

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 10, 2023

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met in Washington, D.C., on April 28, 2023. At the meeting the Committee discussed and gave final approval to five proposed amendments that had been published for public comment in August 2022. The Committee also tabled a proposed amendment.

The Committee made the following determinations at the meeting:

- It unanimously approved proposals to add a new Rule 107 and to amend Rules 613(b), 801(d)(2), 804(b)(3), and 1006, and recommends that the Standing Committee approve the proposed rules amendments and new rule.
- It voted to table an amendment to Rule 611 that would impose safeguards to apply if a court decides to allow jurors to propose questions to witnesses.

A full description of all these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The proposed amendments (including committee notes, summary of public comment, and gap reports) can be found as attachments to this Report.

II. Action Items

A. New Rule 107, for Final Approval

At the Spring 2022 meeting, the Committee unanimously approved a proposal to add a new rule 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 trier of fact in understanding other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. Similar confusion exists in distinguishing a summary of voluminous evidence, covered by Rule 1006, and a summary that is not evidence but rather presented to assist the trier of fact in understanding evidence. In addition, the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards.

The proposed amendment, published for public comment as a new Rule 611(d), allowed illustrative aids to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. The pitch of that balance was left open for public comment --- whether the negative factors would have to *substantially* outweigh the usefulness of the aid (the same balance as Rule 403), or whether the aid would be prohibited if the negative factors simply outweighed the usefulness of the aid.

Because illustrative aids are not evidence, adverse parties do not receive pretrial discovery of such aids. The proposal issued for public comment would have required notice to be provided, unless the court for good cause orders otherwise. This notice requirement was most controversial when applied to the use of illustrative aids on opening and closing --- leading the Committee to exclude openings and closings from the proposal as issued for public comment.

Lawyer groups (such as bar associations) and the Federal Magistrate Judges' Association submitted comments in favor of the proposed amendment. But most practicing lawyers were critical. Most of the negative public comment went to the notice requirement; the commenters argued that a notice requirement was burdensome and would lead to motion practice and less use of illustrative aids. Other comments questioned the need for the rule. Others argued (in the face of contrary case law) that the courts were having no problems in regulating illustrative aids.

In light of the public comment, as well as comments from the Standing Committee and those received at the symposium on the rule proposal in the Fall of 2022, the Committee unanimously agreed on the following changes: 1) deletion of the notice requirement; 2) extending the rule to openings and closings (reasoning that after lifting the notice requirement, there was no reason not to cover openings and closings, especially because courts already regulate illustrative aids used in openings and closings and it would be best to have all uses at trial covered by a single rule); 3) providing that illustrative aids can be used unless the negative factors *substantially* outweigh the educative value of the aid (reasoning that it would be confusing to have a different balancing test than Rule 403, especially when the line between substantive evidence and illustrative aids may sometimes be difficult to draw); 4) specifying in the text of the rule that illustrative aids are not evidence; 5) adding a subdivision providing that summaries of voluminous evidence are themselves evidence and are governed by Rule 1006; and 6) relocating the proposal to a new Rule 107 (reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony).

Because illustrative aids are not evidence, the proposed rule provides that an aid should not be allowed into the jury room during deliberations, unless the court, for good cause, orders otherwise. The committee note specifies that if the court does allow an illustrative aid to go to the jury room, the court must upon request instruct the jury that the aid is not evidence.

Finally, to assist appellate review of illustrative aids, the rule provides that illustrative aids must be entered into the record, unless it is impracticable to do so.

The Committee strongly believes that this rule on illustrative aids will provide an important service to courts and litigants. Illustrative aids are used in almost every trial, and yet nothing in the rules specifically addresses their use. This amendment rectifies that problem.

At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed new Rule 107. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

The proposed amendment to add a new Rule 107, together with the proposed Committee Note, the gap report, and the summary of public comment, is attached to this Report.

B. Proposed Amendment to Rule 1006, for Final Approval¹

Evidence 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. The courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and much of the problem is that 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). Some courts have stated that summaries admissible under Rule 1006 are “not evidence,” which is incorrect. Other courts have stated that all of the underlying evidence must be admitted before the summary can be admitted; that, too, is incorrect. Still other courts state that the summary is inadmissible if any of the underlying evidence *has* been admitted; that is also wrong.

After extensive research and discussion, the Committee unanimously approved an amendment to Rule 1006 that would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006.

The proposal to amend Rule 1006 dovetails with the proposal to establish a rule on illustrative aids, discussed above. These two rules serve to distinguish a summary of voluminous evidence (which is itself evidence and governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted. The Committee believes that the proposed amendment will provide substantial assistance to courts and litigants in navigating this confusing area.

The rule proposal for public comment received only a few public comments, largely favorable.

At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 1006. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

The proposed amendment to Rule 1006, together with the Committee Note, the gap report, and the summary of public comment, is attached to this Report.

¹ This rule is taken out of numerical sequence because it is of a piece with the proposed amendment on illustrative aids.

C. Proposed Amendment to Rule 613(b) for Final Approval

The common law provided 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 existing Rule 613(b) rejects that “prior presentation” requirement. It 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. It turns out, though, that most courts have retained the common law “prior presentation” requirement. These courts have found that a prior presentation requirement saves time, because a witness will often concede that she made the inconsistent statement, and that makes it unnecessary for anyone to introduce extrinsic evidence. The prior presentation requirement also avoids the difficulties inherent in calling a witness back to the stand to give her an opportunity at some later point to explain or deny a prior statement that has been proven through extrinsic evidence.

The Committee has unanimously determined that the better rule is to require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity (for example, when the prior inconsistent statement is not discovered until after the witness testifies). The amendment will bring the rule into alignment with what appears to be the practice of most trial judges --- a practice that the Committee concluded is superior to the practice described in the current rule.

The rule published for public comment provides that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. It gives the court the discretion to dispense with the requirement, in order to allow flexibility. The default rule brings the courts into uniformity and opts for the rule that provides more fairness to the witness and a more efficient result to the court. The rule received only a few public comments, largely favorable.

At the Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 613(b). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

The proposed amendment to Rule 613(b), together with the proposed Committee Note, gap report, summary of public comment, is attached to this Report.

D. Proposed Amendment to Rule 801(d)(2) Governing Successors-in-Interest, for Final Approval

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 defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent. Some circuits would permit the statements made by the declarant to be offered against the successor as a party-opponent statement under Rule 801(d)(2), while others would foreclose admissibility because the statement was made by one who is technically not the party-opponent in the case.

The Committee has determined that the dispute in the courts about the admissibility of party-opponent statements against successors should be resolved by a rule amendment, because the problem arises with some frequency in a variety of predecessor/successor situations (most commonly, decedent and estate in a claim brought for damages under 42 U.S.C. § 1983). The Committee unanimously determined that the appropriate result should be that a hearsay statement would be admissible against the successor-in-interest. The Committee reasoned that admissibility was fair when the successor-in-interest is standing in the shoes of the declarant --- because the declarant is in substance the party-opponent. Moreover, a contrary rule results in random application of Rule 801(d)(2), and possible strategic action, such as assigning a claim in order to avoid admissibility of a statement. The Committee approved the following addition to Rule 801(d)(2):

If a party's claim, defense, 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.

The proposed committee note emphasizes that to be admissible against the successor, the declarant must have made the statement before the transfer of the claim or defense. It also specifies that if a statement made by an agent is not admissible against a principal, then it is not admissible against any successor to the principal.

The rule as published for public comment received only a few comments, largely favorable.

At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 801(d)(2). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

The proposed amendment to Rule 801(d)(2), together with the Committee Note, the gap report, and the summary of public comment, is attached to this Report.

E. Proposed Amendment to the Rule 804(b)(3) Corroborating Circumstances Requirement, for Final Approval

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. Most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest as well as independent evidence corroborating (or refuting) the accuracy of the statement. But some courts do not permit inquiry into independent evidence --- limiting judges to consideration of the inherent guarantees of trustworthiness surrounding the statement. This latter view --- denying consideration of independent corroborative evidence --- is inconsistent with the 2019 amendment to Rule 807 (the residual exception), which requires courts to look at corroborative evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under that exception. The rationale is that corroborative evidence can shore up concerns about the potential unreliability of a statement --- a rationale that is applied in many other contexts, such as admissibility of co-conspirator hearsay, and tips from informants in determining probable cause.

The Committee believes that it is important to rectify the dispute among the circuits about the meaning of “corroborating circumstances” and that requiring consideration of corroborating evidence not only avoids inconsistency with the residual exception, but is also supported by logic and by the legislative history of Rule 804(b)(3).

The proposal published for public comment provided as follows:

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, the court finds it is supported by corroborating circumstances that clearly indicate trustworthiness --- after considering the totality of circumstances under which it was made and evidence, if any, corroborating it. if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

There were only a few public comments to the rule, and all were favorable about requiring consideration of corroborating evidence. But there was some confusion about the two different uses of the word “corroborating” in the rule. What is the difference between “corroborating circumstances” and “corroborating evidence”? The answer is that “corroborating circumstances” is a term of art --- an undeniably confusing one, because it combines the notion of corroborating evidence and circumstantial guarantees of trustworthiness. In contrast, “corroborating evidence” refers to independent evidence that supports the declarant’s account --- under the proposal, that kind of information must be considered in assessing whether “corroborating circumstances” are found.

In using the term “corroborating evidence” the Committee was intending to use the exact language that was adopted in the residual exception, Rule 807, in 2019. But after considerable discussion at the Spring 2023 meeting, the Committee concluded that the better result would be to use a different word than “corroborating”; the deviation from the Rule 807 language is justified by the fact that Rule 807 refers to “trustworthiness” --- not “corroborating circumstances” --- so use of “corroborating” in that rule is not confusing. The Committee determined that it could reach the same result with different terminology.

The proposal unanimously approved by the Committee, for which it seeks final approval, reads as follows:

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, the court finds it is supported by corroborating circumstances that clearly indicate trustworthiness --- after considering the totality of circumstances under which it was made and any evidence that supports or contradicts it. ~~if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.~~

A major advantage of this revision is that (freed from uniformity with Rule 807) it can specifically require the court to consider both evidence supporting the statement and evidence that contradicts it.

At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 804(b)(3). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.

The proposed amendment to Rule 804(b)(3), together with the Committee Note, the gap report, and the summary of public comment, is attached to this Report

III. Information Item

Tabling the Proposed Amendment Setting Forth Safeguards When the Court Allows Jurors to Submit Questions for Witnesses

There is controversy in the courts over whether jurors should be allowed to question witnesses at trial. The Committee was never seeking to resolve that controversy in a rule amendment. But the Committee did develop a proposed amendment that would set forth the minimum safeguards that should be applied if the trial court does decide to allow jurors to question witnesses. Standards regulating the practice can be found in some court of appeals cases, but the Committee determined that it would be useful to set forth a single set of safeguards in an Evidence Rule. The proposal would have required the court to instruct jurors, among other things, that they must submit questions in writing; that they are not to draw negative inferences if their question is rephrased or does not get asked; and that they must maintain their neutrality. The proposal also provided 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 held a symposium on the rule proposal, and on juror questions of witnesses more generally, at its Fall 2022 meeting.

While the proposal sought only to impose safeguards and avoided weighing in on the practice itself, members of the Standing Committee and the Advisory Committee expressed concern that if the proposal were adopted, more courts would be likely to allow the practice; and these members were opposed to the practice. The most voiced objections were: 1) that allowing jurors to ask questions of witnesses would shift control of the litigation from the parties and counsel to jurors; 2) that jurors were likely to become advocates as opposed to factfinders; and 3) that a juror question might alert the prosecutor or plaintiff of the need to introduce evidence on an element of the crime or claim --- evidence that they might otherwise not have introduced.

At its Spring meeting, these doubts about the practice of allowing jurors to question witnesses led the Committee to table the proposal. The Committee did suggest that the proposed safeguards might be usefully placed in the Benchbook for U.S. District Court Judges. After the meeting, the Reporter referred the proposed safeguards, as well as the research done by the Committee, to the Benchbook Committee. The Chair of that Committee, Judge Julie Robinson,

indicated that the Benchbook Committee has recently been reconstituted and would consider the proposed safeguards.

III. Minutes of the Spring 2023 Meeting

The draft of the minutes of the Committee's Spring 2023 meeting is attached to this report. These minutes have not yet been approved by the Committee.