decision concerning the location of "must" within Rule 87(b)(1).)

At the Standing Committee's June 2022 meeting, a member suggested that it would be preferable to create a clear default rule that would provide for the adoption of all the Civil Emergency Rules in the event that a Judicial Conference declaration failed to specify whether it was adopting all or some of those rules. Accordingly, the Standing Committee voted to relocate the word "must" to Civil Rules 87(b)(1)(A) and (C), so that Civil Rule 87(b)(1)(B) provides

simply that the declaration "adopts all the emergency rules in Rule 87(c) unless it excepts one or more of them." The resulting Rule will operate roughly the same way as the Bankruptcy and Criminal Emergency Rules – that is, a Judicial Conference declaration of a rules emergency will put into effect all of the authorities granted in the relevant emergency provisions, unless the Judicial Conference specifies otherwise.

After public comment, the Advisory Committee deleted from the committee note two unnecessary sentences that had been published in brackets, and augmented the committee note's discussion of considerations that pertain to service by an alternative means under Emergency Rules 4(e), (h)(1), (i), and (j)(2). Based on suggestions by a member of the Standing Committee, the committee note was further revised at the Standing Committee meeting to reflect the possibility of multiple extensions under Emergency Rule 6(b)(2) and to delete one sentence that had suggested that the court ensure that the parties understand the effect of a Rule 6(b)(2) extension on the time to appeal.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 6, 15, and 72, and proposed new Civil Rule 87, as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee met on March 29, 2022. In addition to the matters discussed above, the Advisory Committee considered various information items, including a possible rule on multidistrict litigation (MDL). The Advisory Committee's MDL Subcommittee is considering amendments to Rules 16(b) or Rule 26(f), or a new Rule 16.1, to address the court's role in managing the MDL pretrial process. The drafts developed for initial discussion would simply focus the court and parties' attention on relevant issues without greater direction or detail.

The MDL Subcommittee has collected extensive comments from interested bar groups on some possible approaches.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval proposed amendments to Criminal Rules 16, 45, and 56, and new Criminal Rule 62.

Rule 16 (Discovery and Inspection)

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would correct a typographical error in the Rule 16 amendments that are currently pending before Congress. Those amendments, expected to take effect on December 1, 2022, revise both the provisions governing expert witness disclosures by the government – contained in Rule 16(a)(1)(G) – and the provisions governing expert witness disclosures by the defense – contained in Rule 16(b)(1)(C). Subject to exceptions, both Rule 16(a)(1)(G)(v) and Rule 16(b)(1)(C)(v) require the disclosure to be signed by the expert witness. One exception applies if, under another subdivision of the rule (concerning reports of examinations and tests), the disclosing party has previously provided the required information in a report signed by the witness. This exception cross-references the subdivision concerning reports of examinations and tests.

In Rule 16(a)(1), the relevant subdivision is Rule 16(a)(1)(F), and Rule 16(a)(1)(G)(v) duly cross-references that subdivision (applying the exception if the government "has previously provided under (F) a report, signed by the witness, that contains" the required information). In Rule 16(b)(1), the relevant subdivision is Rule 16(b)(1)(B); however, Rule 16(b)(1)(C)(v) as reported to Congress cross-references not "(B)" (as it should) but "(F)" (applying the exception if the defendant "has previously provided under (F) a report, signed by the witness, that contains"

the required information). The proposed amendment would correct Rule 16(b)(1)(C)(v)'s cross-reference from (F) to (B). The Advisory Committee recommended this proposal for approval without publication because it is a technical amendment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 45 (Computing and Extending Time) and Rule 56 (When Court is Open)

In response to the enactment of the Juneteenth Act, the Advisory Committee made technical amendments to Rules 45 and 56 to include Juneteenth National Independence Day in the list of legal public holidays in those rules. The Advisory Committee recommended final approval without publication because these are technical and conforming amendments. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 62 (Criminal Rules Emergency)

New Rule 62 is part of the package of proposed emergency rules drafted in response to Congress's directive in the CARES Act. Subdivisions (a) and (b) of Rule 62 contain uniform provisions shared by the Appellate, Bankruptcy, and Civil Emergency Rules. The uniform provisions address (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations. Under the uniform provisions, the Judicial Conference has the sole authority to declare a rules emergency, which is defined as when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with" the relevant set of rules.

Rule 62 includes an additional requirement not present in the Appellate, Bankruptcy, or Civil Emergency Rules. That provision is (a)(2), which – for Criminal Rules emergencies – requires a determination that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." This provision ensures that the emergency provisions in

subdivisions (d) and (e) of Rule 62 would be invoked only as a last resort, and reflects the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

Subdivision (c) of Rule 62 addresses the effect of the termination of a rules emergency declaration. For proceedings that have been conducted under a declaration of emergency but that are not yet completed when the declaration terminates, the rule permits completion of the proceeding as if the declaration had not terminated if (1) resuming compliance with the ordinary rules would not be feasible or would work an injustice and (2) the defendant consents. This provision recognizes the need for some flexibility during the transition period at the end of an emergency declaration, while also recognizing the importance of returning promptly to compliance with the non-emergency rules.

Subdivisions (d) and (e) of Rule 62 address the court's authority to depart from the Criminal Rules once a Criminal Rules emergency is declared. These subdivisions would allow specified departures from the existing rules with respect to public access, a defendant's signature or consent, the number of alternate jurors, the time for acting under Rule 35, and the use of videoconferencing or teleconferencing in certain proceedings.

Paragraph (d)(1) specifically addresses the court's obligation to provide reasonable alternative access to public proceedings during a rules emergency if the emergency substantially impairs the public's in-person attendance. Following the public comment period, the Advisory Committee considered several submissions commenting on the reference to "victims" in the committee note discussing (d)(1). The Advisory Committee revised the committee note to direct courts' attention to the constitutional guarantees of public access and any applicable statutory provision, including the Crime Victims' Rights Act, 18 U.S.C. § 3771. The Standing Committee

made a minor wording change to this portion of the committee note (directing courts to "comply with" rather than merely "be mindful of" the applicable constitutional and statutory provisions).

As published, subparagraph (e)(3)(B) provided that a court may use videoconferencing for a felony plea or sentencing proceeding if, among other requirements, "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Public comments raised practical concerns about the requirement of an advance writing by the defendant requesting the use of videoconferencing. The Advisory Committee considered these comments as they pertained to the "request" language and the timing of the request, and ultimately elected to retain the language as published.

The Standing Committee made three changes relating to Rule 62(e)(3)(B). First, the Standing Committee voted (10 to 3) to insert "before the proceeding and" in subparagraph (e)(3)(B) to clarify the temporal requirement. Second, the Standing Committee voted (7 to 6) to substitute "consent" for "request" in subparagraph (e)(3)(B). The net result of these two changes is to require that the defendant, "before the proceeding and after consulting with counsel, consents in a writing signed by the defendant that the proceeding be conducted by videoconferencing." Third, the Standing Committee authorized the Advisory Committee Chair and Reporters to draft conforming changes to the committee note. After these deliberations, the Standing Committee voted unanimously to recommend final approval of new Criminal Rule 62.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 16, 45, and 56, and proposed new Criminal Rule 62, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Information Items

The Advisory Committee on Criminal Rules met on April 28, 2022. In addition to the matters discussed above, the Advisory Committee considered several information items,

including proposals to amend Rule 49.1 to address a concern about the committee note's language regarding public access to certain financial affidavits and to amend Rule 17 to address the scope of and procedure for subpoenas.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 106, 615, and 702.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 – the rule of completeness – would allow any completing statement to be admitted over a hearsay objection and would cover all statements, whether or not recorded. The overriding goal of the amendment is to treat all questions of completeness in a single rule. That is particularly important because completeness questions often arise at trial, and so it is important for the parties and the court to be able to refer to a single rule to govern admissibility. The amendment is intended to displace the common law, just as the common law has been displaced by all of the other Federal Rules of Evidence.

The Advisory Committee received only a few public comments on the proposed changes to Rule 106. As published, the amendment would have inserted the words "written or oral" before "statement" so as to address the rule's applicability to unrecorded oral statements. After public comment, the Advisory Committee deleted the phrase "written or oral" to make clear that Rule 106 applies to all statements, including statements – such as those made through conduct or through sign language – that are neither written nor oral.

Rule 615 (Excluding Witnesses)

The proposed amendments to Rule 615 would limit an exclusion order under the existing rule (which would be re-numbered Rule 615(a)) to exclusion of witnesses from the courtroom,

and would add a new subdivision (b) that would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Under the proposed amendments, if a court wants to do more than exclude witnesses from the courtroom, the court must so order. In addition, the proposed amendments would clarify that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee. The rationale is that the exemption is intended to put entities on par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale. In response to public comments, the Advisory Committee made two minor changes to the committee note (replacing the word "agent" with the word "representative" and deleting a case citation). The Standing Committee, in turn, revised three sentences in the committee note (including the sentence addressing orders governing counsel's disclosure of testimony for witness preparation).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendments to Rule 702's first paragraph and to Rule 702(d) are the product of Advisory Committee work dating back to 2016. As amended, Rule 702(d) would require the proponent to demonstrate to the court that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." This language would more clearly empower the court to pass judgment on the conclusion that the expert has drawn from the methodology. In addition, the proposed amendments as published would have required that "the proponent has demonstrated by a preponderance of the evidence" that the requirements in Rule 702(a) – (d) have been met. This language was designed to reject the view of some courts that the reliability requirements set forth in Rule 702(b) and (d) – that the expert has relied on sufficient facts or data and has reliably applied a reliable methodology to the facts – are

questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. With this language, the Advisory Committee sought to explicitly weave the Rule 104(a) standard into the text of Rule 702.

More than 500 comments were received on the proposed amendments to Rule 702. In addition, a number of comments were received at a public hearing. Many of the comments opposed the amendment, and the opposition was especially directed toward the phrase "preponderance of the evidence." Another suggestion in the public comment was that the rule should clarify that it is the court and not the jury that must decide whether it is more likely than not that the reliability requirements of the rule have been met. The Advisory Committee carefully considered the public comments and determined to replace "the proponent has demonstrated by a preponderance of the evidence" with "the proponent demonstrates to the court that it is more likely than not" that the reliability requirements are met. The Advisory Committee also made a number of changes to the committee note, and the Standing Committee, in its turn, made one minor edit to the committee note.

After making the changes, noted above, to the committee notes for Rules 615 and 702, the Standing Committee unanimously approved the proposed amendments to Rules 106, 615, and 702.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 106, 615, and 702, as set forth in Appendix E, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 611, 613, 801, 804, and 1006 with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved for publication for

public comment the proposed new Rule 611(d) and the proposed amendments to Rules 613, 801, 804, and 1006, but did not approve for publication proposed new Rule 611(e). The Advisory Committee will further consider the proposed new Rule 611(e) in the light of the Standing Committee's discussion.

Rule 611(d) (Illustrative Aids)

The proposed amendment would amend Rule 611 ("Mode and Order of Examining Witnesses and Presenting Evidence") by adding a new Rule 611(d) to regulate the use of illustrative aids at trial. The distinction between "demonstrative evidence" (admitted into evidence and used substantively to prove disputed issues at trial) and "illustrative aids" (not admitted into evidence but used solely to assist the jury in understanding the evidence) is sometimes a difficult one to draw and is a point of confusion in the courts. The proposed amendment would set forth uniform standards to regulate the use of illustrative aids, and in doing so, would clarify the distinction between illustrative aids and demonstrative evidence. In addition, because illustrative aids are not evidence and adverse parties do not receive pretrial discovery of such aids, the proposed amendment would require notice and an opportunity to object before an illustrative aid is used, unless the court for good cause orders otherwise.

Rule 611(e) (Juror Questions for Witnesses)

Proposed new Rule 611(e) was not approved for publication. That proposed rule would set forth a single set of safeguards that should be applied if the trial court decides to allow jurors to submit questions for witnesses. The proposed new Rule 611(e) requires the court to instruct jurors, among other things, that if they wish to ask a question, they must submit it in writing; that they are not to draw inferences if their question is rephrased or does not get asked; and that they must maintain their neutrality. The proposed rule also provides that the court must consult with counsel when jurors submit questions, and that counsel must be allowed to object to such

questions outside the jury's hearing. The committee note to proposed Rule 611(e) emphasizes that the rule is agnostic about whether a court decides to permit jurors to submit questions. During the Standing Committee meeting, members expressed differing views concerning this proposal, and the Advisory Committee has been asked to develop the proposal further in the light of that discussion.

Rule 613 (Witness's Prior Statement)

Current Rule 613(b) rejects the "prior presentation" requirement from the common law that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. The current rule provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity to explain or deny the statement at some point in the trial. The proposed amendment to Rule 613(b) would require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity. This would bring the rule into alignment with what the Advisory Committee believes to be the practice of most trial judges.

Rule 801(d)(2) (An Opposing Party's Statement)

Current Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or potential liability has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent.

The proposed amendment to Rule 801(d)(2) would provide that such a statement is admissible against the successor-in-interest. The Advisory Committee reasoned that

admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

Current Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement. There is a dispute in the courts about the meaning of the "corroborating circumstances" requirement. The proposed amendment to Rule 804(b)(3) would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

Rule 1006 (Summaries to Prove Content)

The proposed amendment to Rule 1006 would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006. The proposed amendment to Rule 1006 fits together with proposed new Rule 611(d) on illustrative aids. Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. Courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006, and some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted, and would provide a cross-reference to Rule 611(d) on illustrative aids.

Information Items

The Advisory Committee on Evidence Rules met on May 6, 2022. The Advisory Committee discussed the matters listed above.

PROPOSED 2022 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADEQUACY OF PRIVACY RULES PRESCRIBED UNDER THE E-GOVERNMENT ACT OF 2002

The E-Government Act of 2002 directed that rules be promulgated, under the Rules Enabling Act, "to protect privacy and security concerns relating to electronic filing of documents and the public availability … of documents filed electronically." Pub. L. No. 107-347, § 205(c)(3)(A)(i). Pursuant to this mandate, the "privacy rules" – Appellate Rule 25(a)(5), Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1 – took effect on December 1, 2007. Section 205(c)(3)(C) of the E-Government Act directs that, every two years, "the Judicial Conference shall submit to Congress a report on the adequacy of [the privacy rules] to protect privacy and security." Pursuant to that directive, the Judicial Conference submitted reports to Congress in 2009 and 2011. The Committee recommends that the Judicial Conference approve this third report (the "2022 Report"), which covers the period from 2011 to date. Future reports will be submitted beginning in 2024 and every two years thereafter.

The 2022 Report discusses rule and form amendments relevant to privacy issues that were adopted since the 2011 report. There have been changes to then-Bankruptcy Forms 9 and 21 in 2012; Appellate Form 4 in 2013 and 2018; Bankruptcy Rule 9037 in 2019; and Appellate Rule 25(a)(5) (this amendment is on track to take effect on December 1, 2022, absent contrary action by Congress). In addition, privacy concerns also shaped the content of Rule 2 in the new set of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g) (which is on track to take effect on December 1, 2022, absent contrary action by Congress).

The 2022 Report also discusses privacy-related topics currently pending on the Rules Committees' dockets, and deliberations in which the Rules Committees considered but rejected additional privacy-related rule amendments.

> **Recommendation:** That the Judicial Conference approve the proposed 2022 Report of the Judicial Conference of the United States on the Adequacy of Privacy Rules Prescribed Under the E-Government Act of 2002, as set forth in Appendix F, and ask the Administrative Office Director to transmit it to Congress in accordance with the law.

JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider the Executive Committee's request for a report on the strategic initiatives that the Standing Committee is pursuing to implement the *Strategic Plan for the Federal Judiciary*. The Committee's views were communicated to Chief Judge Scott Coogler, judiciary planning coordinator.

Respectfully submitted,

John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia Ann Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
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Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

* * * * *

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which went into effect February 19, 2020.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Form 101 (published in Aug. 2021) will go into effect December 1, 2022.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2022)

REA History:

- Transmitted to Supreme Court (Oct 2021)
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020 – Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 (published in Aug. 2021) will go into effect December 1, 2022.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (a)(4)(A)(vi) of FRAP 4.	CV 87 (Emergency CV 6(b)(2))
AP 26	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 45, BK 9006, CV 6, CR 45, and CR 56
AP 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, BK 9006, CV 6, CR 45, and CR 56
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case. At its March 2022 meeting, the Bankruptcy Rules Committee remanded the Rule and Forms to the Consumer and Forms Subcommittee for further consideration in light of comments received. This action will delay the effective date of the proposed changes to no earlier than December 1, 2024.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites.	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK 9006(a)(6)(A)	Technical amendment approved by Advisory Committee without publication would add Juneteenth National Independence Day to the list of legal holidays.	AP 26, AP 45, CV 6, CR 45, and CR 56

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 6	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CR 45, and CR 56
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the 22nd day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 45	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 56
CR 56	The technical proposed amendment adds "Juneteenth National Independence Day" to the list of legal holidays.	AP 26, AP 45, BR 9006, CV 6, and CR 45
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Approved by Standing Committee (June 2022 unless otherwise noted)

REA History:

- Published for public comment (Aug 2021 – Feb 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
	designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)–(d).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to subdivision (g) to reflect the consolidation of Rules 35 and 40.	AP 35, 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	AP 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	AP 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	AP 35, 40
BK 1007(b)(7) and related amendments	The proposed amendment to Rule 1007(b)(7) would require a debtor to submit the course certificate from the debtor education requirement in the Bankruptcy Code. Conforming amendments would be made to the following rules by replacing the word "statement" with "certificate": Rules 1007(c)(4), 4004(c)(1)(H), 4004(c)(4), 5009(b), 9006(b)(3) and 9006(c)(2).	
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
BK 8023.1 (new)	This would be a new rule on the substitution of parties modeled on FRAP 43. Neither FRAP 43 nor Fed. R. Civ. P. 25 is applicable to parties in bankruptcy appeals to the district court or bankruptcy appellate panel, and this new rule is intended to fill that gap.	
BK Restyled Rules (Parts VII-IX)	The third and final set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the second set (Parts III-VI) were published in 2021. The full set of restyled rules is expected to go into effect no earlier than December 1, 2024.	
BK Form 410A	The proposed amendments are to Part 3 (Arrearage as of Date of the Petition) of Official Form 410A and would replace the first line (which currently asks for "Principal & Interest") with two lines, one for "Principal" and one for "Interest."	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- Published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved for publication by Standing Committee (Jan and June 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
	The amendments would put the burden on the claim holder to identify the elements of its claim.	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to the entire rule, not just to subdivision (a).	
EV 611(d)	The proposed new subdivision (d) would provide standards for the use of illustrative aids.	EV 1006
EV 613	The proposed amendment would require that, prior to the introduction of extrinsic evidence of a witness's prior inconsistent statement, the witness receive an opportunity to explain or deny the statement.	
EV 801	The proposed amendment to paragraph (d)(2) would provide that when a party stands in the shoes of a declarant or declarant's principal, hearsay statements made by the declarant or declarant's principal are admissible against the party.	
EV 804	The proposed amendment to subparagraph (b)(3)(B) would provide that when assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider the totality of the circumstances and evidence, if any, corroborating the statement.	
EV 1006	The proposed changes would permit a properly supported summary to be admitted into evidence whether or not the underlying voluminous materials have been admitted. The proposed changes would also clarify that illustrative aids not admitted under Rule 1006 are governed by proposed new subdivision (d) of Rule 611.	EV 611

Legislation That Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021–January 3, 2023)

Name	Sponsors & Cosponsors	Affected Rules	Text, Summary, and Committee Report	Legislative Actions Taken
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary:** Prohibits in class actions any allegation that an employee was misclassified as an independent contractor.	• 03/01/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 01/04/2021: Introduced in House; referred to Judiciary Committee
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ) *Cosponsor:* Rose (R-TN)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary:** Prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty unless the nonparty is represented by a party in a class action.	• 03/01/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 01/04/2021: Introduced in House; referred to Judiciary Committee
Mutual Fund Litigation Reform Act	**H.R. 699** *Sponsor:* Emmer (R-MN)	CV 8 & 9	**Bill Text:** https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf **Summary:** Creates a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity."	• 03/22/2021: Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 02/02/2021: Introduced in House; referred to Judiciary Committee
Providing Responsible Oversight of Trusts to Ensure Compensation and Transparency (PROTECT) Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Cosponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Amends 11 U.S.C. § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts]." Allows outside parties to demand information from administrators of such trusts regarding payment to claimants. Gives the U.S. Trustee investigative powers with respect to asbestosis trusts set up under § 524, even in the districts in North Carolina & Alabama where Bankruptcy Administrators or the federal courts currently take on U.S. Trustee functions in bankruptcy cases. May provide reason to amend BK 9035.	• 03/03/2021: Introduced in Senate; referred to Judiciary Committee

Last updated October 4, 2022

Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act of 2021	**H.R. 1693** *Sponsor:* Jeffries (D-NY) *Cosponsors:* 56 bipartisan cosponsors	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr1693/BILLS-117hr1693rfs.pdf **Summary:** Decreases penalties for certain cocaine-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill. **House Committee Report:** https://www.congress.gov/117/crpt/hrpt128/CRPT-117hrpt128.pdf	• 09/29/2021: Received in Senate; referred to Judiciary Committee • 09/28/2021: Passed in House on Yeas & Nays (361–66) • 03/09/2021: Introduced in House
Sunshine in the Courtroom Act of 2021	**S. 818** *Sponsor:* Grassley (R-IA) *Cosponsors*: Klobuchar (D-MN) Cornyn (R-TX) Durbin (D-IL) Leahy (D-VT) Blumenthal (D-CT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** Allows presiding judges in district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides." Tasks Judicial Conference with promulgating guidelines. Expands statutory exception to prohibition on photography and broadcasting of criminal proceedings.	• 06/24/2021: Judiciary Committee ordered reported favorably (no amendments) • 06/24/2021: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 03/18/2021: Introduced in Senate; referred to Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Cosponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate] https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House] **Summary:** Requires disclosure and oversight of third-party-litigation-funding agreements in MDLs and in "any class action."	• 10/19/2021: House Judiciary Committee referred to Courts, Intellectual Property & Internet Subcommittee • 05/10/2021: Response letter sent from Judge Bates to Sen. Grassley and Rep. Issa • 05/03/2021: Letter received from Sen. Grassley and Rep. Issa • 03/18/2021: Introduced in House and Senate; referred to Judiciary Committees
Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Cosponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** Precludes trade-secret evidentiary privilege and restricts admissibility of forensic computer evidence in criminal proceedings.	• 10/19/2021: Judiciary Committee referred to Crime, Terrorism & Homeland Security Subcommittee • 04/08/2021: Introduced in House; referred to Judiciary Committee and to Science, Space &

				Technology Committee, which referred to Research & Technology Subcommittee
Juneteenth National Independence Day Act	**S. 475** *Sponsor*: Markey (D-MA) *Cosponsors:* 60 bipartisan cosponsors	AP 26; BK 9006; CV 6; CR 45	**Bill Text:** https://www.congress.gov/117/plaws/publ17/PLAW-117publ17.pdf **Summary:** Establishes Juneteenth National Independence Day (June 19) as a federal public holiday.	• 6/17/2021: Became Public Law No. 117-17
Bankruptcy Venue Reform Act of 2021	**H.R. 4193** *Sponsor*: Lofgren (D-CA) *Cosponsors:* 15 bipartisan cosponsors **S. 2827** *Sponsor:* Cornyn (R-TX) *Cosponsor:* Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/117/bills/hr4193/BILLS-117hr4193ih.pdf [House] https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate] **Summary:** Modifies venue requirements relating to bankruptcy proceedings. Senate version includes a provision (absent from the House version) giving "no effect" in venue determinations to certain mergers, dissolutions, spinoffs, and divisive mergers of entities. Requires rulemaking under § 2075 to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in bankruptcy cases and arising under or related to proceedings before bankruptcy courts, district courts, and BAPs.	• 09/23/2021: S. 2827 introduced in Senate; referred to Judiciary Committee • 06/28/2021: H.R. 4193 introduced in House; referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	**S. 2497** *Sponsor*: Warren (D-MA) *Cosponsors:* Durbin (D-IL) Blumenthal (D-CT) Booker (D-NJ) Sanders (I-VT)	BK	**Bill Text:** https://www.congress.gov/117/bills/s2497/BILLS-117s2497is.pdf **Summary:** Prevents individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting court from discharging, releasing, terminating, or modifying liability of or claim or cause of action against an entity other than the debtor or estate. • Prohibiting court from permanently enjoining commencement or continuation of any action with respect to an entity other than debtor or estate.	• 07/28/2021: Introduced in Senate; referred to Judiciary Committee

Protecting Our Democracy Act	**H.R. 5314** *Sponsor:* Schiff (D-CA) *Cosponsors:* 168 Democratic cosponsors **S. 2921** *Sponsor:* Klobuchar (D-MN) *Cosponsors:* 10 Democratic-caucusing co-sponsors	CR 6; CV	**Bill Text:** https://www.congress.gov/117/bills/hr5314/BILLS-117hr5314rds.pdf [House] https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate] **Summary:** Amends existing rules and directs Judicial Conference to promulgate additional rules to, for example: • Preclude any interpretation of CR 6(e) to prohibit disclosure to Congress of certain grand-jury materials related to individuals pardoned by the President. • "[E]nsure the expeditious treatment of" civil actions to enforce congressional subpoenas. Requires that the new rules be transmitted within 6 months of the effective date of the bill. **Committee Report:** https://www.congress.gov/117/cprt/HPRT46236/CPRT-117HPRT46236.pdf	• 12/13/2021: H.R. 5314 received in Senate • 12/09/2021: H.R. 5314 passed in House on Yeas & Nays (220–208) • 9/30/2021: S. 2921 introduced in Senate; referred to Homeland Security & Governmental Affairs Committee • 9/21/2021: H.R. 5314 introduced in House
Congressional Subpoena Compliance and Enforcement Act	**H.R. 6079** *Sponsor:* Dean (D-PA) *Cosponsors:* Nadler (D-NY) Schiff (D-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf **Summary:** Requires Judicial Conference to promulgate rules "to ensure the expeditious treatment of" civil actions to enforce congressional subpoenas. Requires that the new rules be transmitted within 6 months of the effective date of the bill.	• 11/26/2021: Introduced in House; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States (AMICUS) Act	**S. 3385** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* Sanders (I-VT) Blumenthal (D-CT) Hirono (D-HI) Warren (D-MA) Lujan (D-NM)	AP 29	**Bill Text:** https://www.congress.gov/117/bills/s3385/BILLS-117s3385is.pdf **Summary:** Requires amici curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund preparation or submission of amicus brief.	• 12/14/2021: Introduced in Senate; referred to Judiciary Committee
Courtroom Video-conferencing Act of 2022	**H.R. 6472** *Sponsor:* Morelle (D-NY) *Cosponsors:* Fischbach (R-MN) Bacon (R-NE)	CR	**Bill Text:** https://www.congress.gov/117/bills/hr6472/BILLS-117hr6472ih.pdf **Summary:** Makes permanent (even in absence of emergency situations) certain CARES Act	• 01/21/2022: Introduced in House; referred to Judiciary Committee

	Tiffany (R-WI)		provisions, including allowing the chief judge of a district court to authorize teleconferencing for initial appearances, arraignments, and misdemeanor pleas or sentencing. Requires defendant's consent before proceeding via teleconferencing and ensures that defendants can utilize video or telephone conferencing to privately consult with counsel.	
Save Americans from the Fentanyl Emergency (SAFE) Act of 2022	**H.R. 6946** *Sponsor:* Pappas (D-NH) *Cosponsors:* 10 bipartisan cosponsors	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr6946/BILLS-117hr6946ih.pdf **Summary:** Decreases penalties for certain fentanyl-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill.	• 03/08/2022: Energy & Commerce Committee referred to Health Subcommittee • 03/07/2022: Introduced in House; referred to Energy & Commerce Committee and to Judiciary Committee
Bankruptcy Threshold Adjustment and Technical Corrections Act	**S. 3823** *Sponsor:* Grassley (R-IA) *Cosponsors:* Durbin (D-IL) Whitehouse (D-RI) Cornyn (R-TX)	BK 1020; BK Forms 101 & 201	**Bill Text:** https://www.congress.gov/117/plaws/publ151/PLAW-117publ151.pdf **Summary:** Retroactively reinstates for further 2 years from date of enactment the CARES Act definition of "debtor" in § 1182(1), with its $7.5 million subchapter V debt limit.	• 06/21/2022: Became Public Law No. 117-151
Government Surveillance Transparency Act of 2022	**S. 3888** *Sponsor:* Wyden (D-OR) *Cosponsors:* Daines (R-MT) Lee (R-UT) Booker (D-NJ) **H.R. 7214** *Sponsor:* Lieu (D-CA) *Cosponsor:* Davidson (R-OH)	CR 41	**Bill Text:** https://www.congress.gov/117/bills/s3888/BILLS-117s3888is.pdf [Senate] https://www.congress.gov/117/bills/hr7214/BILLS-117hr7214ih.pdf [House] **Summary:** Adds a sentence and two subdivisions of text to CR 41(f)(1)(B) regarding what the government must disclose in an inventory taken under the Rule. (See page 25 of either PDF for full text.)	• 03/24/2022: H.R. 7214 introduced in House; referred to Judiciary Committee • 03/22/2022: S. 3888 introduced in Senate; referred to Judiciary Committee
21st Century Courts Act of 2022	**S. 4010** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* Blumenthal (D-CT) Hirono (D-HI) **H.R. 7426** *Sponsor:* Johnson (D-GA)	AP 29; CV; CR	**Bill Text:** https://www.congress.gov/117/bills/s4010/BILLS-117s4010is.pdf [Senate] https://www.congress.gov/117/bills/hr7426/BILLS-117hr7426ih.pdf [House] **Summary:** Requires amici curiae to disclose whether counsel for a party authored amicus brief in whole or in part and whether a party or a party's counsel made a monetary	• 04/06/2022: S. 4010 introduced in Senate; referred to Judiciary Committee • 04/06/2022: H.R. 7426 introduced in House; referred to Judiciary Committee, to Oversight & Reform Committee, and to House Administration

	Cosponsors: 8 Democratic cosponsors		contribution intended to fund preparation or submission of the brief. Also requires (within 1 year) promulgation of rules regarding procedures for the public to contest a motion to seal a judicial record.	
Supreme Court Ethics, Recusal, and Transparency Act of 2022	**H.R. 7647** *Sponsor:* Johnson (D-GA) *Cosponsors:* 60 Democratic cosponsors **S. 4188** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 12 Democratic cosponsors	AP 29; CV; CR; BK	**Bill Text:** https://www.congress.gov/117/bills/hr7647/BILLS-117hr7647ih.pdf [House] https://www.congress.gov/117/bills/s4188/BILLS-117s4188is.pdf [Senate] **Summary:** Directs rulemaking regarding party and amici disclosures in the Supreme Court. Also requires amici in any court to disclose whether counsel for a party authored amicus brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to preparation or submission of the brief. Directs rulemaking to prohibit filing or to strike an "amicus brief that would result in the disqualification of a justice, judge, or magistrate judge."	• 05/11/2022: S. 4188 introduced in Senate; referred to Judiciary Committee • 05/11/2022: House Judiciary Committee consideration & mark-up session; ordered to be reported (amended) (22–16) • 05/03/2022: H.R. 7647 introduced in House; referred to Judiciary Committee
Restoring Artistic Protection Act of 2022	**H.R. 8531** *Sponsor:* Johnson (D-GA) *Cosponsors:* Bowman (D-NY) Maloney (D-NY) Jayapal (D-WA) Thompson (D-MS) Bush (D-MO)	EV	**Bill Text:** https://www.congress.gov/117/bills/hr8531/BILLS-117hr8531ih.pdf **Summary:** Enacts new EV rule that would make inadmissible in criminal cases evidence of a defendant's creative or artistic expression unless the court finds by clear and convincing evidence that four factors are met.	• 07/27/2022: Introduced in House; referred to Judiciary Committee
Competitive Prices Act	**H.R. 8777** *Sponsor:* Porter (D-CA) *Cosponsors:* Nadler (D-NY) Cicilline (D-RI) Jaypal (D-WA) Jeffries (D-NY)	CV 8, 12(b)(6), 56	**Bill Text:** https://www.congress.gov/117/bills/hr8777/BILLS-117hr8777ih.pdf **Summary:** Abrogates *Twombly* pleading standard in antitrust actions; specifies standards necessary to state a plausible claim or demonstrate a genuine dispute of material fact. ("Consciously parallel conduct" could be enough to state a plausible claim.)	• 09/06/2022: Introduced in House; referred to Judiciary Committee
Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2022	**S. 4822** *Sponsor:* Whitehouse (D-RI) *Cosponsors:* 49 Democratic-caucusing cosponsors	CV 5.1, 24	**Bill Text:** https://www.congress.gov/117/bills/s4822/BILLS-117s4822pcs.pdf **Summary:** Requires declaratory and injunctive challenges to constitutionality or lawfulness of bill to be brought in D.D.C. and appealed	• 09/22/2022: Cloture failed (49–49) • 09/19/2022: Motion made to proceed in Senate; cloture motion made on motion to proceed

			to CADC; copy of complaint must be delivered to Clerk of House and Secretary of Senate; D.D.C. and CADC must expedite dispositions; action must be transferred to D.D.C. if amendment/counterclaim/cross-claim/affirmative defense/other pleading or motion challenges Act; any member of House or Senate has right to bring such an action or intervene in such an action	• 09/13/2022: Placed on Senate Legislative Calendar under General Orders • 09/12/2022: Introduced in Senate
Protect Reporters from Exploitative State Spying (PRESS) Act	**H.R. 4330** *Sponsor:* Raskin (D-MD) *Cosponsors:* Lieu (D-CA) Yarmuth (D-KY) Norton (D-DC) Blumenauer (D-OR) Eshoo (D-CA) Demings (D-FL) Scanlon (D-PA)	CV 26–37, 45; BK 7026–37, 9016; CR 16, 17	**Bill Text:** https://www.congress.gov/117/bills/hr4330/BILLS-117hr4330eh.pdf **Summary:** Imposes notice-and-hearing requirements and substantive standards for subpoenas to issue against journalists and service providers holding journalists' records; limits scope of compelled testimony or document production. **Committee Report:** https://www.congress.gov/117/crpt/hrpt354/CRPT-117hrpt354.pdf	• 09/20/2022: Received in Senate; referred to Judiciary Committee • 09/19/2022: Passed in House by voice vote • 06/07/2022: Reported as amended by Judiciary Committee • 07/01/2021: Introduced in House; referred to Judiciary Committee
Strategic Lawsuits Against Public Participation (SLAPP) Protection Act of 2022	**H.R. 8864** *Sponsor:* Raskin (D-MD) *Cosponsors:* Cohen (D-TN)	CV 12; CV 56	**Bill Text:** https://www.congress.gov/117/bills/hr8864/BILLS-117hr8864ih.pdf **Summary:** Imposes special procedures for motions to dismiss SLAPPs. Special motion for dismissal must be made within 60 days of service or removal. Stays all other proceedings except remand proceedings. Movant must put forward evidence establishing that the claim "is based on, or in response to, the party's lawful exercise of the constitutional right of petition, freedom of the press, peaceful assembly, free speech on a matter of public concern, or other expressive conduct on a matter of public concern"; respondent has burden to show statutory exception and must put forward prima facie evidence as to each element of the claim "under the standard of [CV] 56"; and then movant still has opportunity to show no genuine issue of material fact and that movant is entitled to judgment as a matter of law under CV 56. Court must expedite ruling but may extend statutory deadline for docket delays, discovery, or good cause.	• 09/15/2022: Received in House; referred to Judiciary Committee
Clean Slate Act of 2021	**H.R. 2864** *Sponsor:* Blunt Rochester (D-DE)	CR 49.1	**Bill Text:** https://www.congress.gov/117/bills/hr2864/BILLS-117hr2864ih.pdf	• 09/21/2022: Subcommittee discharged; Judiciary Committee

	Cosponsors: 21 bipartisan cosponsors		**Summary:** Mandates sealing of nonviolent federal marijuana offenses 1 year after sentence completed. Mandates sealing of federal criminal records relating to judgment of acquittal or dismissal. Mandatory sealing rules have retroactive effect. Allows certain nonviolent offenders convicted of no more than 2 felonies to petition for sealing of federal criminal records—hearing procedures might need rulemaking.	consideration & mark-up session held; ordered reported with amendments (20–12) • 10/19/2021: Referred to Crime, Terrorism & Homeland Security Subcommittee • 04/28/2021: Introduced in House; referred to Judiciary Committee
National Defense Authorization Act for Fiscal Year 2023	**H.R. 7900** *Sponsor:* Smith (D-WA)	CV, CR, EV	**Bill Text:** https://www.congress.gov/117/bills/hr7900/BILLS-117hr7900pcs.pdf **Summary:** • Excludes from evidence in any court hearing and any grand jury "any information obtained by or with the assistance of a member of the Armed Forces in violation of" 18 U.S.C. § 1385 (the Posse Comitatus Act). (Title IV, subtitle E, § 549B) • Decreases penalties for certain cocaine-related crimes and allows those convicted under prior law to petition for a lower sentence. Provides that, notwithstanding CR 43, defendant not required to be present at hearing to reduce a sentence under this bill. (Title LVIII, subtitle A, § 5848) **Proposed Amendments:** • SA 6392, by Sen. Whitehouse (D-RI), provides that "[n]otwithstanding rule 41 of the Federal Rules of Criminal Procedure, a warrant for the seizure of any property identified [in a different subsection] may be . . . issued by a judicial officer of the United States District Court for the District of Columbia; and . . . executed in any district in which the property is found or transmitted to the government of a foreign country for service in accordance with an applicable treaty or other international agreement." It also provides that, for judicial review of a forfeiture determination by Treasury (which would be in D.D.C.), "there shall be	• 08/03/2022: Placed on Legislative Calendar under General Orders • 07/28/2022: Received in Senate • 07/14/2022: Passed in House (329–101) • 07/01/2022: Armed Services Committee reported with amendment • 05/27/2022: Introduced in House; referred to Armed Services Committee

			no discovery in a proceeding under this section" except upon motion and a showing by the petitioner that there is both good cause for discovery and that discovery would be in the interest of justice. • SA 6084, SA 6347, and SA 6438, by Sen. Peters (D-MI), bar the discovery of, reception into evidence of, and testimony about certain "medical quality assurance records" except in specified circumstances, such as civil or criminal law enforcement. **Committee Report:** Although there is a committee report from the House Armed Services Committee and a supplement to that report, neither addresses the above provisions.	

TAB 3

FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules, and Panelists on Juror Questions to Witnesses
From: Daniel J. Capra, Reporter
Re: Possible amendment to Rule 611 to add safeguards when jurors are allowed to ask questions of witnesses
Date: October 1, 2022

At its last meeting, the Committee unanimously approved, for release for public comment, an amendment to Rule 611 that would add a subdivision providing procedural safeguards in cases where the trial judge has decided to allow jurors to pose questions to witnesses.[1] The Standing Committee however, decided to send the proposal back to the Committee for further consideration. There was no formal, voted-upon, explanation for the Standing Committee's vote. Based on the discussion by the Standing Committee members, it appears that the major concern was that if the

[1] Rule 611 currently provides as follows:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
(1) make those procedures effective for determining the truth;
(2) avoid wasting time; and
(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
(1) on cross-examination; and
(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

rule were amended to provide procedural safeguards, this would lead many judges to *institute the practice* of allowing jurors to pose questions to witnesses. The proposed amendment studiously avoids coming out one way or another on the advisability of the practice; but at least some Standing Committee members appeared not to believe that the expressed agnosticism in the rule would be seen that way by judges.

At any rate, more study is required. And as the first step in that study, the Committee has put together a panel discussion for the morning of the Fall, 2022 Advisory Committee meeting in Phoenix. It is serendipitous that the meeting is in Phoenix, because the State of Arizona provides as a general rule that "[j]urors must be instructed that they are permitted to submit to the court written questions directed to witnesses or to the court and that the court will give the parties an opportunity to object to those questions outside the jury's presence." Ariz. Crim R.18.6(e).[2] And many of the trial judges in the District of Arizona previously served as state trial judges, and have continued the practice of allowing jury questions of witnesses in Federal court. Thus, the panel that we have put together, of judges and practitioners, has a wealth of experience with which to assist the Committee in its required study.

This memo is divided into three parts. Part One sets forth the proposed amendment and Committee Note, as slightly revised in response to comment at the Standing Committee meeting. Part Two sets forth some of the Federal case law on the practice of allowing jurors to pose questions to witnesses. Part Three sets forth the issues that will be addressed at the panel discussion.

[2] The rule also provides that "[t]he court may prohibit or limit the submission of questions to witnesses for good cause."

> *Compare* Indiana R.Evid. 614(d): A juror may be permitted to propound questions to a witness by submitting them in writing to the judge. The judge will decide whether to submit the questions to the witness for answer. The parties may object to the questions at the time proposed or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.

I. Proposed Rule 611(e)

The proposal in its current form provides as follows:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * * * *

(e) Juror Questions for Witnesses. [3]

(1) ***Instructions to Jurors If Questions Are Allowed.*** If the court allows jurors to submit questions for witnesses during trial, then the court must instruct the jury that:

(A) any question must be submitted to the court in writing;
(B) a juror must not disclose a question's content to any other juror;
(C) the court may rephrase or decline to ask a question submitted by a juror;
(D) a juror must draw no inference from the fact that a juror's question is asked, rephrased, or not asked;
(E) an answer to a juror's question should not be given any greater weight than an answer to any other question; and
(F) the jurors are neutral factfinders, not advocates.

(2) ***Procedure When a Question Is Submitted.*** When a question is submitted by a juror, the court must, outside the jury's hearing:

(A) review the question with counsel to determine whether it should be asked, rephrased, or not asked; and
(B) allow a party to object to it.

(3) ***Posing the Question to a Witness***. If the court allows a juror's question to be asked, the court must pose it to the witness or permit one of the parties to do so.

Proposed Committee Note

New subdivision (e) sets forth procedural safeguards that are necessary when a court decides to allow jurors to submit questions for witnesses at trial. Courts have taken different positions on whether to allow jurors to ask questions of witnesses. But courts agree that before the practice is undertaken, trial judges should weigh the benefits of allowing juror questions in a particular case against the potential harm that it might cause. And they agree that safeguards must be imposed.

[3] This amendment was proposed as a new subdivision (e). Subdivision (d) is the proposed amendment on illustrative aids, which was released for public comment, and which is a topic for discussion by another panel at the Fall Committee meeting.

Rule 611(e) takes no position on whether and under what circumstances a trial judge should allow jurors to pose questions to witnesses. The intent of the amendment is to codify the minimum procedural safeguards that are necessary when the court decides to allow juror questions. These safeguards are necessary to ensure that the parties are not prejudiced, and that jurors remain impartial factfinders.

The safeguards set forth are taken from and are well-established in case law. But the cases set out these safeguards in varying language, and often not in a single case in each circuit. The intent of the amendment is to assist courts and counsel by setting forth all the critical safeguards in uniform language and in one place.

The safeguards and instructions set forth in the rule are mandatory, but they are not intended to be exclusive. Courts are free to impose additional safeguards, or to provide additional instructions, when necessary to protect the parties from prejudice, or to assure that the jurors maintain their neutral role.

A court may refuse to allow a juror's question to be posed, or may modify it, for a number of reasons. For example, the question may call for inadmissible information; it may assume facts that are not in evidence; the witness to whom the question is posed may not have the personal knowledge required to answer; the question may be argumentative; or the question might be better posed at a different point in the trial. In some situations, one of the parties may wish to pose the question, and the court may in its discretion allow the party to ask a juror's question—so long, of course, as it is permissible under the rules of evidence. In any case, the court should not disclose—to the parties or to the jury—which juror submitted the question.

After a juror's question is asked, a party may wish to ask follow-up questions or to reopen questioning. The court has discretion under Rule 611(a) to allow or prohibit such questions.

Reporter's Notes:

1. The Indiana provision, set forth in footnote 3, supra, places a provision governing juror questions to witnesses under Rule 614 --- the rule governing the "Court's Calling or Examining Witnesses." The heading is changed to "Calling and Interrogation of Witnesses by Court and Jury." There is intuitive appeal to grouping together questions by jurors and questions by the court. But on balance, the proposed amendment is better placed in Rule 611. Rule 614 covers the court's *calling* witnesses as well as questioning them. Obviously, juror cannot call witnesses. So there is some asymmetry in lumping court and juror questioning together. Moreover, Rule 611 is where you go to find everything about a court's control over questions to witnesses by *anyone other than the court itself*. So the amendment seems more properly placed within Rule 611.

2. Why an amendment like this? The Committee determined that the amendment would substantially assist the court and the parties when the decision is made to allow jurors to pose

questions to witnesses. The amendment would place, in rule text, a list of safeguards that are floating around in a large number of cases. The list of protections is pretty similar across the circuits, but they are expressed somewhat differently. And in some circuits, the safeguards cannot be found in one case --- two or three cases must be consulted. So there is a benefit, to both the court and to counsel, in having a codified reference point when deciding the relatively complex issues surrounding juror questioning of witnesses.

II. Federal Case Law on Juror Questioning of Witnesses[4]

Every circuit court has issued a ruling on juror questioning of witnesses. Essentially these rulings articulate the risks of prejudice to the parties, as well as the benefits of increased juror attention and better juror understanding. The courts differ on how they weigh these risks and benefits. Some courts are fairly hostile to juror questioning, others are quite permissive, as discussed below. No federal court has held that juror questioning of witnesses is per se prohibited.

A typical case of skepticism about jurors questioning witnesses is the Second Circuit's opinion in *United States v. Bush,* 47 F.3d 511, 515 (2d Cir. 1995), where the court raised the following concerns about the practice:

- Questioning by jurors "risks turning jurors into advocates."
- It "creates the risk that jurors will ask prejudicial or other improper questions."
- "Remedial measures taken by the court to control jurors' improper questions may embarrass or even antagonize the jurors if they sense that their pursuit of the truth has been thwarted by rules they do not understand."
- Juror questioning "will often impale attorneys on the horns of a dilemma" because an attorney, by objecting to a question from a juror, risks alienating the jury.

The *Bush* court concluded that the balance of the prejudicial effect arising from juror questioning, against the benefits of issue-clarification, will "almost always lead trial courts to disallow juror questioning, in the absence of extraordinary or compelling circumstances." *Id.* at 516.[5]

[4] This section is taken, with some modifications, from previous memos submitted to the Committee.

[5] For other cases expressing skepticism about juror questioning of witnesses, see, e.g., *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992) ("[a]llowing jurors to pose questions during a criminal trial is a procedure fraught with perils"; but allowing the practice, subject to procedural safeguards, because "trial judges should be given wide latitude to manage trials."); *United States v. Cassiere*, 4 F.3d 1006, 1018 (1st Cir. 1993) ("the practice should be reserved for exceptional situations"); *DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 515–17 (4th Cir. 1985)* (expressing concern particularly about a juror's reaction if their question is not asked); *United States v. George*, 986 F.2d 1176, 1178 (8th Cir. 1993) (warning against the risks of juror questioning and "the importance of maintaining the jury's role as neutral factfinder" but stating that "the practice of allowing juror questions is a matter committed to the sound discretion of the district court and is not prejudicial per se").

But other courts are more positive about the practice of questioning by jurors. For example, in *SEC v Koenig*, 557 F.3d 736, 742 (7th Cir. 2009), the court noted that its prior decisions had expressed skepticism about juror questioning. But it observed that "[n]ow that several studies have concluded that the benefits exceed the costs, there is no reason to disfavor the practice."[6] Judge Easterbrook, writing in *Koenig,* referred to the following supportive data for allowing jurors to ask questions:

> Principle 13(C) of the ABA's American Jury Project recommends that judges permit jurors to ask questions of witnesses. The Final Report of the Seventh Circuit's American Jury Project 15–24 (Sept. 2008) concurs, with the proviso that jurors should submit their questions to the judge, who will edit them and pose appropriate, non-argumentative queries. District judges throughout the Seventh Circuit participated in that project. The judges, the lawyers for the winning side, and, tellingly, the lawyers for the losing side, all concluded (by substantial margins) that when jurors were allowed to ask questions, their attention improved, with benefits for the overall quality of adjudication. Keeping the jurors' minds on their work is an especially vital objective during a long trial about a technical subject, such as accounting.[7]

Id. at 741.

The Eleventh Circuit, in *United States v. Richardson,* 233 F.3d 1285, 1289-91 (11th Cir. 2000), was also positive about the use of juror questioning, especially in complex cases:

> The underlying rationale for the practice of permitting jurors to ask questions is that it helps jurors clarify and understand factual issues, especially in complex or lengthy trials that involve expert witness testimony or financial or technical evidence. If there is confusion in a juror's mind about factual testimony, it makes good common sense to allow a question to be asked about it. Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Indeed, there may be cases in which the facts are so complicated that jurors should be allowed to ask questions in order to perform their duties as fact-finders. Moreover, juror questioning leads to more attentive jurors and thereby leads to a more informed verdict. *See* Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking,* 12 Law & Hum. Behav. 231, 233-34 (1988) (addressing benefits of juror questioning). [Internal citations and quotations omitted.]

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[6] See also Third Circuit Pattern Jury Instruction for Civil Cases 1.8, Option 2 (recognizing that certain judges routinely allow juror questions).

[7] Judge Easterbrook also cited scholarly works asserting the benefits of allowing jurors to ask questions of witnesses. *Id.* at 742. *See, e.g.,* Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking,* 59 Vand. L.Rev.1927 (2006); Nicole L. Mott, *The Current Debate on Juror Questions,* 78 Chi.-Kent L.Rev. 1099 (2003).

So it is fair to say that the courts of appeals are not uniform in their attitude toward juror questioning of witnesses. But they *are* essentially uniform in holding that *if* juror questioning is permitted, it must be done subject to significant procedural safeguards. For example, the court in *Richardson,* after extolling the practice of juror questioning of witnesses, described necessary safeguards:

> • In determining whether to permit juror questioning, the trial court should weigh the potential benefit to the jurors against the potential harm to the parties, especially when one of those parties is a criminal defendant. District courts must in each case balance the positive value of allowing a troubled juror to ask a question against the possible abuses that might occur if juror questioning became extensive.
>
> • Questions should be permitted to clarify factual issues when necessary, especially in complex cases. However, the questioning procedure should not be used to test legal theories, to fill in perceived gaps in the case, or occur so repeatedly that they usurp the function of lawyer or judge, or go beyond the jurors' role as fact finders.
>
> • Jurors should not be permitted to directly question a witness but rather should be required to submit their questions in writing to the trial judge, who should pose the questions to the witness in a neutral manner. Written submission of questions eliminates the possibility that a witness will answer an improper question and prevents jurors from hearing prejudicial comments that may be imbedded in improper questions. This procedure also allows the attorneys to make and argue objections without fear of alienating the jury.
>
> • The jury should be instructed throughout the trial regarding the limited purpose of the questions, the proper use of the procedure and should be constantly cautioned about the danger of reaching conclusions or taking a position before all of the evidence has been received or speculating about answers to unasked questions.
>
> • Finally, the district court should make clear to the jury that questions are to be reserved for important points, that the rules of evidence may frequently require the judge to eschew certain questions, and that no implication should be drawn if a juror-inspired question withers on the vine.[8]

Similarly, the court in *United States v. Collins*, 226 F.3d 457, 463–464 (6th Cir. 2000), set forth the following procedural safeguards that must be undertaken before jurors' questions are permitted:

[8] For other cases on the need for safeguards, s*ee, e.g., United States v. Sykes,* 614 F.3d 303, 313 (7th Cir. 2010) (error to permit jurors to question witnesses directly, without reducing the questions to writing or submitting them first to the judge); *United States v. Hernandez,* 176 F.3d 719, 726 (3d Cir. 1999) (allowing jury questions is within the trial court's discretion, but the judge should ask any juror-generated questions and should only do so after allowing attorneys to raise any objection out of the hearing of the jury). See also *United States v. Ricketts,* 317 F.3d 540, 546 (6th Cir. 2003) (error for the trial court to permit jurors to submit questions to witnesses without counsel first being allowed to review those questions).

> When a court decides to allow juror questions, counsel should be promptly informed. At the beginning of the trial, jurors should be instructed that they will be allowed to submit questions, limited to important points, and informed of the manner by which they may do so. The court should explain that, if the jurors do submit questions, some proposed questions may not be asked because they are prohibited by the rules of evidence, or may be rephrased to comply with the rules. The jurors should be informed that a questioning juror should not draw any conclusions from the rephrasing of or failure to ask a proposed question. Jurors should submit their questions in writing without disclosing the content to other jurors. The court and the attorneys should then review the questions away from the jurors' hearing, at which time the attorneys should be allowed an opportunity to present any objections. The court may modify a question if necessary. When the court determines that a juror question should be asked, it is the judge who should pose the question to the witness.

The following procedural safeguards can be distilled from *Richardson*, *Bush, Collins,* and the other cases that have been discussed above:

- The judge must consider the possible value of allowing questions against the risk of possible abuse.
- The court must notify the parties of the court's intent to allow juror questioning at the earliest possible time, and give the parties an opportunity to be heard in opposition to the practice.
- Questions must be submitted in writing.
- Questions should be limited to important points.
- Jurors must be instructed not to disclose to other jurors the content of any question submitted to the court.
- Questions should be factual and not argumentative or opinionated.
- The court must review each question with counsel --- outside the hearing of the jury --- to determine whether it is appropriate under the Evidence Rules.
- The court must allow a party's objection to a juror's question to be made outside the hearing of the jury.
- The court must notify the jury that it may rephrase questions to comply with the Evidence Rules.
- The court must instruct the jury that if a juror's question is not asked, or is rephrased, the juror should not draw any negative inferences against any party.
- The jurors should be reminded that they are not advocates but rather are impartial factfinders.

● The court must instruct the jury that answers to questions asked by jurors should not be given any greater weight than would be given to any other testimony.[9]
● When the court determines that a juror's question may be asked, the question is to be posed by the court or by a party, not the juror.
● Counsel should be allowed to re-examine witnesses after a juror's question is answered by the witness.

III. Subjects for the Panel Discussion

The topics for the panel discussion can be usefully divided into three separate subject areas:

1. What are the benefits and costs of allowing jurors to pose questions to witnesses? And do the benefits outweigh the costs?

2. How does the process of juror questioning actually work in practice?

3. Does the proposed rule adequately address the necessary procedural requirements? Should something be added or deleted?

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[9] A good example of a jury instruction regarding questioning of witnesses is found in California (with thanks to Judge Carolyn Kuhl for sending it to me):

> If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys and decide whether it may be asked.
>
> Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.
>
> Remember that you are not an advocate for one side or the other. Each of you is an impartial judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any question asked by any juror with any other juror until after deliberations begin.

See also Third Circuit Pattern Instruction for Civil Cases 1.8, Option 2 (written by Capra and Struve):

> You will have the opportunity to ask questions of the witnesses in writing. When a witness has been examined and cross-examined by counsel, and after I ask any clarifying questions of the witness, I will ask whether any juror has any further clarifying question for the witness.
>
> If so, you will write your question on a piece of paper, and hand it to my Deputy Clerk. Do not discuss your question with any other juror. I will review your question with counsel at sidebar and determine whether the question is appropriate under the rules of evidence. If so, I will ask your question, though I might put it in my own words. If the question is not permitted by the rules of evidence, it will not be asked, and you should not draw any conclusions about the fact that your question was not asked. Following your questions, if any, the attorneys may ask additional questions. If I do ask your question you should not give the answer to it any greater weight than you would give to any other testimony.

What follows is some background for each of these topics.

A. Should Courts Allow Jurors to Pose Questions to Witnesses?

As stated above, the proposed amendment studiously avoids taking any position on *whether* a court should allow jurors to pose questions to witnesses --- in contrast to, for example, the Arizona rule, which provides that jurors must be allowed to pose questions unless the court finds good cause to prohibit the practice.

The Committee found no upside into entering the debate on the merits of the practice. The circuits appear to have relatively entrenched positions and coming down on one side or the other invited controversy with no clear path to a resolution. It seems clear that if the Committee does propose the amendment again, it will remain agnostic on the practice.

And yet the amendment was sent back for further study, and presumably some of the study should be about the merits of the practice itself. This is especially so because some Standing Committee members believed that the amendment, even if agnostic on its face, would be the camel in the tent, and would lead to more widespread adoption of the practice. The Committee has an interest in determining whether that outcome is favorable or unfavorable.

There is no better place than Arizona to talk about the benefits and costs of jurors questioning witnesses. Arizona has been a pioneer in the practice. Moreover, a Ninth Circuit Task Force, chaired by Judge Bolton (who is on the panel), recommended that "in civil trials judges should instruct jurors that they are permitted to submit written questions to the judge" because "[s]ubmission of questions can improve the jury's level of attentiveness to the trial and may improve their comprehension."[10]

Accordingly, the first section of the panel discussion will cover the benefits and costs of allowing jurors to pose questions to witnesses. And, without trying to steal the thunder of the panelists, this memo will provide a short discussion of the basic arguments, and of the findings from the several studies that have reviewed the practice.

Asserted Benefits:

The asserted benefits of allowing jurors to pose questions to witnesses have been articulated as follows:

1. Improving juror comprehension. Studies indicate that people learn better actively than passively. The argument is that allowing jurors to pose questions will assist them in figuring out

[10] Jud. Council of the 9th Cir., *Ninth Circuit Jury Trial Improvement Committee Second Report: Recommendations and Suggested Best Practices,* at 11 (2006).

some of the issues that are outside their ordinary experience.[11] It is asserted that juror questions are particularly useful in complex cases.

2. Improving the jurors' attention. If jurors have the opportunity to ask questions, the theory is that they will pay more attention and be more involved.

3. Improves juror deliberations and decisionmaking. To the extent juror questions can help to alleviate misunderstandings or confusion, deliberations will be more effective and jurors are more likely to come to the proper result. It is also possible that juror deadlock will be less likely.

4. Assists the parties and the court. If a juror is laboring under a misimpression, or fails to understand critical aspects of the case, it would be good for the court and parties to know that during the trial. Parties in particular can address matters of concern to a juror that they had previously overlooked or ignored.

5. It may uncover juror bias. If a question indicates that a juror is biased, the court and the parties can engage in remedies during the trial.

Asserted Costs:

The asserted costs associated with juror questioning have been articulated as follows:

1. Jurors are changed from factfinders to advocates. The theory here is that to be impartial, one cannot be actively involved in the factfinding. The more extreme arguments here are that the practice essentially adopts the Continental system of factfinder as investigator. One of the lesser arguments is that jurors can become so involved with preparing questions that they fail to pay attention to the testimony at trial.

2. Control is shifted from the parties (lawyers) to the jury. Opponents argue that the parties' autonomy in structuring their cases can be disrupted by wayward questions of jurors. For example, a juror's question may be about something the party deliberately left out of their presentation. Or, the question may require the party to address an issue at a time different from what the party had planned.

3. The risk of inappropriate questions. Jurors may ask questions that call for inadmissible information. And even if an answer is not provided, the question may have done the damage.

[11] See, e.g., Alayna Jehle and Monica K. Miller, *Controversy in the Courtroom: Implications of Allowing Jurors to Question Witnesses,* 32 Wm. Mitchell L. Rev. 27, 30-33 (2005) (discussing the "Story Model" of learning and concluding that "jurors should be allowed to ask questions in order to facilitate their natural decision-making tendencies").

4. The problem of objection. The argument is that lawyers will find it risky to object for fear of offending the questioning juror. While there are ways to arrange for sidebar objection,[12] the questioning juror will probably still figure out that an objection was made by a particular party.

5. Excessive weight. Jurors might give excessive weight to answers in response to jurors' questions. (Especially so as to the juror that asked the question).

6. Undue delay. The argument is that allowing juror questions disrupts the flow of the trial and results in excessive time spent reviewing and ruling on the questions. Obviously this objection is more salient if the jury is asking dozens of questions.

It should be noted that the strength of the arguments against jurors posing questions to witnesses is dependent on the procedures that the courts employ. If one posits a trial where jurors are simply allowed willy-nilly to stand up and ask dozens of questions that must be immediately answered, then the argument that the jurors have taken over is pretty strong. The arguments are significantly less compelling if the safeguards set forth in proposed Rule 611(e) are employed, and if the jurors' questions are 1) limited in number, 2) submitted in writing, and 3) intended for clarification as opposed to advocacy. It is important, then, to determine how juror questioning actually works in practice --- and we have a panel for that.

Studies:

There have been a number of studies that have been conducted on the practice of juror questioning of witnesses. Some of them have been surveys of judges, lawyers and jurors. Others have been reviews of cases in which the practice has been employed. And others involved mock trials. Here are a few takeaways from all the data:

1. One example from a two-week trial indicated that jurors asked a total of 35 questions, six of which were objected to, and the total amount of time taken by juror questions was a little less than two hours in a trial that took 152 hours. Jurors were surveyed and concluded that questioning helped their comprehension and made them more comfortable with the verdict rendered.[13]

2. In the 1980's a number of studies were conducted, and they are summarized by Jeffrey Berkowitz in *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?,* 44 Vand. L. Rev. 117, 140-42 (1991):

> During the past ten years at least three major studies have addressed juror questioning: a study conducted in the Second Circuit and two studies by Professor Stephen Penrod and Mr. Larry Heuer. The studies are based on real trials during which jurors were

[12] Judge Robert Jones hooked up his courtroom so that if a lawyer had an objection to a juror's question, the lawyer could press a button that would alert the judge.

[13] Hon. Marina Garcia Marmolejo, *Jack of All Trades, Master of None: Giving Jurors the Tools They Need to Reach a Verdict,* 28 Geo. Mason L.Rev. 149, 172-77 (2020).

allowed to pose questions to witnesses under an indirect questioning method in which the judge screened written questions. Because the judges and lawyers in each Heuer and Penrod study agreed to participate in the study at the outset, the results could be skewed in favor of allowing jurors to ask questions. Significantly, in each of the studies, the jurors who could question witnesses were more satisfied with their jury service than those who were not allowed to ask questions. This satisfaction stemmed from the additional involvement of asking questions. Jurors claimed that they were less worried about an incorrect verdict because asking questions eliminated their concerns about insufficient information. Despite this fact, however, several judges who participated in the Second Circuit study concluded that they would not allow juror questions in the future. The other important finding in the studies focused on the number of questions asked and the parties' satisfaction with the procedure. The Second Circuit study revealed no correlation between the number of questions asked and the judge's perception of the utility of the procedure. One of the Heuer and Penrod studies, however, found that judges became more concerned with the utility of the procedure as the number of questions increased. The Heuer and Penrod studies also showed that the belief that jury questions uncover pertinent and helpful information has been exaggerated. Benefits in this area were modest at best. . . . The studies further revealed that juror questions provided little instruction about the jurors' understanding of the evidence and law in the case. . . . Notably, the Second Circuit study found a divergence between the views of attorneys for the prosecution or the plaintiff and those representing the defense. Prosecutors and plaintiff counsel were overwhelmingly in favor of allowing jurors to ask questions. On the other hand, defense counsel were split on the subject, with several attorneys strongly opposed to allowing jurors to ask questions.

3. Judge Marmolejo summarizes the findings of the Arizona Jury Project, and the Seventh Circuit study, in the following excerpt from *Jack of All Trades, Master of None: Giving Jurors the Tools They Need to Reach a Verdict,* 28 Geo. Mason L. Rev. 149, 160-63 (2020).

> Scholars widely agree that the two most renowned studies in this area are the Arizona Jury Project and the Seventh Circuit Bar Association American Jury Project ("the Seventh Circuit Project"). . . . The Arizona Supreme Court created the Arizona Jury Project in 1993 with the principal goal of improving juror comprehension and increasing juror participation in their process of factfinding. . . . [The Project] included a detailed analysis of 829 questions submitted by jurors in fifty civil trials, for which comprehensive results found: That juror questions generally do not add significant time to trials and tend to focus on the primary legal issues in the cases. Jurors not only use questions to clarify the testimony of witnesses and to fill in gaps, but also to assist in evaluating the credibility of witnesses and the plausibility of accounts offered during trial through a process of cross-checking. Talk about answers to juror questions does not dominate deliberations. Rather, the answers to juror questions appear to supplement and deepen juror understanding of the evidence. In particular, the questions jurors submit for experts reveal efforts to grapple with the content, not merely the trappings, of challenging evidence. Moreover, jurors rarely appear to express an advocacy position through their questions.

> The Seventh Circuit Project is the federal equivalent to the Arizona Jury Project. It, too, examined the practice of allowing juror questions for witnesses during trials. Twenty-two federal district judges participated in the fifty jury trials that formed the basis for the Project. In total, four hundred and thirty-four jurors, eighty-six lawyers, and twenty-two federal district judges completed questionnaires. The results showed that the vast majority of judges believed that juror questions increased the fairness of the trial. And while the perspective of judges is important, most important was the fact that the vast majority of jurors themselves confirmed that their ability to ask questions increased or helped them better understand the evidence. Former US District Judge James F. Holderman, a participant in the Seventh Circuit Jury Project . . . expanded upon his experience. His findings validate the following significant concepts seen throughout the studies:
>
> • Most of the jurors' questions sought information to clarify evidence that had been presented during the lawyers' questioning of the witness.
>
> • Rarely did the jurors' questions seek testimony on a subject that was inadmissible, and when such questions were submitted, [the judge] explained to the jury why the question could not be asked and brought the jurors' focus back to the pertinent evidence.
>
> • The jurors' questions provided a window into the jurors' thinking and areas of interest, which allowed the lawyers beneficial insights during the trials that the lawyers would not have otherwise had.
>
> • The jurors appreciated the opportunity to inquire. They were more engaged and attentive to the evidence presented by the lawyers. Any confusion they had about the evidence was dispelled by the answers provided to the jurors' questions.
>
> • After the jurors reached a verdict, they appeared to be more confident of the correctness of their decision because they were confident that they had understood the evidence.

4. A Colorado field experiment involving 239 criminal trials found that jurors who were permitted to submit questions were more likely to agree that they had sufficient information to reach a correct decision. The jurors reported greater attentiveness and confidence in the ultimate decision rendered.[14]

[14] Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking*, 59 Vand. L. Rev. 1927, 1929, 1932 (2006).

5. A survey conducted in the Eighth Circuit and in Iowa state court, of lawyers and judges, essentially indicated that the negative views about juror questioning of witnesses were found in those who had not tried out the practice. Those who had used the practice were big fans.[15]

6. A poll conducted by the American College of Trial Lawyers found general support among attorneys for allowing jurors to question witnesses.[16] Seventy-nine percent of the attorneys polled believe that allowing jurors to ask questions improves juror comprehension of the evidence. Additionally, ninety-three percent of the attorneys believe that the practice increases juror satisfaction with the trial. About one-half of respondents also view the practice as enhancing the quality of justice.

7. Professor Nicole Mott performed a content analysis on 2271 questions asked by jurors in real trials. She found that jurors' questions were almost exclusively used to clarify testimony and were not an attempt to uncover new evidence or cross-examine witnesses.[17]

In sum, the data collected so far supports the practice of allowing jurors to pose questions to witnesses, subject to safeguards. One goal of the panel discussion is to obtain more data through the views of those with extensive experience with the practice.

B. How Does the Practice Actually Work?

The costs and benefits of juror questioning are difficult to assess without considering how the process works at a trial, and what procedural safeguards are employed. So the second part of the panel discussion will be an inquiry into how the system works when it is used. The questions will be addressed to how best to execute the goal of juror input, while protecting the parties from unnecessary prejudice and the court from inconvenience.

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[15] Hon. Thomas D. Waterman, Hon. Mark W. Bennett and David C. Waterman, *A Fresh Look at Jurors Questioning Witnesses: A Review of Eighth Circuit and Iowa Appellate Precedents and an Empirical Analysis of Federal and State Trial Judges and Trial Lawyers,* 64 Drake L. Rev. 485, 512 (2016): "Both lawyers and judges who have experienced the practice of jurors submitting question for witnesses, while in the minority of those surveyed, had a much more positive and encouraging view of the practice than those who had not experienced it. Moreover, this remained true for every single attribute and metric of the practice we analyzed, including how the practice affects the fairness and efficiency of the trial, the juror understanding of the case, the accuracy of the verdict, and whether jurors ask too many questions or questions that are too argumentative."

[16] J. Donald Cowan, Jr., Thomas M. Crisham, Michael B. Keating, Gael Mahony, Debra E. Pole, Michael A. Pope, William W. Schwarzer & John R. Wester, *What Attorneys Think of Jury Trial Innovations*, 86 Judicature 192, 194 (2003).

[17] Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question*," 78 Chi.-Kent L. Rev. 1099, 1099 (2003)

Here is a non-exclusive list of questions for the panel:

1. Deciding whether to allow juror questions in the first place:

a. In what cases or situations, if any, should a court not allow jurors to pose questions for the witnesses?

b. In what cases would juror questioning be most useful?

c. Are there special concerns about allowing jurors to pose questions to witnesses in criminal cases? (Note that the 9th Circuit Task Force recommendation was limited to civil cases).

d. Are jurors *encouraged* to ask questions, or simply allowed to do so?

2. Questions by jurors:

a. What is the likelihood in your experience of a juror asking a question that:

i. calls for inadmissible information?

ii. constitutes argument or advocacy as opposed to factfinding?

iii. indicates that the juror is biased? (And if so, what steps did the court/parties take in response?).

iv. calls for more evidence to be presented?

v. Is really a question to the court or to the parties, and not to the testifying witness?

b. What's the numerical range of questioning by jurors, in your trial experience? (One study indicated an average of about five questions per trial).

c. Is there ever a sense that jurors are so wrapped up in the questioning that they fail to pay attention to the testimony as it is developing?

d. Has it ever happened that a juror asked a question that raised a matter that counsel deliberately decided to leave out?

e. Has it ever happened that a juror's question will be answered later in the trial? If so, how is that handled?

f. Do you think that juror questioning, when used, reduces the number of questions posed by the jury during deliberations? Does it accelerate deliberations? Does it reduce the risk of a hung jury?

3. Trial complications:

a. When does the juror's question get asked? (The ordinary practice appears to be that questions are entertained after the parties' examinations have been completed. Are there other options?).

b. How long does it take for jurors to formulate questions and for the court and parties to review them?

c. How are parties' objections managed?

d. Are lawyers concerned about an objection offending the juror, even if the objection is outside the hearing of the jury? (After all in many cases the juror will probably be able to figure out which of the parties lodged an objection).

e. If a question is rejected, is the juror/jury given an explanation for the rejection? (Arguably an explanation could itself be prejudicial, but on the other hand the lack of an explanation could cause the juror to draw a negative inference.)

f. Has the court ever rejected a question in the absence of an objection from one of the parties?

g. Has it ever been necessary for a witness to be recalled in order to answer a juror's question?

h. Has it happened that jurors have follow-up questions to a juror's question? How is this situation handled?

i. Does the judge read the question to the witness? What if one of the parties want to read the question, or want to ask the question on their own?

j. Is a scope limitation, akin to Rule 611(b), applied to the question by the juror?

C. The Safeguards of the Proposed Amendment

The third topic for the panel discussion is whether improvements can be made in the proposed amendment. What follows are some questions of interest to the Committee.

1. Neutrality instruction. The amendment calls for an instruction that "the jurors are neutral factfinders, not advocates." Is that a helpful instruction to the jury? Or is it simply a concept that the judge must keep in mind in administering the practice?

2. Keeping the juror's identity secret. The proposed Committee Note states that "the court should not disclose—to the parties or to the jury—which juror submitted the question." Is

that a goal that can be achieved? Will it not often occur that jurors are going to know which juror posed a question?

3. Jurors sharing their questions. Currently an instruction is mandated that a juror should not share the question with other jurors. Is that necessary? Is it enforceable?

4. Record. Should the rule require that juror questions be preserved for the record, whether or not they are asked?

5. General. Are there any other protections that should be added?

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Memorandum To: Advisory Committee on Evidence Rules and Members of the Panel Discussing Illustrative Aids
From: Daniel J. Capra, Reporter
Re: Proposed Rule on Illustrative Aids and the Treatment of "Demonstrative Evidence"
Date: September 1, 2022

At its last meeting, the Advisory Committee unanimously approved a possible amendment to Rule 611 that would set standards for allowing the use of illustrative aids, and would distinguish illustrative aids from demonstrative evidence. The Standing Committee unanimously approved the proposed amendment for release for public comment. The public comment period began on August 15 and runs until February 16.

At the Fall 2022 meeting, the Committee is convening a panel of experienced judges and lawyers to provide input to the Committee about the proposed amendment. This memo is intended to provide analysis and information for both the Committee and the panel.

This memo is divided into three parts. Part One sets forth the amendment and committee note as it has been issued for public comment. Part Two discusses the problems from the case law and the need for the amendment. Part Three sets forth some examples and questions that will be topics for the panel discussion.

I. The Proposed Amendment and Committee Note as Issued for Public Comment

The proposed amendment and Committee Note provide as follows:[1]

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * * * *

(d) Illustrative Aids.

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence if:

(A) its utility in assisting comprehension is not [substantially][2] outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time; and

(B) all parties are given notice and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise.

(2) ***Use in Jury Deliberations.*** An illustrative aid must not be provided to the jury during deliberations unless:

(A) all parties consent; or

(B) the court, for good cause, orders otherwise [so orders] [orders that it be provided].[3]

(3) ***Record***. When practicable, an illustrative aid that is used at trial must be entered into the record.

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[1] Rule 611(d) is derived from Maine Rule of Evidence 616 --- the only rule in the United States that is particularly directed toward the use of illustrative aids. The person largely responsible for Maine Rule 616, Peter Murray, has graciously agreed to be on the panel discussing illustrative aids, on the morning of the Fall, 2022 Committee meeting.

[2] "Substantially" is in brackets to invite discussion about how the balancing test should be set. "Substantially" tracks Rule 403, thus rendering relevant evidence presumptively admissible. But there is a question as to whether the same permissive standard should apply when the information presented is not probative of any disputed issue in the case, but is offered solely to assist the factfinder to understand evidence already presented.

The question of the proper balancing test will be discussed by the panel.

[3] At the Standing Committee meeting, there was apparently some discussion about whether "unless the court orders otherwise" should be changed to "unless the court so orders." The amendment issued to the public retains the language approved by the Advisory Committee --- "orders otherwise." I consulted the style consultants and both stated that "the court so orders" is confusing because it is too vague a reference. One style consultant suggested: "unless the court orders that it be provided." The other preferred to keep the rule the way it is: "unless the court orders otherwise." This style kerfuffle will be resolved before the Spring meeting.

Committee Note

The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term is vague and has been subject to differing interpretation in the courts. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the factfinder thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, to study it, and to use it to help determine the disputed facts.

The second category—the category covered by this rule—is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party presenting evidence. Examples include blackboard drawings, photos, diagrams, PowerPoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the finder of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible information offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be prepared to distort the evidence presented, to oversimplify, or to stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. Cf. Fed.R.Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive demonstrative evidence of a disputed event. If those dangers [substantially] outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its

discretion to prohibit—or modify—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

One of the primary means of safeguarding and regulating the use of illustrative aids is to require advance disclosure. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection—unless the court, for good cause, orders otherwise. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided.

Because an illustrative aid is not offered to prove a fact in dispute, and is used only in accompaniment with testimony or presentation by the proponent, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

II. Background on the Need for the Amendment

Illustrative aids are used in virtually every trial, yet there is no rule of evidence that explicitly controls their use. This is not to say that courts are without power to control illustrative aids, as Rule 611(a) provides the court broad authority to run the trial. But technically, Rule 611(a) could be read to be inapplicable, as it grants control over "presenting evidence" --- and illustrative aids are not evidence.

The Committee believed that a specific rule governing illustrative aids was necessary to provide specific regulation, especially because courts have often failed to recognize the distinction between illustrative aids (which are not evidence) and demonstrative evidence (offered to prove a fact).

The problem of distinguishing between illustrative aids and demonstrative evidence is illustrated in *Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 703-705, 709 (7th Cir. 2013) (Hamilton, J.). In *Baugh,* the trial court allowed an "exemplar" of the ladder involved in the accident at issue to be presented at trial, but only for the purpose of helping the defense expert to illustrate his testimony. Over objection, the trial court allowed the jury to inspect and walk on the ladder during deliberations. The Seventh Circuit found that while allowing the ladder to be used for illustrative purposes was within the court's discretion, it was error to allow it to be provided to the jury for use in its deliberations. The court drew a line between exhibits admitted into evidence to prove a fact, and presentations used only to illustrate a party's argument or a witness's testimony. The court stated that the "general rule is that materials not admitted into evidence simply should not be sent to the jury for use in its deliberations."

The *Baugh* court thought that the problem it faced might have been caused by the vagueness of the term "demonstrative evidence":

> The term "demonstrative" has been used in different ways that can be confusing and may have contributed to the error in the district court. In its broadest and least helpful use, the term "demonstrative" is used to describe any physical evidence. *See, e.g., Finley v. Marathon Oil Co*., 75 F.3d 1225, 1231 (7th Cir.1996) (using "demonstrative evidence" as synonym for physical exhibits). . . .
>
> As Professors Wright and Miller lament, the term, "demonstrative" has grown "to engulf all the prior categories used to cover the use of objects as evidence.... As a result, courts sometimes get hopelessly confused in their analysis." 22 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 5172 (2d ed.); see also 5 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 9:22 (3d ed.) (identifying at least three different uses and definitions of the term "demonstrative" evidence, ranging from all types of evidence, to evidence that leaves firsthand sensory impressions, to illustrative charts and summaries used to explain or interpret substantive evidence). The treatises struggle to put together a consistent definition from the multiple uses in court opinions and elsewhere. See 2 McCormick on Evidence § 212 n. 3 (Kenneth S. Broun ed., 7th ed.) (recognizing critique of its own use of "single term 'demonstrative evidence,' " noting that this approach "joins together types of evidence offered and admitted on distinctly different theories of relevance").

Id. at 706.

The *Baugh* court declined to "reconcile" all the definitions of "demonstrative" evidence but did delineate the distinction between exhibits that are admitted into evidence to prove a fact

and illustrative aids that are introduced only to help the factfinder understand a witness's testimony or a party's argument. Many courts have been confused about this evidence/not-evidence distinction.[4] Others courts, similarly, operate under an incorrect definition of "demonstrative evidence."[5]

The goal of an amendment is to provide a distinction in the rules between demonstrative evidence and illustrative aids, and to set forth standards for when illustrative aids can be used at trial.

A. General Description of the Case Law

What follows is a general description of the case law on "demonstrative evidence" and "illustrative aids" with the proviso that courts don't always get the distinctions right:

> 1. For evidence offered to prove a disputed issue of fact by demonstrating how it occurred, the demonstration must 1) withstand a Rule 403 analysis of probative value balanced against prejudicial effect; 2) satisfy the hearsay rule; and 3) be authenticated. Rule 403 is usually the main rule that comes into play when substantive "demonstrative evidence" is used. The most important question will be whether the demonstration is similar enough to the facts in dispute that it withstands the dangers of any unfair prejudice and jury confusion it presents.[6]
>
> If the evidence satisfies Rule 403, it will be submitted to the jury for consideration as substantive evidence during deliberations.
>
> 2. For information offered only for pedagogical or illustrative purposes, the trial judge has discretion to allow it to be presented, depending on how much it will actually assist the jury in understanding a witness's testimony or a party's presentation; that assessment of assistance value is balanced against how likely the jury might misuse the information as evidence of a fact, as well as other factors such as confusion and delay. This balance is conducted by most courts explicitly under Rule 611(a), which provides the trial court the authority to exercise "reasonable control over the mode and order of examining witnesses and presenting evidence"; and Rule 403 is often cited as well.[7] The bottom line

[4] See, e.g., *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir.1992) ("[A]ny kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence.").

[5] For example: "Demonstrative evidence is physical evidence that has no independent probative value, but which illustrates or demonstrates a party's testimony or theory of the case.... [It] is simply used as a testimonial aid." *GCIU-Emp'r Ret. Fund v. Quad Graphics, Inc.,* Case No. 16-cv-00100, 2019 WL 7945594, at *4 (C.D. Cal., Oct. 29, 2019).

[6] *See, e.g., United States v. Stewart-Carrasquillo,* 997 F.3d 408, 420-22 (1st Cir. 2021) (finding no error in excluding a proposed demonstration of a disputed event --- whether one person could pull large bales of drugs out of the ocean and into a boat --- because the purported demonstration differed from the actual circumstances in substantial ways); *Krause v. County of Mohave,* 459 F.Supp.3d 1258, 1272 (D. Ariz. 2020) ("At a minimum, the animation's proponent must show the computer simulation fairly and accurately depicts what it represents.").

[7] *See, e.g., Apple, Inc. v. Corellium, LLC,* Civil No. 19-81160-cv, 2021 WL 2712131 (S.D. Fla. July 21, 2021) (allowing the use of an illustrative aid, relying on Rule 611(a), and noting that the aid would be useful in explaining

is that the aid cannot be misrepresentative, as that could lead the jury to confusion or to draw improper inferences.[8]

If the illustrative aid is sufficiently helpful and not substantially misleading or otherwise prejudicial, it may be presented at trial, but, as the court held in *Baugh*, in most courts *it may not be given to the jury for use in deliberations.*[9] Though some judges believe they have the discretion to allow the jury to use pedagogical aids, PowerPoints, etc. in their deliberations, over a party's objection.

The recent case of *Rodriguez v. Vil. of Port Chester*, 535 F. Supp. 3d 202 (S.D.N.Y. 2021), provides a good example of a court's approach to illustrative aids. The defendants sought to preclude evidence of a medical illustration of the plaintiff's injuries. The plaintiff intended to use the illustration as an aid to "help the jury understand the anatomy of the ankle and exactly which bones were broken and how the injury affected the entirety of the ankle." *Id.* At 217. The defendants argued that the illustration was inappropriate because it constituted the artist's "interpretive . . . spin to verbal descriptions of x-rays and CT scans." *Id.* at 218. The court found this argument meritless and concluded as follows:

> In determining the admissibility of . . . exhibits illustrating witness testimony, courts must carefully weigh whether the exhibits are unduly prejudicial because the jury will interpret them as real-life recreations of substantive evidence that they must accept as true. A court is permitted to exclude relevant evidence if "its probative value is substantially outweighed by," among other things, "a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." However, the Court can [minimize] such concerns through a limiting instruction explaining that the . . . exhibit is not substantive evidence, and simply because it was presented

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a difficult concept to the jury; court refers to it as a "demonstrative aid"); *United States v. Edwards*, 525 F. Supp. 3d 864, 868 (N.D. Ill. 2021) (firearm was properly used as an aid to illustrate "racking" of a gun; the government made clear that the gun was not the defendant's and was not used in any crime; court relies on Rule 611(a) and refers to the use of the gun as a "demonstrative aid"); *United States v. Kaley,* 760 F. App'x 667, 681–82 (11th Cir. 2019) (finding under Rule 611(a) and Rule 403 that the illustrative aid fairly represented the evidence); *United States v. Crinel*, 2017 WL 490635, at *11–12 & Att.2 (E.D. La. Feb. 7, 2017) (directing modification to pedagogical aid so that it is not misleading); *Johnson v. Blc Lexington Snf*, Civil Action No. 19-064, 2020 US Dist LEXIS 233263 (E.D. Ky.) (barring the use of an inflammatory and conclusory illustrative aid, sought to be used during opening and closing argument; relying on Rule 611(a) as requiring the court to "police the line between demonstration of evidence and demonization of an opposing party or witness"); *In re RFC*, Case No. 13-cv-3451, 2020 US Dist LEXIS 23482 (D. Minn. Feb. 11, 2020) (chart offered as a pedagogical device was precluded, because it inaccurately summarized data in a database, and mischaracterized many transactions).

[8] *See, e.g.,* United States v. Bakker, 925 F.2d 728 (4th Cir. 1991) (the defendant's summaries were properly excluded under Rule 403 because they did not fairly represent the evidence).

[9] *See, e.g., United States v. Buck*, 324 F.3d 786, 791 (5th Cir.2003) ("It was proper for the diagram to be shown to the jury to assist in its understanding of testimony and documents that had been produced, but the diagram should not have been admitted as an exhibit or taken to the jury room.").

through a doctor does not replace the jurors' obligations to judge the facts themselves.

> The Court therefore declines to preclude use of this illustration . . . However, the Court reserves ruling on its admissibility until trial, as its propriety as an exhibit will depend on whether it . . . accurately reflects the testimony and opinion of the witness whose testimony it is meant to explain.[10]

Id. at 219.

3. There is another related type of evidence that raises the substantive/pedagogical line: summaries and charts. Here, the line is the same though there is an additional rule involved: Rule 1006 covers summaries if they are to be admitted substantively. The conditions for admission under Rule 1006, when the rule is properly applied, are: 1) the underlying information must be substantively admissible (though not necessarily admitted); 2) the evidence that is summarized must be too voluminous to be conveniently examined in court; 3) the originals or duplicates must be presented for examination and copying by the adversary.[11] Rule 1006 summaries of the evidence are distinct from illustrative aids, which are not offered into evidence to prove a fact.[12]

Summaries offered for illustrative purposes are permissible subject to Rule 611(a) and 403. That is to say they may be considered by the factfinder (but not as evidence) so long as they are consistent with the evidence, not misleading and helpful to the jury in

[10] For other examples of recent court treatment of illustrative aids, see, e.g., *United States v. Nelson*, 533 F. Supp. 3d 779, 798–99, 801–02 (N.D. Cal. 2021) (the government's illustrative aid regarding cellphone company records would help the jury make sense of that evidence; but an express statement in one of the slides that two defendants were "traveling together" suggested a degree of concerted action that was not supported by the underlying data, and was struck pursuant to Rule 403); *King v. Skolness (In re King)*, Case No. 18-71778, 2020 Bankr LEXIS 2866 (Bankr. N.D. Ga. Oct. 14, 2020). In *King*, the defendants sought to introduce a spreadsheet created by illustrating certain transactions implicating that the money paid by the defendants was directly spent by the plaintiff for his own purposes. The court found that the spreadsheet was not admissible as an illustrative aid because "it presents cherry picked information to present a conclusion about where the money included therein was spent" and so the spreadsheet was "an ineffective method for determining the truth of the evidence presented as well as highly prejudicial to the Plaintiff."

[11] Note the proviso, "when properly applied." The Committee has a separate amendment on Rule 1006 out for public comment --- addressing the line between summaries of admissible evidence under Rule 1006 and illustrative aids, which are not evidence, and specifying that illustrative aids are to be treated under Rule 611(d).

[12] *See, e.g., United States v. James,* 955 F3d 336, 344 (3d Cir. 2020) (the defendant's objection to a government presentation under Rule 1006 was misplaced because it was used only as an illustrative aid; noting rather optimistically that "this is hardly a subtle evidentiary distinction"); *United States v. Posada-Rios*, 158 F.3d 832, 835 (5th Cir. 1998) ("Since the government did not offer the charts into evidence and the trial court did not admit them, we need not decide whether … they were not admissible under Fed. R. Evid. 1006 … . Where, as here, the party using the charts does not offer them into evidence, their use at trial is not governed by Fed. R. Evid. 1006."); *White Indus. v. Cessna Aircraft Co.,* 611 F. Supp. 1049, 1069 (W.D. Mo. 1985) ("[T]here is a distinction between a Rule 1006 summary and a so-called 'pedagogical' summary. The former is admitted as substantive evidence, without requiring that the underlying documents themselves be in evidence; the latter is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted.").

understanding the evidence. *See, e.g., United States v. Wood*, 943 F.2d 1048, 1053-54 (9th Cir. 1991): In a complex tax fraud case, the trial court allowed a government witness to testify to his opinion of Wood's tax liability, as summarized by two charts, but prohibited the defendant's witness from using his own charts; Rule 1006 was not applicable, because the charts were pedagogical devices and not substantive evidence; the court found no error in allowing the use of the prosecution's chart but prohibiting the use of the defense's chart, because the prosecution's chart was supported by the proof, while the chart prepared by the defense witness was based on an incomplete analysis.[13]

But as stated in *Baugh,* when summaries are offered only for illustration, the general rule is that they should not be submitted to the jury during deliberations. *See, e.g., Pierce v. Ramsey Winch Co.,* 753 F.2d 416, 431 (5th Cir. 1985) (distinguishing between summaries that are admitted under Rule 1006 and "other visual aids that summarize or organize testimony or documents that have already been admitted in evidence"; concluding that summaries admitted under Rule 1006 should go to the jury room with other exhibits but the other visual aids should not be sent to the jury room without the consent of the parties).

B. Submission to the Jury?

One area of confusion and disagreement is over whether the court ever has discretion to send an illustrative aid to the jury over a party's objection. The *Baugh* court found that it was error to do so. See also *United States v. Harms,* 442 F.3d 367, 375 (5th Cir.2006) (stating that illustrative aids "should not go to the jury room absent consent of the parties" (quoting *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000)); *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004) (pedagogical devices are considered "under the supervision of the district court under Rule 611(a), and in the end they are not admitted as evidence"). But *United States v. Robinson*, 872 F.3d 760, 779–80 (6th Cir. 2017), suggests some disagreement about the discretion of the trial judge to send illustrative aids to the jury room. In that case, the defendant argued that that the district court abused its discretion when it sent illustrative aids to the jury during deliberations, where the aids

[13] The court in *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998), gives some helpful guidance on the use of pedagogical aids, as distinct from summaries that are admitted under Rule 1006:

> We understand the term "pedagogical device" to mean an illustrative aid such as information presented on a chalkboard, flip chart, or drawing, and the like, that (1) is used to summarize or illustrate evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent. This type of exhibit is more akin to argument than evidence since it organizes the jury's examination of testimony and documents already admitted in evidence. Trial courts have discretionary authority to permit counsel to employ such pedagogical-device "summaries" to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury. This court has held that Fed.R.Evid. 611(a) provides an additional basis for the use of such illustrative aids, as an aspect of the court's authority concerning the mode of interrogating witnesses and presenting evidence.

had been displayed to the jury during the testimony of a government witness, but had not been admitted into evidence. Over a defense objection, the district court sent these aids to the jury in response to the jury's request to have them, but also read a pattern jury instruction stating that "[the demonstrative aids] were offered to assist in the presentation and understanding of the evidence" and "[were] not evidence [themselves] and must not be considered as proof of any facts." *Id.* at 779. The Sixth Circuit stated that "the law is unclear as to whether it is within a district court's discretion to provide a deliberating jury with demonstrative aids that have not been admitted into evidence." *Id.* at 779-80. The court found it unnecessary to decide this point because any error was harmless given that the summaries sent to the jury merely reiterated evidence already admitted at trial.[14]

The proposed amendment sets forth, as a default rule, that illustrative aids are not to be submitted to the jury, but leaves discretion to the court to allow it.

C. Benefits of a Rule Governing Illustrative Aids

One benefit of the amendment is that it will provide some clarity and procedural regulation --- and user-friendliness --- to the use of illustrative aids. It would create a convenient location for standards governing illustrative aids --- which currently are found in scattered case law. It would certainly help the neophyte figure out the limits of Rule 1006 and the distinction between summaries admissible under that rule and illustrative aids. And it would mean that the neophyte would not have to master the case law distinguishing "demonstrative evidence" offered to prove a fact from other demonstrations that are offered only to illustrate an expert's opinion or the party's argument --- a daunting problem because, as discussed above, the courts use the term "demonstrative evidence" quite loosely. It is undeniable that the terms used are often slippery and vague, and that mistakes are sometimes made, as in *Baugh.*

Probably the biggest benefit to the rule is to provide a nomenclature that will make this whole area easier to understand. The biggest problem here is the unregulated use of the term "demonstrative." Having a rule that distinguishes illustrative aids from demonstrative evidence might go a long way to alleviating some of the confusion in this area.

[14] In *Verizon Directories Corp. v. Yellow Book USA, Inc.,* 331 F. Supp. 2d 136, 144 (E.D.N.Y. 2004), Judge Jack Weinstein also suggested that pedagogical devices and summaries not within Rule 1006 could be admitted into evidence and sent to the jury room in appropriate cases. He stated that increased flexibility in the use of educational devices "will probably result in courtroom findings more consonant with truth and law" and so whether designated as "pedagogical devices" or "demonstratives," this material "may be admitted as evidence when it is accurate, reliable and will assist the factfinder in understanding the evidence." *Id. Verizon* was, however, a bench trial.

III. Issues for the Panel Discussion

The panel discussion will proceed in two parts. Part One will be a discussion of the proposed amendment – whether it is useful, and whether anything should be added or deleted. Part Two of the discussion will be devoted to specific examples that test the line between demonstrative evidence and illustrative aids --- because the goal of the amendment is to delineate that line, the thought is that discussion of specific examples by the experienced panel will give the Committee some insight into whether something needs to be added to the text or the committee note to assist in that delineation. The hypotheticals will hopefully give some idea about the scope of the amendment.

A. The Proposed Amendment

Here are some questions for the panel:

1. Is the Amendment Useful? Have you encountered problems in the use of illustrative aids, the solution of which might have been aided by the amendment?

2. Bench Trials. The amendment as issued extends to both jury trials and bench trials. Will it be useful to have this rule applicable in bench trials?[15]

3. Opening and closing arguments. The amendment as it stands is not intended to cover aids used during opening and closing argument.

a. Do you think that is clear from the rule?

b. If openings and closings are not covered, should the following language (or something like it) be added to the committee note?

> It is important to note that the proposed rule is not intended to regulate visual aids that an attorney uses merely to guide the jury through an opening or closing argument. The illustrative aids covered by this rule are designed to assist the jury in understanding evidence; a visual aid that assists the jury in following an argument is therefore not an illustrative aid.

c. More importantly, *should* the rule be extended to regulate aids used during opening and closing arguments? The concern expressed is that the notice requirement in the rule would be unduly intrusive as applied to opening and closing arguments. Is that a valid concern? Can the concern be addressed by a flexible approach to notice as applied to opening and closing arguments?

4. ***Outweigh or substantially outweigh?*** The rule requires the court to balance the positive value of the evidence --- the degree to which it will assist the jury in understanding evidence ---

[15] *See, e.g., United States ex. rel. Morsell v. NortonLifeLock, Inc.,* Civil Action No. 12-800, 2022 WL 278773 (D.D.C. Jan. 31, 2022) (court in bench trial reviews bullet points of PowerPoints that will be used at trial as illustrative evidence, and excludes some as improper argument).

against the risk of unfair prejudice, confusion, and delay. Obviously the analog is to Rule 403, but the innovation is that instead of *probative* value, the benefit to be addressed is *educative* value.

The Rule 403 balancing test applies only if the prejudicial effect *substantially* outweighs the probative value. A question for the Committee --- and the panel --- is whether the balancing test should be pitched the same way (presumptively admissible, rarely excluded) when it comes to illustrative aids.

The argument in favor of using the same test is that it is familiar, and different balancing tests should probably be left for narrow circumstances, in order to avoid confusion. Moreover, the line between demonstrative evidence and illustrative aids is often a fine one. Some presentations are arguably both demonstrative and educative. Where that is so, it seems confusing and complicated for the court to apply two differently weighted balancing tests for the same presentation.

The arguments against cutting out "substantially" are: 1) There are in fact different balancing tests employed when the equities are thought to be different from the general rule, so a different balancing test is not without precedent;[16] and 2) the equities are arguably different when the topic of exclusion is an illustrative aid as opposed to probative evidence. Because illustrative aids are not evidence, any cost in their admission is less justified than when probative evidence is being admitted. Put another way, we don't want to lose probative evidence unless the negative risks substantially outweigh. But the cost of loss of an illustrative aid is not as serious. Judge David Campbell, the former Chair of the Standing Committee put it this way in an email to me.

> I don't think I'd include "substantially" in Rule 611(d)(1)(A). This portion of the rule is talking about "unfair" prejudice, and I see no reason why illustrative aids should be allowed to introduce any degree of unfair prejudice into the trial. They are not evidence. Their purpose is simply to help the jury understand the evidence. It seems to me that such pedagogical tools should never be used to introduce unfair prejudice.

It should be noted that no final decision on whether to include "substantially" will or should be made at the Fall meeting. It should and will await public comment --- comment is specifically invited by the bracketing. Insights from the panel are most welcome.

Finally, if "substantially" is not included, should then the distinction from the Rule 403 balancing test be explained in the committee note?

5. Notice requirement:

a. Is notice required under the current practice?

b. Some kinds of illustrative aids present difficulty with respect to prior notice --- such as a witness marking up a photo or drawing a sketch while testifying. Is there enough flexibility in

[16] See Rules 412 (civil cases involving sexual assault); 609(a)(1) (impeachment of criminal defendants); 609(a)(2) (impeachment with old convictions); and 703 (disclosing inadmissible bases of expert opinions).

the rule to excuse notice in situations like this? Should more be placed in the committee note to try to define an exception to the notice requirement --- such as some examples?

6. Submission to the jury within the court's discretion? The original draft of the amendment provided that an illustrative aid could not be submitted to the jury for deliberations. The rationale: it's not evidence. But the rule as issued for public comment provides for more flexibility. There is a presumption that the illustrative aid is not to go to the jury. But the court can allow it for good cause. The committee note mentions that good cause might be found where the jury specifically asks to use the aid, or where the case is complex. Here are some questions about submitting the aid to the jury.

a. How often, if at all, are illustrative aids sent to the jury room?

b. What circumstances could exist for an illustrative aid to be sent to the jury room?

c. Is this discretionary approach sound or should there be a strict prohibition?

d. Assuming there is a good cause exception, should there be more explication of the good cause standard in the rule or committee note? If so, what other examples can be provided?

7. Should anything further be added to the text or committee note? Is the rule or note missing something?

One possible addition that might be an improvement is to provide examples to delineate the distinction between illustrative aids and demonstrative evidence. Some examples are set forth below.

B. Examples to Test the Coverage of the Amendment

At Judge Schiltz's suggestion, we have prepared some examples for the panel to consider and evaluate. The goal of these examples is: 1) to get some idea of how challenging it is to make the distinction between illustrative aids and demonstrative evidence; and 2) to test the coverage of the rule with respect to certain visual presentations at trial. Discussion of these examples will assist the Committee in determining whether these or other examples should be added to the committee note.

The examples follow:

1. Software to Highlight Exhibits: Judge Campbell provides an excellent example, and the challenges presented by it, in an email to me:

> The most common illustrative aid I see used – if it can be called one – is software that allows the lawyer, during examination, to excerpt, highlight, magnify, or contrast portions of exhibits. This software creates visual images (often colorful) that are not part of the exhibit being addressed and are meant to assist in examination and illustrate what the lawyer believes to be important about the exhibit, so I've assumed the software's images are a form of illustrative aid. This software is used in almost every case, and I've never seen an objection from the other side. Would the use of this software be considered an

illustrative aid under the proposed rule? If so, it would likely be difficult to give the opposing side advance notice of every way in which the software will be used at trial, particularly when dozens or scores of exhibits will be presented, and difficult to mark each image and preserve it for the record. If the intent of the rule is not to apply to such software, that might be worth clarifying in the proposed comment. If the intent is to cover such software, the extent of pretrial disclosure and exhibit-marking required by the rule might be worth addressing in the comment.

2. The Peephole: In a recent trial in the Bronx, the question was whether the defendant set a fire in an apartment. A neighbor testified that he smelled smoke and then looked out of his peephole, and saw the defendant about 15 feet away, coming out of the smoky apartment. The defendant challenged the identification, arguing that the peephole distorts vision. The government in rebuttal presented the actual peephole that was in the witness's door, and the jury was allowed to look through it and use it during deliberations. Would the peephole be covered by the rule?

3. Distortion of Color in a Photograph: In a robbery case, a videotape of the crime was taken with an infrared camera. It showed the perpetrator as wearing a gray sweatshirt; the defendant was arrested immediately thereafter and he was wearing a black sweatshirt. An expert testified for the government that an infrared camera can create a distortion in color. The expert presented a video showing an "experiment" to demonstrate how the distortion can occur. The experiment used the same camera, at the same location and time of day as the surveillance video. It did not use the same sweatshirt as was worn by the defendant, but it did use one of the same color. The sweatshirt looks gray. Is this "experiment" covered by the amendment?

4. Product Test: The plaintiff was driving a Chevrolet Malibu in a rainstorm when the ball joint on the car dislodged. (A ball joint is a part that essentially connects the steering system to the drive train). The plaintiff alleges that when this happened, her car spun out of control, and she ended up hitting a pole and suffering severe injuries. The manufacturer contends that when a ball joint dislodges, the car does not spin out of control. It simply stops moving. The manufacturer's experts describe to the jury what a ball joint does, and concludes that when it dislodges, the steering wheel and drive train no longer work, so the car will quickly come to a stop. The manufacturer proposes to play, during the expert's testimony, a video of a Malibu (same model and year) being driven by a professional driver on a dirt track. The car is modified so that the driver can dislodge the ball joint by pressing a button. The video shows that after the button is pressed, the car rolls to a stop. Is this video admissible? On what ground? Is the amendment applicable?

5. PowerPoint: There could be many possibilities here, but one suggested by the Chair is a powerpoint presentation during cross-examination of the plaintiff in a personal-injury case. A

PowerPoint is used by defense counsel to display six prior inconsistent statements that the plaintiff has made at various times about the extent of her injuries.

6. Summary: The defendant is charged with misapplying federal funds. She ran a nonprofit known by the anagram MACE, which received federal funds. At trial the government presented a summary diagram that depicted the connections between the defendant and the misapplied payments. The MACE logo was placed near the center of the summary, with fifteen lines drawn from the logo to the names of fifteen MACE employees. The summary listed the number of checks and total amount received by each employee. Above the MACE logo was a red line pointing to two captions, "MACE Board of Directors" and "Ruby Buck, CEO/President" (the defendant). Buck's picture was included above the caption. Is this summary diagram covered by the amendment? Is it admissible?

7. Computerized Recreation of an Accident: In a dispute over causation of a car accident, an accidentologist testifies that he analyzed skidmarks and contact points, and with that input ran a program that purports to recreate the accident. This is played during the accidentologist's testimony, and is consistent with his conclusion that the accident was caused by the plaintiff driving onto the wrong side of the road --- as shown in the computerized presentation. Is this covered by the rule? What foundation is required?

8. Lawyer's Summary of Testimony: In closing argument, the prosecutor puts up bullet points on the screen that summarize aspects of testimony that the prosecutor wishes to emphasize. Examples include: "The expert testified that the fingerprints matched"; "The defendant grudgingly admitted that he was at the store the day before the break-in"; and "The defense witness claimed that he was not one of the people in the car."

9. Video of an Operation: In a medical malpractice action involving gall bladder removal surgery, the defendants played a video of their expert performing a laparoscopic cholecystectomy --- using the same procedure used by the defendant. The video was offered as an "educational tool for the jury" but it also supported the expert's effort to refute the plaintiff's expert opinion that the technique employed did not comport with the standard of care. The video demonstrated that the defendant's technique could be used to successfully retract a part of the gallbladder.

10. Accident Conditions: In a case for damages in a two-car accident, the plaintiff argued that the volume of traffic, going in multiple directions, made the situation at the time of the accident "chaotic." The plaintiff wishes to offer a videotape of the traffic conditions at the site. The video was taken two weeks after the event, at the same time of day. The plaintiff argues that the tape is

both demonstrative and illustrative. The plaintiff contends that "it is important to show the jury the videotape during opening statement because it will help orient the jury to the collision location and traffic conditions at the outset of the case."

11. Witness Sketch: In a prosecution involving a shooting, a police officer who was at the scene was asked, while testifying, to do a sketch of where he thought the bullet came from. The jury was informed that the sketch was not to scale and was made from memory. The purpose of the drawing was to illustrate the detective's idea of the direction from which a bullet was fired. The defendant was not notified in advance that a sketch would be prepared. Is the sketch covered by the amendment?

12. Damages Chart: During her summation to the jury, plaintiff's counsel displays a prepared chart entitled "How to Figure Damages." The chart lists various items of damages, including damages for pain and suffering with suggested dollars-per-year awards. The chart remains within the jury's view throughout closing arguments and the trial court's charge to the jury. The trial court sua sponte gives a cautionary instruction that statements of counsel are not evidence and further instructs the jury that the case be decided solely upon the evidence.

13. Patent Litigation: In a patent litigation, the defendant has prepared a side-by-side video of the plaintiff's product and the defendant's product in operation, in order to show that they operate differently. The video will be played during the defense expert's testimony. Would the video be covered by Rule 611(d)?

14. Day-in-the-life Film: A plaintiff who suffered a catastrophic injury while operating a machine offers a day-in-the-life film, showing how he manages his life, and his pain and suffering, after the injury. Is the video covered by Rule 611(d)?

What about a day-in-the-life video of a personal-injury plaintiff made by an investigator for the defense, showing the plaintiff shoveling snow, changing the oil in his car, and dancing at a local tavern?

15. Video Recreation Showing the Prosecution's Theory: The defendant was driving a Ford Bronco and the victim was in the passenger seat. The defendant admits shooting the victim, but claims that the victim stabbed him in the leg during an argument while the defendant was driving the car, and the defendant shot in self-defense. The government's theory is that the defendant shot the victim from outside the car while the victim was sleeping and reclined in the passenger seat. The government introduced two video reenactments. The first video reenactment

shows two live actors recreating the expert witness' theory of the shooting based upon bullet trajectories through the body of the victim and into the seat and the side of the Ford Bronco. The second video reenactment is a computer animation based upon the trajectory of the bullet passing through the victim's abdomen and into the vehicle seat. These video reenactments were used by the State's expert witness during his testimony to illustrate the State's theory and the expert's conclusion that the victim was asleep and reclining while he was shot. The video was also used to disprove a theory that Harris was being attacked or that he was driving while he fired the gun. The court instructed that "the animation represents only a re-creation of the proponent's version of the event; it should in no way be viewed as the absolute truth; and, like all evidence, it may be accepted or rejected in whole or in part."

The video reenactment using actors shows that the correct bullet trajectory through the head and into the vehicles side panel required the head to be lying over to the right and very close to the panel (i.e., asleep); another scene shows the body movement required for the victim to have attacked the defendant with a knife held in his left hand, and indicates that a bullet fired at this time would not align with the path through the body and into the seat backrest. Another scene shows the movement required by the driver in reaching for a weapon under the front edge of the front seat (as the defendant claimed). This shows the difficulty of placing the weapon in a correct alignment while the arm of the victim would be in the way.

The computer animation dealt with the trajectory of the bullet through the victim's abdomen. The animation shows the line of trajectory through the body and how the line of trajectory changes if the victim were in the act of stabbing with a knife held in the right hand.

At the conclusion of the playing of the tapes, the expert concluded that the victim was "sitting [in] the passenger's seat with it scooted as far back as you could, and then with the back rest reclined as far as it can be. That his head would have had to have been very, very close to the right side panel at the ... time that this occurred .... that general body position is in agreement with for all four shots at the time that they occur."

The court treated the tapes as illustrative, concluding that they "cleared up the confusion and made the expert's testimony easier to understand." Is this correct?

16. Mannequin: This case arises from a fatal police shooting. The plaintiff's shooting reconstruction expert created a mannequin to show the trajectory of bullets fired into the victim. The expert inserted wooden rods into the mannequin to depict the trajectory and entrance and exit wounds of each bullet fired into the victim. The plaintiff argues that the mannequin is essential as it will "greatly aid the jury in understanding the highly technical and fact-intensive nature of this matter." She contends that "the exhibit need not be completely accurate to be admitted and its admission is largely within the discretion of the district court judge." The plaintiff explains that the mannequin was created based on "the Coroner's report, the Coroner's photographs of the victim's injuries taken at his autopsy, the testimony of the officers and witnesses, and the expert opinion of" the plaintiff's expert. Defendants contend that the plaintiff is offering the mannequin

"to prove disputed facts, namely, the hotly contested issue of the trajectories of the bullets fired by Defendant Officers." They further contend that because the mannequin is offered to prove a disputed fact and not merely to set forth a general scientific principle, the "substantial similarity" test used for replicated experiments must be applied. Ultimately, the Defendants argue that the mannequin should be excluded under Rule 403 because it can be manipulated and is merely cumulative of the coroner's photographs depicting the trajectories of the bullets.

17. Courtroom Recreation: An expert testifies to his opinion that the victim was killed when a person took a rope that was laying in the house and used it as a garrote on the victim. He explains how this can happen by taking a rope identical to that found at the scene and placing it around the neck of an Assistant District Attorney.

18. Another Courtroom Recreation: Two defendants are identified as having been on a boat that was found to be carrying drugs, late at night. The two men on the boat jumped off and escaped before the Coast Guard boarded. But a Coast Guard officer testifies that he shined a spotlight on them while they were on the boat, and could see them clearly in the light. The officer identified the two defendants at trial as the two on the boat. The defendants argue that the light was not strong enough to provide an accurate identification, as the two boats were 50 feet apart. The government offers to bring into court the spotlight used at the time, and to shine the light in a darkened courtroom, to an object 50 feet away, so the jury can see how powerful the light was. Is this demonstrative, or illustrative, or both?

19. Neuroimaging Review: In a case alleging that a child suffered a brain injury during delivery, the plaintiff's expert, a pediatric neuroradiologist, has created a series of PowerPoint slides titled "Neuroimaging Review." These slides contain various images of the child's head and brain, along with annotated text and arrow symbols. The expert explains that the PowerPoint presentation "is mostly designed to show the ... extent of injury on the MRI, the findings we see on diffusion-weighted and T2 imaging. It's also helpful to show the ultrasound.... [T]he exhibit is not so much a rebuttal to ... [the defense radiologist's] statements as it is a way to just show the extent of injury in imaging."

TAB 4

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 613(b): Laying a Foundation for Extrinsic Evidence of a Witness's Prior Inconsistent Statement
Date: October 1, 2022

At the last meeting, the Committee unanimously approved, for release for public comment, an amendment to Rule 613(b) that governs extrinsic evidence of a witness's prior inconsistent statement. The amendment would require a witness to receive an opportunity to explain or deny a prior inconsistent statement *prior* to the introduction of extrinsic evidence of the statement, unless the court orders otherwise. The Standing Committee unanimously approved the amendment for release for public comment. The period for public comment opened on August 14, 2022 and will close on February 16, 2023. To date, no comments have been received with respect to the proposed amendment to Rule 613(b).

This memo sets forth the proposed amendment and committee note as issued for public comment, briefly recaps the rationale for the proposed amendment, and proposes one very minor change to the committee note.

Proposed Amendment and Committee Note:

Rule 613

(b) Extrinsic Evidence of a Prior Inconsistent Statement.

Unless the court orders otherwise, ~~E~~extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it~~, or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *prior* to the introduction of extrinsic evidence of the statement. This requirement of a prior foundation is consistent with the common law approach to prior inconsistent statement impeachment. *See, e.g.,* Wammock v. Celotex Corp., 793 F.2d 1518, 1521 (11th Cir. 1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement."). The original rule imposed no timing preference or sequence, however, and permitted an impeaching party to introduce extrinsic evidence of a witness's prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness's availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement prevents unfair surprise; gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges' efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

Rationale for Proposed Amendment

Existing Rule 613(b) promises an impeached witness an opportunity to explain or deny her prior inconsistent statement at some point in time during the trial if extrinsic evidence of the statement is to be introduced (unless the trial judge decides to dispense with such an opportunity "if justice so requires"). But the current Rule does not specify *when* the witness must get that opportunity. An impeaching party may confront the witness with her prior inconsistent statement on cross-examination and provide the requisite opportunity *prior* to offering extrinsic evidence of the statement. But because there is no timing requirement in Rule 613(b), a party might offer extrinsic evidence of a witness's prior inconsistent statement *first*, and offer the witness an opportunity to explain or deny the statement thereafter. The Committee unanimously proposed an amendment to Rule 613(b) that would impose a prior foundation requirement, demanding that the

witness receive the requisite opportunity to explain or deny *before* extrinsic evidence is offered, with retained flexibility for the trial judge to excuse it in appropriate cases.

A prior foundation was required at common law and many federal courts continue to insist on a prior foundation. These courts have held that a witness *must* receive an opportunity to explain a prior inconsistent statement *before* extrinsic evidence may be offered.[1] Other federal courts acknowledge the flexible timing afforded by Rule 613(b), but find that a trial judge retains discretion through Rule 611(a) to insist upon an opportunity for the witness to explain or deny a prior inconsistent statement on cross-examination *before* extrinsic evidence of it is offered in a particular case.[2] Therefore, the flexible timing authorized by Rule 613(b) has been rejected by some federal courts.[3]

Courts insist upon a prior foundation because it can prove problematic to admit extrinsic evidence of a prior inconsistent statement prior to giving the witness the requisite opportunity to explain or deny the statement. Even when the witness remains available, she will need to be called back to the stand solely to allow her an opportunity to explain or deny a prior statement. Where the witness freely acknowledges the statement, there may have been no need to introduce extrinsic evidence at all. The witness might have been excused from the trial by the time extrinsic evidence of her statement is offered, necessitating her recall. There may be disagreement as to which party bears the burden of recalling her to afford her the opportunity to explain or deny her prior statement. [4] The witness may even have become unavailable by the time the extrinsic evidence of her prior inconsistent statement is offered. This creates the possibility that extrinsic evidence of a prior inconsistent statement will be admitted, but that the witness's promised opportunity to explain or deny the statement cannot be had. The original Advisory Committee dealt with these possibilities by affording discretion for the trial judge to allow extrinsic evidence of a prior inconsistent statement without affording the witness the usual opportunity to explain or deny the

[1] *See, e.g., United States v. Schnapp*, 322 F.3d 564 (8th Cir. 2003) (no error in prohibiting the defendant from introducing an inconsistent statement from a prosecution witness because counsel did not ask the witness about the statement on cross-examination, and it was well within the judge's discretion not to permit deviation from the traditional procedure of first providing a witness an opportunity to explain or deny the statement); *United States v. Devine*, 934 F.2d 1325, 1344 (5th Cir. 1991) ("Proof of such a statement may be elicited by extrinsic evidence only if the witness on cross-examination denies having made the statement."); *United States v. Cutler*, 676 F.2d 1245 (9th Cir. 1982); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989) ("before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same").

[2] *See United States v. Hudson*, 970 F.2d 948, 956 n.2 (1st Cir. 1992) ("Rule 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law prior foundation requirement when such an approach seems fit.").

[3] This application of Rule 613(b) may be more widespread than the reported cases show. *See* Draft Minutes of the Evidence Advisory Committee's Spring 2022 meeting, p. 17 ("The Chair agreed, noting that every one of the federal judges whom he had asked about this issue reported requiring a prior foundation despite the flexible timing allowed under current Rule 613(b).").

[4] *See* 3 J. Weinstein & M. Berger, Weinstein's Evidence, § 623[04], at 613–24 (1985) ("The rule does not indicate that the party introducing evidence of the inconsistent statement must afford the witness an opportunity to explain. It merely indicates that the witness must be afforded that opportunity. Thus neither side has the burden of recalling the witness; normally the impeaching party will not wish to do so.").

statement "if justice so requires."[5] The Advisory Committee note to the original Rule suggested that justice might permit extrinsic evidence of a prior inconsistent statement without the usual opportunity for the witness to explain or deny when the witness becomes unavailable by the time the statement is *discovered* by the opposing party.[6]

The Committee at the Spring 2022 meeting determined that a prior foundation requirement avoids the inefficiencies and disputes that can arise when extrinsic evidence of a prior inconsistent statement is admitted before allowing the impeached witness an opportunity to explain or deny. The amended text of Rule 613(b) would reflect practice in the federal courts, eliminating the current disconnect between the flexible timing authorized by the Rule and the common practice of requiring a prior foundation. The amendment would preserve a trial judge's discretion to allow a later opportunity to explain, or to dispense with it altogether, in appropriate cases (such as when the prior inconsistent statement is not discovered until after the witness has left the stand).

For these reasons, the Committee unanimously proposed an amendment to Rule 613(b) that would impose the common law prior foundation requirement with retained flexibility for the trial judge to excuse it in appropriate cases. As noted above, no public comments have been received to date on the proposed amendment to Rule 613(b). The comment period will close before the Committee's Spring 2023 meeting and any comments received will be reported in the agenda materials for that meeting.

Minor Change to Committee Note:

The Committee might want to consider a very minor change to the committee note. The first sentence of the committee note, as published, reads: "Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *prior* to the introduction of extrinsic evidence of the statement." The sentence contains the word "prior" twice. It may make sense to change the second "prior to" to "before" to avoid duplicative use of the term. The sentence would then read: "Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *before* the introduction of extrinsic evidence of the statement."

[5] Fed. R. Evid. 613(b).

[6] *See* Advisory Committee's note to 1975 version of Rule 613 ("In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge.").

TAB 5

FORDHAM

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to 801(d)(2) for Statements Made by a Predecessor in Interest
Date: October 1, 2022

At the last meeting, the Committee unanimously approved, for release for public comment, an amendment to Rule 801(d)(2). The amendment would resolve a circuit split on whether a statement made by a declarant can be offered against a party-opponent, if that party's cause of action or defense is derived directly from the declarant. The proposed amendment would bind the successor if the statement would have been admissible against the declarant (or the declarant's principal) as a party-opponent statement. The Standing Committee unanimously approved the amendment for release for public comment.

The public comment period began on August 15 and ends on February 1, 2023. [At this writing, no public comment has been made about the proposed amendment.]

This memo does the following:

- It sets forth the proposed amendment and Committee Note as issued for public comment;
- It recaps some of the drafting decisions that were made;
- It recaps the rationale for the amendment; and
- It discusses a possible change that was raised by a member of the Standing Committee.

Proposed Amendment and Committee Note:

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * * * *

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

If a party's claim or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Committee Note

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that derives its interest from a declarant or

principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

Recap of Drafting Decisions:

1. The amendment is placed at the end of the rule because it has to apply to all the subdivisions. The statement offered against the successor might not have been made by the predecessor himself, but instead may have been adopted by the predecessor, or made by the predecessor's agents. (This is especially so in corporate situations, in which the statement is made by an agent of the corporate principal.) If the predecessor's own statements are admissible against the successor, it would be irrational to have other Rule 801(d)(2) statements *not* admissible against the successor. Indeed many of the cases discussed in this memo have found statements admissible against a party when they were made by a predecessor's agent.

2. Reference to the "declarant's principal" mucks up the text a bit, but the reference is necessary because in many of the cases, the statement is made by a declarant and admissible against the predecessor party under Rule 801(2)(C) or (D). So the successor is not standing in the shoes of the *declarant, but rather of the principal*. If the rule only referred to "the declarant" then it would not cover the many cases in which the statement is made by a declarant-agent --- because the successor is standing in the shoes of the principal, not the agent.

Recap on the Rationale for the Amendment:

The major reason for the amendment is to rectify a circuit split on whether statements of a predecessor are admissible against a successor. The amendment adopts the view that there should be admissibility. Here are the reasons for that decision:

1. When the party's claim or defense is directly derived from the claim or defense of the declarant or the declarant's principal, the declarant or principal is essentially a real party in interest. It is the declarant's or principal's actions that are in dispute, not the successor's. Successors are usually bound by judgments against the predecessor under the doctrines of claim and issue preclusion. So it makes little sense to *bind* the successor to things the predecessor has done, yet prohibit mere admission of his statements.

2. The rationale for admitting party-opponent statements is that it is consistent with the adversary system: you can't complain about statements you made that are now being offered against you. That adversarial interest is also applicable when there has been a substitution of parties. The successor should not be able to complain about statements offered against it that are

made by the very person (or the agent of that person) whose injuries (or defense) the successor is relying on at trial.

3. The contrary rule, that a successor is not bound (adopted by a number of courts) gives rise to arbitrary and random application. Take two cases involving allegations of police brutality, both happening on the same day, both tried on the same day, and the victim in each case made a statement that his injuries weren't very severe. Victim 1 is alive at the time of trial --- so his statement is easily admitted against him under Rule 801(d)(2)(A). But assume Victim 2 is run over by a car and killed a month before trial. Under the *Huff* rule, Victim 2's statement, identical in all respects to that of Victim 1, is inadmissible hearsay. This makes no sense.

5. Given the breadth and number of successorship interests --- merger, assignment, estates, etc. --- the contrary view can have a substantial negative impact on federal litigation.

For the above reasons, the equities are in favor of admissibility of a hearsay statement against a party whose claim or defense is directly derived from the claim or defense of the declarant or the declarant's principal.

Possible Adjustment Raised by a Standing Committee Member

The committee note addresses the situation that might occur if the original party-opponent makes a hearsay statement *after* the litigation interest has been transferred to the successor. The position expressed makes a good deal of sense. The concept of admissibility is attribution --- the attribution in this situation is that the successor has taken an interest from the predecessor and so essentially adopts all hearsay statement that the predecessor made. But that attribution ends after the transfer. And it would be inappropriate to saddle the successor with post-transfer statements made by the predecessor --- perhaps made with the intent to undermine the successor's position.

All this is so, and the Standing Committee member who commented on the proposed amendment completely agreed. The suggestion was that this was a point of such importance that it should be made part of the text of the rule. Consequently, the Committee should give thought to elevating the concept currently in the committee note into the text of the rule.

Here is the language:

> The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

Reporter's Comment:

There are a number of reasons for keeping the language about post-transfer statements in the committee note. First, so far as I can tell, the problem has never arisen in any reported case. So while it is a potential problem, it would not seem to arise with sufficient frequency to justify treatment in text.

Second, the point is implicit in the text anyway. The text provides that "a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party." But a statement made after a transfer would not be admissible against the declarant or principal, for the simple reason that at the time of the statement, the declarant or the declarant's principal is no longer a party. So it would not be a party-opponent statement at the time it was made. It seems unnecessary to add language for a rare-occurring event that is already covered by the rule. This seems to be precisely the kind of point that is properly placed in the committee note.

Third, the concern sometimes expressed about committee notes --- that they establish rules of law that cannot be found in the text of the amendment --- does not apply here. As stated above, the text, fairly read, would not allow admissibility of a statement made by the predecessor after a transfer of interest, because the linchpin of attribution is no longer present. So there is nothing problematic about relegating the issue of post-transfer statements to the note.

Finally, the language already added to the rule --- in a hanging paragraph that is anathema to stylists --- is already complicated enough. Adding a rule about post-transfer statements will only make it more so. Here is how it might look:

If a party's claim or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party – but not if the declarant or principal made the statement after the right or potential liability has been transferred, by contract or operation of law, to the party against whom the statement is offered.

This is really the tail wagging the dog. The language necessary to cover the rare-to-zero occurrence of post-transfer statements is almost as long as the language making the basic point addressed by the amendment.

If, however, the Committee does decide to include language in text about post-transfer statements, the question that would then arise is whether there would be any change necessary in the existing committee note. The answer should be no. The committee note explains, helpfully, that the rationale of attribution does not apply to post-transfer statements. There is no reason to take that out of the note. It would help to explain why the text was included.

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 804(b)(3): Corroborating Circumstances Requirement
Date: October 1, 2022

At the last meeting, the Committee unanimously approved, for release for public comment, an amendment to Rule 804(b)(3) – the hearsay exception for "statements against interest." The amendment would resolve a conflict in the courts by directing courts to consider "the totality of circumstances" as well as "evidence, if any, corroborating" the statement in determining whether a statement against penal interest offered in a criminal case is supported by corroborating circumstances that clearly indicate its trustworthiness. The Standing Committee unanimously approved the amendment for release for public comment. The period for public comment opened on August 14, 2022 and will close on February 16, 2023. To date, no comments have been received with respect to the proposed amendment to Rule 804(b)(3).

This memo sets forth the proposed amendment and committee note as issued for public comment, briefly recaps the rationale for the proposed amendment, and discusses one possible change to the text of the amendment raised in the Standing Committee.

Proposed Amendment and Committee Note:

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness, ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability~~ --- after considering the totality of circumstances under which it was made and evidence, if any, corroborating it.

Committee Note

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating or contradicting it. While most courts have considered corroborating evidence, some courts have refused to do so. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement that tends to expose the declarant to criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. It must also consider corroborating information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that contradicts the declarant's account.

The amendment is consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. It is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "unless corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like *Donnelly v. United States*, 228 U.S. 243 (1912) that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

Rationale for Proposed Amendment

There is a split of authority regarding the information that may be considered in determining whether a statement against penal interest is supported by "corroborating circumstances that clearly indicate its trustworthiness" under Rule 804(b)(3)(B). Most federal courts hold that a trial judge should consider evidence, if any, corroborating the accuracy of the hearsay statement at issue in applying the exception.[1] Some circuits hold, however, that trial judges may consider only inherent guarantees of trustworthiness surrounding the statement and *may not*

[1] *See, e.g., United States v. Desena*, 260 F.3d 150 (2d Cir. 2001) (finding corroborating circumstances requirement satisfied with respect to a statement identifying declarant and defendant as perpetrators of an arson, in part, because an eyewitness's description of the scene of the arson the day of the crime matched the declarant's description of the defendant's actions); *United States v. Lora*, No. 20-33, 2022 WL 453368, at *2 (2d Cir. Feb. 15, 2022) (noting that the Second Circuit has "divided that inquiry into 'corroboration of the *truth* of the declarant's statement,' which 'focus[es] on whether the evidence in the record supported or contradicted the statement'; and 'corroboration of the declarant's trustworthiness,' which 'focus[es] on [the] declarant's *reliability when the statement was made.'")*.

consider corroborative evidence in determining admissibility.[2] The Committee determined that the approach taken by the majority of federal courts that consider corroborating information in the Rule 804(b)(3) inquiry was superior for several reasons, including:

- Courts limiting their inquiry to the inherent circumstantial guarantees of reliability surrounding the making of the statement are relying upon *Ohio v. Roberts* Sixth Amendment precedent that no longer applies.

- Limiting the information that trial judges may consider in ruling on the admissibility of a hearsay statement under Rule 804(b)(3) appears inconsistent with Rule 104(a) and the Supreme Court's interpretation of it in *Bourjaily v. United States*.

- Rule 807 was amended in 2019 to direct courts to consider "the totality of circumstances" under which a hearsay statement was made, *as well as* "evidence, if any, corroborating the statement" in assessing trustworthiness for purposes of the residual exception because it makes little sense to disregard information that may be helpful in determining reliability. This created an inconsistency between Rules 804(b)(3) and 807, in those courts that reject the relevance of corroborating evidence in assessing "corroborating circumstances" under Rule 804(b)(3).

- Considering corroborating information in determining whether corroborating circumstances clearly indicate the trustworthiness of a statement against penal interest appears consistent with congressional intent in adding the requirement to Rule 804(b)(3).

- The minority of courts that reject corroborating information in determining admissibility under Rule 804(b)(3)(B) have not corrected course on their own in the wake of the Supreme Court's decision in *Crawford v. Washington* in 2004.[3]

Thus, the Committee proposed an amendment to Rule 804(b)(3)(B) expressly directing courts to consider corroborating evidence, if any, in determining admissibility.

Possible Change Raised by a Standing Committee Member

A member of the Standing Committee suggested one minor modification to the proposed amendment: adding rule text directing the court to consider evidence *contradicting* the proffered

[2] *See, e.g., United States v. Franklin,* 415 F.3d 537, 547 (6th Cir. 2005) ("To determine whether a statement is sufficiently trustworthy for admission under Rule 804(b)(3), the court is not to focus on whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself.").

[3] *See, e.g., United States v. Ocasio-Ruiz*, 779 F.3d 43, 46 (1st Cir. 2015) ("Such corroboration "is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

statement against penal interest. While corroborating evidence militates in favor of admissibility, evidence contradicting the statement clearly cuts against admissibility.

It may not be advisable to add language about contradictory evidence to the text of the proposed amendment for a few reasons. First, it would seem that the existing text of the amendment directing courts to consider corroborating evidence, if any, logically means that contradictory evidence cuts against admissibility. Indeed, the federal courts that consider corroborating information under the existing rule recognize that contradiction of a proffered statement against interest supports exclusion.[4] Thus, it appears unnecessary to spell this out in rule text. Second, the amendment to Rule 804(b)(3)(B) was designed to track the 2019 amendment to Rule 807. The text of Rule 807 directs courts to consider "the totality of the circumstances" under which a statement was made and "evidence, if any, corroborating the statement." It does not expressly direct courts to consider contradictory evidence undercutting admissibility. Thus, if such language were added to the Rule 804(b)(3)(B) amendment, the two rules would utilize slightly distinct language to address the same issue, which is not optimal. Although it runs counter to common sense, an argument could even be made that the two rules should be interpreted differently due to the use of distinct language. One might argue that the Committee must have intended that contradictory evidence *not* be considered under Rule 807 because it failed to include it expressly in rule text when it did include it in amended Rule 804(b)(3)(B). Finally, to the extent that there could be any question whether the amendment to Rule 804(b)(3)(B), as published, includes the consideration of information contradicting the statement against interest, the committee note specifically addresses this issue in two separate places, stating that: courts should "consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating or contradicting it" and that "Courts must also consider evidence that contradicts the declarant's account."

Therefore, it seems that the existing language of the proposed amendment covers contradictory evidence by definition when it directs courts to look for corroboration. And any confusion that could arise is handled in the committee note. Given the conflict it would create with the language of Rule 807, the better approach may be to leave the amendment language as published. The Committee can certainly revisit the issue should public comments raise this concern.

If the Committee is interested in adding contradiction to rule text, however, it would require the addition of two words to the published amendment as follows:

[4] *See, e.g., United States v. Bumpass*, 60 F.3d 1099 (4th Cir. 1995) (third-party confession to charges not admissible where it was directly contradicted by three eyewitnesses); *United States v. Hawkins*, 803 F.3d 900 (7th Cir. 2015) (statement properly excluded where contradicted by declarant and other eyewitnesses). Even federal courts that purport *not* to consider the existence of corroboration in the Rule 804(b)(3) calculus have recognized that statements that are contradicted by other evidence should not be admitted. *See United States v. Mackey*, 117 F.3d 24 (1st Cir. 1997) (noting defendant's girlfriends' testimony that defendant had no interest in baseball in rejecting statement of his bookie that defendant had won 60k on betting on baseball --- and not by robbing a bank).

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness, ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability~~ --- after considering the totality of circumstances under which it was made and evidence, if any, corroborating or contradicting it.

There would be no need to alter the committee note because it already expressly discusses contradictory information.

TAB 7

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 1006: Summaries to Prove Content of Voluminous Writings, Recordings, or Photographs
Date: October 1, 2022

At the last meeting, the Committee unanimously approved, for release for public comment, an amendment to Rule 1006. Rule 1006 provides an exception to the Best Evidence rule that permits the use of a summary to prove the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. The amendment would clarify certain aspects of the Rule that have caused repeated problems for some federal courts. The difficulties courts experience in applying Rule 1006 largely stem from confusion about the distinctions between a summary offered as an illustrative or pedagogical aid pursuant to Rule 611(a) and a Rule 1006 summary offered as alternative evidence of underlying voluminous content. The Committee also approved for publication an amendment to Rule 611 to provide guidance regarding the proper use of illustrative aids. The Standing Committee unanimously approved the Rule 1006 amendment for release for public comment. The period for public comment opened on August 14, 2022 and will close on February 16, 2023. To date, no comments have been received with respect to the proposed amendment to Rule 1006.

This memo sets forth the proposed amendment and committee note as issued for public comment, briefly recaps the rationale for the proposed amendment, and suggests two modest modifications to the committee note.

Proposed Amendment and Committee Note:

Rule 1006. Summaries to Prove Content

(a) **Summaries of Voluminous Materials Admissible as Evidence.** The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) **Procedures.** The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) **Illustrative Aids Not Covered.** A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).

Committee Note

Rule 1006 has been amended to correct misperceptions about the operation of the Rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the Rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings – or a portion of them -- *have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, the summary may be admitted in addition to the underlying documents.

A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

Although Rule 1006 refers to materials too voluminous to be examined "in court" and permits the trial judge to order production of underlying materials "in court", the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of voluminous, admissible information offered to prove a fact, and summaries of evidence offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 611(d).

Rationale for the Proposed Amendment

A review of federal cases shows that some courts repeatedly struggle with several issues under Rule 1006. First, the cases reflect confusion over the evidentiary status of a Rule 1006 summary. Some courts mistakenly hold that Rule 1006 summaries are "not evidence" and may be relied upon merely as aids to understanding. Other federal cases reveal related confusion over the proper use of the voluminous writings or recordings underlying a Rule 1006 summary at trial. Some courts mistakenly demand admission of the underlying material, while others prohibit resort to a Rule 1006 summary if the underlying records have been admitted into evidence. Finally, although a Rule 1006 summary only earns an exception to the Best Evidence rule if it is an accurate and non-argumentative reflection of the underlying materials, some federal courts have permitted Rule 1006 summaries to include assumptions, conclusions, and arguments not found in the underlying material.[1]

Most of this confusion stems from cases that conflate illustrative aids offered under Rule 611(a) (which are not evidence, which must be based upon admitted evidence, and which may make assumptions and arguments supported by the evidence) and Rule 1006 summaries (which are offered to prove the content of admissible voluminous materials that may not have been admitted into evidence).[2] The amendment would clarify the distinction between Rule 1006 summaries and Rule 611 illustrative aids, explaining in rule text that Rule 1006 summaries are admitted "as evidence" and that they may be admitted "whether or not" the underlying materials have been admitted. In addition, the amendment would add a new subsection (c) expressly stating

[1] See the Committee Note, below, which raises concerns about inaccurate or argumentative summaries and states that such concerns can be addressed under Rule 403.

[2] *See e.g., United States v. Bailey*, 973 F.3d 548, 567 (6th Cir. 2020) (citing a portion of a prior opinion discussing Rule 611(a) summaries in connection with discussion of Rule 1006).

that Rule 1006 does not govern the use of illustrative aids and directing courts and litigants to Rule 611 for standards governing the use of illustrative aids.

Modification to Committee Note

The Committee may wish to consider two minor modifications to the committee note. First, it is well-settled that the voluminous material underlying Rule 1006 summaries must be "admissible" even though it need not be admitted into evidence. Indeed, this is one of the few parts of the Rule 1006 foundation about which the federal courts have not demonstrated confusion. The proposed amendment, therefore, does not clarify this portion of the foundation in rule text. In order to ensure that the amendment does not create confusion about the continuing vitality of that portion of the foundation, it may make sense to add one sentence to the paragraph of the committee note that discusses the underlying voluminous materials, as follows:

> Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. [It is true that the underlying voluminous materials summarized by a Rule 1006 summary must, themselves, be admissible.] But b~~B~~ecause Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states.

Second, the Committee may want to consider deleting two words from the final paragraph of the committee note distinguishing Rule 1006 summaries from Rule 611 illustrative aids, as follows:

> The amendment draws a distinction between summaries of voluminous, admissible information offered to prove a fact, and summaries ~~of evidence~~ offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 611(d).

Describing Rule 611 aids as "summaries of evidence" may mislead the casual reader into thinking that Rule 611 summaries are themselves evidence. In addition, the sentence ends with the words "understanding the evidence" and the deletion avoids using the term "evidence" twice. Finally, eliminating the words "of evidence" avoids a misdescription of Rule 611 illustrative aids if the amendment ultimately proposed covers closing arguments, as well as evidence – a point which is under discussion in the Committee.

Supplemental Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Public Comment on Rule 1006
Date: October 28, 2022

To date, one public comment has been received with regard to the proposed amendment to Rule 1006. In his comment, Jacob Hayward expressed strong support for the proposed amendment but noted his "desire for the amended text of Rule 1006 to make explicit the requirement, plainly reflected in common law and elsewhere within the FRE, that the underlying evidence being summarized would be itself admissible if not for its voluminousness or cumulative nature." Mr. Hayward opined that the amendment to Rule 1006 would clarify a number of important issues, but expressed concern that the proposed text of the rule nowhere states that the underlying voluminous material must be *admissible* even if it need not be admitted. He proposes a modest modification to the text of the amendment to make this portion of the well-accepted foundation for Rule 1006 summaries express.

My memo of October 1, 2022 raised the same concern:

> [I]t is well-settled that the voluminous material underlying Rule 1006 summaries must be "admissible" even though it need not be admitted into evidence. Indeed, this is one of the few parts of the Rule 1006 foundation about which the federal courts have not demonstrated confusion. The proposed amendment, therefore, does not clarify this portion of the foundation in rule text. In order to ensure that the amendment does not create confusion about the continuing vitality of that portion of the foundation, it may make sense to add one sentence to the paragraph of the Committee Note that discusses the underlying voluminous materials.

As I noted in the October 1 memo, this issue seems important to address. Even if it appears unlikely that courts will ignore this longstanding part of the Rule 1006 foundation, there is a risk in omitting it from an amendment designed to clarify the required foundation for admitting a Rule 1006 summary. *Expressio unius est exclusio alterius.* Adding a sentence to the committee note could reinforce the admissibility requirement. However, adding language to the rule text, as Mr. Hayward suggests, would seem to be a superior alternative because it would eliminate any possible inference that this requirement of admissibility has been removed.

If the Committee is inclined to reinforce the admissibility requirement in rule text, there are multiple drafting options:

Option 1

Rule 1006. Summaries to Prove Content

(a) **Summaries of Voluminous Materials Admissible as Evidence.** The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation to prove the content of admissible voluminous writings, recordings, or photographs that cannot

be conveniently examined in court, whether or not they have been introduced into evidence.

(b) **Procedures.** The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) **Illustrative Aids Not Covered.** A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).

Option 2

Mr. Hayward suggests the following:

Rule 1006. Summaries to Prove Content

(a) **Summaries of Voluminous Materials Admissible as Evidence.** The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court but are otherwise admissible, whether or not they have been introduced into evidence.

(b) **Procedures.** The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) **Illustrative Aids Not Covered.** A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).

If the Committee prefers to address this concern through a committee note, my memo of October 1, 2022 that appears as Tab 7 in the meeting materials suggests adding a sentence to the note stating: "It is true that the underlying voluminous materials summarized by a Rule 1006 summary must, themselves, be admissible." The Committee might even consider rewording such a sentence to say that it "remains true" that the underlying materials must be admissible.