AGENDA

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE
RULES OF EVIDENCE

Friday, December 5, 2025, 1:30 p.m.
via WebEx and
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Approval of February 2, 2025, Meeting Minutes [Pages 2 to 3]

III. Announcements from the Chair

IV. Old Business

a. Rules 107 and 1006 (Judge Freyre) [Pages 4 to 161]

b. Rule 807 (Luke McConnell and Rick Lee) [Pages 162 to 173]

V. New Business

a. Proposed Changes to FRE 609 and 707 (Judge Freyre) [Pages 174 to 207]

VI. Adjourn

VII. Next meeting will be Friday, December 4, 2026

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

February 7, 2025, Meeting Minutes

A quorum being present, the Colorado Supreme Court's Advisory Committee on the Rules of Evidence was called to order by Judge Rebecca R. Freyre at 1:30 pm in the Ralph. L. Carr Colorado Judicial Center Fourth Floor Conference Room and via WebEx. Members present or excused from the meeting were:

Name	Present	Absent
Judge Rebecca R. Freyre, Chair	X	
David DeMuro	X	
Judge Stephanie Dunn	X	
Judge Sean Finn	X	
Judge Melina Hernandez		X
Rick Lee	X	
Luke McConnell	X	
Professor Christopher Mueller		X
Norman Mueller	X	
Chief Judge Román	X	
Corelle Spettigue	X	
Professor Karen Steinhauser		X
Judge Juan G. Villaseñor	X	
Lisa Weisz	X	
Judge Shay Whitaker	X	

I. Attachments & Handouts

- February 7, 2025, Agenda
- December 8, 2023, Minutes
- CRE 804 Memo
- Preliminary Draft of Proposed FRE Amendments

II. Minutes

- The December 8, 2023, minutes were adopted as submitted.

III. Announcements from the Chair

- Chair Judge Freyre stated that the Court adopted changes to several Colorado Rules of Evidence since the last meeting. However, this Committee did not propose changes to Rules 107 (new) and 1006 despite those rules having received federal rule changes. After discussion, the Committee decided to reconsider any changes to these rules at the next meeting.

Since the last meeting, Judge Finn removed gendered pronouns from the Rules of Evidence, and the Court approved those proposals.

IV. Old Business

a. CRE 804 Update (Lisa Weisz, Rick Lee, and Judge Villaseñor)

This proposal would broaden what a trial court can consider related to hearsay exceptions. Under current law, the proponent of a statement against interest must establish its trustworthiness through an analysis limited to intrinsic factors. Under the amendment, the proponent must still establish the trustworthiness of the statement, but the analysis may rely on both intrinsic and extrinsic factors.

The Committee voted unanimously to approve the proposal.

Judge Freyre noted that Rule 807 may need corollary changes. Judge Freyre formed a subcommittee to consider possible changes. Luke McConnell and Rick Lee volunteered.

V. New Business

a. 2026 Proposed Amendments to the Federal Rule of Evidence 801 (Judge Freyre)

The proposed language in the federal rule seems to make changes that more closely mirror the Colorado rule, so the Committee will not explore changing the Colorado rule.

On a separate note, Judge Finn noticed some grammatical errors consistently appear in the rules. Often, *which* is used when *that* should be. Judge Finn will tackle this project.

VI. Future Meeting date

The committee adjourned at 1:59 pm.

PRELIMINARY DRAFT

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence

Request For Comment

Comments are Sought on Amendments to:

Appellate Rules	2 and 4
Bankruptcy Rules	Restyled Rules Parts III-VI; Rules 3002.1, 3011, and 8003; new Rule 9038; Official Forms 101, 309E1, 309E2, and 417A; and new Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R
Civil Rules	15, 72, and new Rule 87
Criminal Rule	New Rule 62
Evidence Rules	106, 615, and 702

Written Comments Due by
February 16, 2022

THE UNITED STATES COURTS

Prepared by the
Committee on Rules of Practice and Procedure
Judicial Conference of the United States

AUGUST 2021

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

MEMORANDUM

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

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

DATE: May 15, 2021

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met remotely on April 30, 2021. At the meeting the Committee discussed ongoing projects involving possible amendments to Rules 106, 615, and 702. It also considered items to be put on the agenda for further consideration by the Committee.

The Committee made the following determinations at the meeting:

● It unanimously approved proposed amendments to Rules 106, 615, and 702, and is submitting them to the Standing Committee with the recommendation that they be released for public comment;

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II. Action Items

A. Proposed Amendment to Rule 106, for Release for Public Comment

At the suggestion of Hon. Paul Grimm, the Committee has for the last four years considered and discussed whether Rule 106 --- the rule of completeness --- should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. The Committee has considered whether Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers unrecorded oral statements, as well as written and recorded statements.

The courts are not uniform in the treatment of these issues. On the hearsay question, some courts have held that when a party introduces a portion of a statement that is misleading, it can still object, on hearsay grounds, to completing evidence that corrects the misimpression. Other courts have held essentially that if a party introduces a portion of a statement so that it can mislead the factfinder about the statement actually made, that party forfeits the right to object to the remainder that is necessary to remedy the misimpression. As to unrecorded oral statements, most courts have found that when necessary to complete, such statements are admissible either under Rule 611(a) or under the common law rule of completeness.

After much discussion and consideration, the Committee has unanimously approved, for release for public comment, an amendment to Rule 106 that would: 1) allow the completing statement to be admissible over a hearsay objection; and 2) cover unrecorded oral statements. 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. What has been particularly confusing to courts and practitioners is that Rule 106 has been considered a "partial codification" of the common law --- meaning that the parties must be aware that common law may still be invoked. One goal of the amendment is to displace the common law --- as it has been displaced by all the other Federal Rules of Evidence.

As to admissibility of out-of-court statements, the amendment takes the position that the proponent, by providing a misleading presentation, forfeits the right to foreclose admission of a remainder that is necessary to remedy the misimpression. Simple notions of fairness, already embodied in Rule 106, dictate that a misleading presentation cannot stand unrebutted. The amendment leaves it up to the court to determine whether the completing remainder will be admissible to prove a fact, or admissible for the more limited non-hearsay purpose of providing context. Either usage is encompassed within the rule terminology--- that the completing remainder is admissible "over a hearsay objection."

As to unrecorded oral statements, the rationale for covering them is that most courts already admit such statements when necessary to complete --- they just do so under a different evidence rule or under the common law. The Committee was convinced that covering unrecorded oral statements under Rule 106 would be a user-friendly change, especially because the existing hodgepodge of coverage of unrecorded statements presents a trap for the unwary. As stated above, the fact that completeness questions commonly rise at the trial itself means that parties cannot be expected to quickly get an answer from the common law, or from a rule such as Rule 611(a), that does not specifically deal with completeness.

It is important to note that nothing in the amendment changes the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. So, the mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

The Committee unanimously approved the proposed amendment to Rule 106. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 106, and the Committee Note, are attached to this Report.

B. Proposed Amendment to Rule 615, for Release for Public Comment

Rule 615 provides for court orders excluding witnesses so that they "cannot hear other witnesses' testimony." The Committee determined that there are problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, because exclusion from the courtroom is not sufficient to protect against the risk of witnesses tailoring their testimony after obtaining access to trial testimony. But other courts have read the rule as it is written.

After extensive consideration and research over three years, the Committee agreed on an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself is necessary. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increased possibility of witness access to information about testimony through news, social media, YouTube or daily transcripts.

At the Spring, 2021 meeting the Committee unanimously voted in favor of an amendment that limits an exclusion order to just that --- exclusion of witnesses from the courtroom. But 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."

The Committee also considered whether an amendment to Rule 615 should address orders that prohibit counsel from preparing prospective witnesses with trial testimony. The Committee resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules.

Finally, the Committee approved an additional amendment to the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion. There is some dispute in the courts on whether the entity-party is limited to one such exemption or is entitled to more than one. The amendment clarifies that the exemption is limited to one officer or employee. The rationale is that the exemption is intended to put entities on a par with individual parties, who cannot be excluded under Rule 615. Allowing the entity more than one exemption is inconsistent with that rationale.

The Committee unanimously approved the proposed amendment to Rule 615. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 615, and the Committee Note, are attached to this Report

C. Proposed Amendment to Rule 702, for Release for Public Comment

The Committee has been researching and discussing the possibility of an amendment to Rule 702 for four years. The project began with a Symposium on forensic experts and *Daubert,* held at Boston College School of Law in October, 2017. That Symposium addressed, among other things, the challenges to forensic evidence raised in a report by the President's Council of Advisors on Science and Technology. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensic experts, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1) It would be difficult to draft a freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; and 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony --- the problem of overstating results (for example, by stating an opinion as having a "zero error rate", where that conclusion is not supportable by the methodology). The Committee heard extensively from DOJ on the important efforts it is now employing to regulate the testimony of its forensic experts, and to limit possible overstatement.

The Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. But a majority of the members decided that the amendment would be problematic, because Rule 702(d) already requires that the expert must reliably apply a reliable methodology. If an expert overstates what can be reliably concluded (such as a forensic expert saying the rate of error is zero) then the expert's opinion should be excluded under Rule 702(d). The Committee was also concerned about the possible unintended consequences of adding an overstatement provision that would be applied to all experts, not just forensic experts.

The Committee, however, unanimously favored a slight change to existing Rule 702(d) that would emphasize that the court must focus on the expert's opinion, and must find that the opinion actually proceeds from a reliable application of the methodology. The Committee unanimously approved a proposal that 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." As the Committee Note elaborates: "A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology." The language of the amendment more clearly empowers the court to pass judgment on the conclusion that the expert has drawn from the methodology. As such it is consistent with the decision in *General Electric Co., v. Joiner,* 522 U.S. 136 (1997), where the Court declared that a trial court must consider not only the expert's methodology but also the expert's conclusion; that is because the methodology must not only be reliable, it must be reliably applied.

Finally, the Committee resolved to respond to the fact that many courts have declared 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 --- are questions of weight and not admissibility, and more broadly that expert testimony is presumed to be admissible. These statements can be read to misstate Rule 702, because its admissibility requirements must be met by a preponderance of the evidence. The Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence.

Initially, the Committee was reluctant to propose a change to the text of Rule 702 to address these mistakes as to the proper standard of admissibility, in part because the preponderance of the evidence standard applies to almost all evidentiary determinations, and specifying that standard in one rule might raise negative inferences as to other rules. But ultimately the Committee unanimously agreed that adding the preponderance of the evidence standard to the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts. While it is true that the Rule 104(a) preponderance of the evidence standard applies to Rule 702 as well as other rules, it is with respect to the reliability requirements of expert testimony that many courts are misapplying that standard. Moreover, it takes some effort to determine the applicable standard of proof --- Rule 104(a) does not mention the applicable standard of proof, requiring a resort to case law. And while *Daubert* mentions the standard, it is only in a footnote, in a case in which there is much said about the liberal standards of the Federal Rules of Evidence. Consequently, the Committee unanimously approved an amendment that would explicitly add the preponderance of the evidence standard to Rule 702(a)-(d). The Committee Note to the proposal

makes clear that there is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof to other rules --- emphasizing the preponderance standard in Rule 702 specifically was made necessary by the decisions that have failed to apply it to the reliability requirements of Rule 702.

The Committee unanimously approved the proposed amendment to Rule 702. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 702, and the Committee Note, are attached to this Report.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Written or Oral Statements

If a party introduces all or part of a ~~writing or recorded~~ written or oral statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ written or oral statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Committee Note

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir.1986) (noting that "[a] contrary construction

[1] New material is underlined in red; matter to be omitted is lined through.

raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said. In this example the prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered

statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial—where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, covers these questions under one rule. The rule is expanded to now cover all writings and all statements—whether in documents, in recordings, or in oral form.

The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey,* 2017 WL 5126163, at *7 (D. Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that

what was actually said can be established with sufficient certainty."). A party seeking completion with an oral statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. *See, e.g.*, *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The intent of the amendment is to displace the common-law rule of completeness. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988), the Court in dictum referred to Rule 106 as a "partial codification" of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent—especially when the rule is one, like the rule of completeness, that arises most often during the trial. Displacing the common-law is especially appropriate because the results under this rule as amended will generally

be in accord with the common-law doctrine of completeness at any rate.

The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106. So for example, the mere fact that a defendant denies guilt before later admitting it does not, without more, mandate the admission of his previous denial. *See United States v. Williams*, 930 F.3d 44 (2d Cir. 2019).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

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

(a)(1) a party who is a natural person;

(b)(2) an one officer or employee of a party that is not a natural person, after being if that officer or employee has been designated as the party's representative by its attorney;

(c)(3) a any person whose presence a party shows to be essential to presenting the party's claim or defense; or

[1] New material is underlined in red; matter to be omitted is lined through.

~~(d)~~(4) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

Committee Note

Rule 615 has been amended for two purposes. Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial—and that

purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) ("The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript."). On the other hand, a rule extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the rule itself was limited to exclusion of witnesses from the courtroom.

An order under subdivision (a) operates only to exclude witnesses from the courtroom. This includes exclusion of witnesses from a virtual trial. Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit parties subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the rule's policy of preventing tailoring of testimony.

The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. However, an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

Finally, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated agent per entity. This limitation, which has been followed by most courts, generally provides parity for individual and entity parties. The rule does not prohibit the court from exercising discretion to allow an entity-party to swap one representative for another as the trial progresses, so long as only one witness-agent is exempt at any one time. If an entity seeks to have more than one witness-agent protected from exclusion, it is free to argue under subdivision (a)(3) that the additional agent is essential to presenting the party's claim or defense.

Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3). *See, e.g.*, *United States v. Arayatanon*, 980 F.3d 444 (5th Cir. 2020) (no abuse of discretion in exempting from exclusion two agents, upon a showing that both were essential to the presentation of the government's case).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent has demonstrated by a preponderance of the evidence that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the ~~expert has reliably applied~~expert's opinion reflects a reliable application of the

[1] New material is underlined in red; matter to be omitted is lined through.

principles and methods to the facts of the case.

Committee Note

Rule 702 has been amended in two respects. First, the rule has been amended to clarify and emphasize that the admissibility requirements set forth in the rule must be established to the court by a preponderance of the evidence. *See* Rule 104(a). Of course, the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States*, 483 U.S. 171 (1987). But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But of course other admissibility requirements in the rule (such as that the expert must be qualified and the expert's testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.

Of course, some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the preponderance of the evidence standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit.

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

Rule 702(d) has also been amended to emphasize that a trial judge must exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert. A testifying expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable to evaluate meaningfully the reliability of scientific and other methods

underlying expert opinion, jurors may also be unable to assess the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement that a court must determine admissibility by a preponderance applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are unsupported by the expert's basis and methodology.

The amendment's reference to "a preponderance of the evidence" is not meant to indicate that the information presented to the judge at a Rule 104(a) hearing must meet the rules of admissibility. It simply means that the judge must find, on the basis of the information presented, that the proponent has shown the requirements of the rule to be satisfied more likely than not.

§ 440 Procedures for Committees on Rules of Practice and Procedure

This section contains the "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees," last amended in September 2011. JCUS-SEP 2011, p. 35.

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its advisory committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1). These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules committee action. *Cf*. 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 Functions

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate advisory committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rule Changes

(a) Meetings

Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Preparing Draft Changes

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their

purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) Considering Draft Changes

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 Publication and Public Hearings

(a) Publication

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The proposed change must be published in the *Federal Register* and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and

(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) Public Comment Period

A public comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.

(c) Hearings

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be transcribed. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) Expedited Procedures

The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) Summary of Comments

When the public comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) Advisory Committee Review; Republication

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) Submission to the Standing Committee

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

(1) be accompanied by a separate report of the comments received;

(2) explain the changes made after the original publication; and

(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b) Records

The advisory committee's records consist of:

- written suggestions received from the public;
- written comments received from the public on drafts of proposed rules;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;
- approved drafts of rule changes; and
- reports to the Standing Committee.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the AO and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee's functions include:

(a) coordinating the work of the advisory committees;

(b) suggesting proposals for them to study;

(c) considering proposals they recommend for publication for public comment; and

(d) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 Procedures

(a) Meetings

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Attendance by the Advisory Committee Chairs and Reporters

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) Action on Proposed Rule Changes or Committee Notes

The Standing Committee may accept, reject, or modify a proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) Transmission to the Judicial Conference

The Standing Committee must transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee's report includes its own recommendations and explains any changes that it made.

§ 440.30.30 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The Secretary prepares minutes of Standing Committee meetings.

(b) Records

The Standing Committee's records consist of:

- the minutes of Standing Committee and advisory committee meetings;
- agenda books and materials prepared for Standing Committee meetings;
- reports to the Judicial Conference; and
- official correspondence about rule changes, including correspondence with advisory committee chairs.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the AO and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

Last revised (Transmittal 01-023) April 6, 2021

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MEMORANDUM

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

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

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 15, 2022

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met in Washington, D.C., on May 6, 2021. At the meeting the Committee discussed and gave final approval to three proposed amendments that had been released for public comment. The Committee also considered and approved six proposed amendments with the recommendation that they be released for public comment.

The Committee made the following determinations at the meeting:

* * * * *

● It unanimously approved proposals to amend Rules 611 * * * * *, 613(b), 801(d)(2), 804(b)(3), and 1006, and recommends to the Standing Committee that these proposed amendments be released for public comment.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The proposed amendments can also be found as attachments to this Report.

II. Action Items

* * * * *

D. Possible Amendment to Rule 611 on Illustrative Aids, for Release for Public Comment

At the Spring meeting, the Committee unanimously approved a proposal to add 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 other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. In addition, the standards for allowing illustrative aids to be presented --- and particularly whether illustrative aids may be used by the jury during deliberations --- are not made clear in the case law. The Committee has determined that it would be useful to set forth uniform standards to regulate the use of illustrative aids, and in doing so clarify the distinction between illustrative aids and demonstrative evidence.

The proposed amendment would distinguish illustrative aids --- presentations that are not evidence but offered only to help the factfinder understand evidence --- from demonstrative evidence offered to prove a fact. The amendment would allow 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.

Because illustrative aids are not evidence, adverse parties do not receive pretrial discovery of such aids. The proposed rule would require notice to be provided, unless the court for good cause orders otherwise. The Committee determined that advance notice is important so that the court can rule on whether the aid has sufficient utility before it is displayed to the jury. (After all, you can't unring a bell.) The Committee Note recognizes that the timing of the notice will depend on the circumstances.

Finally, because illustrative aids are not evidence, the proposed rule provides that the aids should not be allowed into the jury room during deliberations, unless the court orders otherwise.

The Committee Note specifies that if the court does allow an illustrative aid to go to the jury room, the court should instruct the jury that the aid is not evidence.

It is important to note that the proposed rule is not intended to regulate PowerPoints or other aids that an attorney uses merely to guide the jury through an opening or closing argument. Again, illustrative aids assist the jury in understanding *evidence*; something that assists the jury in following an *argument* is therefore not an illustrative aid.

The Committee strongly believes that the 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 evidence rules specifically addresses their use. This amendment rectifies that problem.

At the Spring 2022 meeting, the Committee unanimously approved the proposed amendment to add Rule 611(d) to regulate the use of illustrative aids at a trial. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to add Rule 611(d), together with the proposed Committee Note, is attached to this Report.

E. Proposed Amendment to Rule 1006, for Release for Public Comment[1]

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 Committee has determined that the courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and that 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 evidence that has already been presented (which is not itself evidence and would be governed by new Rule 611(d)). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been

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

admitted. The Committee believes that the proposed amendment will provide substantial assistance to courts and litigants in navigating this confusing area.

At the Spring 2022 meeting, the Committee unanimously approved the proposed amendment to Rule 1006. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 1006, together with the proposed Committee Note, is attached to this Report.

* * * * *

G. Proposed Amendment to Rule 613(b), for Release for Public Comment.

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. 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 many (perhaps 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 almost always concede that she made the inconsistent statement, and that makes it unnecessary for anyone to introduce extrinsic evidence. The prior presentation requirement also avoids unfair surprise and 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.

After discussion at three Committee meetings, the Committee 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). This 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.

* * * * *

At the Spring 2022 meeting, the Committee unanimously approved the proposed amendment to Rule 613(b). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 613(b), together with the proposed Committee Note, is attached to this Report.

H. Proposed Amendment to Rule 801(d)(2) Governing Successors-in-Interest, for Release for Public Comment

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.

At its Spring, 2002 meeting, after previous discussion, the Committee 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 successor/predecessor 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 should 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 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 would emphasize that to be admissible against the successor, the declarant must have made the statement before the transfer of the claim or defense.

At its Spring 2022 meeting, the Committee unanimously approved the proposed amendment to Rule 801(d)(2). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 801(d)(2), together with the proposed Committee Note, is attached to this Report.

I. Proposed Amendment to the Rule 804(b)(3) Corroborating Circumstances Requirement, for Release for Public Comment

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 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.

At its Spring, 2022 meeting, the Committee unanimously approved an amendment to Rule 804(b)(3) that 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. The proposed language for the amendment, which is recommended for release for public comment, is 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 offered in a criminal case as one that tends to expose the declarant to criminal liability~~.

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).

At its Spring 2022 meeting, the Committee unanimously approved the proposed amendment to Rule 80(4)(b)(3). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

The proposed amendment to Rule 804(b)(3), together with the proposed Committee Note, is attached to this Report.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[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] 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

[1] New material is underlined in red.

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.

(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 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.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 613. Witness's Prior Statement

* * * * *

(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

[1] New material is underlined in red; matter to be omitted is lined through.

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.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

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;

[1] New material is underlined in red; matter to be omitted is lined through.

(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.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions. * * *

(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

[1] New material is underlined in red; matter to be omitted is lined through.

(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).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[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 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.

[1] New material is underlined in red; matter to be omitted is lined through.

(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).

§ 440 Procedures for Committees on Rules of Practice and Procedure

This section contains the "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees," last amended in September 2011. JCUS-SEP 2011, p. 35.

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its advisory committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1). These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 Functions

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate advisory committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rule Changes

(a) Meetings

Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Preparing Draft Changes

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) Considering Draft Changes

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 Publication and Public Hearings

(a) Publication

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The proposed change must be published in the *Federal Register* and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and

(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) Public Comment Period

A public comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.

(c) Hearings

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be transcribed. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) Expedited Procedures

The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) Summary of Comments

When the public comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) Advisory Committee Review; Republication

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) Submission to the Standing Committee

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

(1) be accompanied by a separate report of the comments received;

(2) explain the changes made after the original publication; and

(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b) Records

The advisory committee's records consist of:

- written suggestions received from the public;
- written comments received from the public on drafts of proposed rules;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;
- approved drafts of rule changes; and
- reports to the Standing Committee.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the AO and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee's functions include:

(a) coordinating the work of the advisory committees;

(b) suggesting proposals for them to study;

(c) considering proposals they recommend for publication for public comment; and

(d) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 Procedures

(a) Meetings

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the

reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Attendance by the Advisory Committee Chairs and Reporters

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) Action on Proposed Rule Changes or Committee Notes

The Standing Committee may accept, reject, or modify a proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) Transmission to the Judicial Conference

The Standing Committee must transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee's report includes its own recommendations and explains any changes that it made.

§ 440.30.30 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The Secretary prepares minutes of Standing Committee meetings.

(b) Records

The Standing Committee's records consist of:

- the minutes of Standing Committee and advisory committee meetings;
- agenda books and materials prepared for Standing Committee meetings;
- reports to the Judicial Conference; and
- official correspondence about rule changes, including correspondence with advisory committee chairs.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the AO and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

Last revised (Transmittal 01-026) May 27, 2022

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

MEMORANDUM

TO: Scott S. Harris
Clerk, Supreme Court of the United States

FROM: Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure

DATE: October 23, 2023

RE: Summary of Proposed New and Amended Federal Rules of Procedure

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This memorandum summarizes proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure and the Federal Rules of Evidence. All of the proposed amendments and new rules have been approved by the relevant advisory committees, the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee), and the Judicial Conference of the United States at its September session. If adopted by the Court and transmitted to Congress by May 1, 2024, absent congressional action, the amended and new rules will take effect on December 1, 2024.

I. Federal Rules of Appellate Procedure 32, 35, and 40, and the Appendix of Length Limits

The amendments transfer the contents of Rule 35 (En Banc Determination) to amended Rule 40 (Panel Rehearing; En Banc Determination), bringing together in one place the relevant

provisions dealing with rehearing. These amendments clarify the distinct criteria for rehearing en banc and panel rehearing and eliminate redundancy. Amendments to Rule 32 (Form of Briefs, Appendices, and Other Papers) and the Appendix of Length Limits reflect the transfer of the contents of Rule 35 to Rule 40.

II. The Restyled Rules of Bankruptcy Procedure; amendments to Rules 1007, 4004, 5009, 7001, and 9006; and new Rule 8023.1

The Restyled Bankruptcy Rules

The Bankruptcy Rules are the fifth and final set of national procedural rules to be restyled. They were published for comment over several years in three sets. After each publication period, the Advisory Committee on Bankruptcy Rules made recommendations for final approval based on the comments received, the advice of the style consultants, and the drafting guidelines and principles used in restyling the Appellate, Criminal, Civil, and Evidence Rules. The amendments include formatting changes to achieve clearer presentation and stylistic changes to replace inconsistent, ambiguous, repetitive, or archaic words.

The style changes are not intended to change substantive meaning. Accordingly, the Advisory Committee took special efforts to reject any proposed style improvement that might result in a substantive change. In addition, the Advisory Committee declined to modify certain well-established and widely used phrases, such as "meeting of creditors," on the ground that doing so would be unduly disruptive to practice and expectations. Finally, the restyling project did not change any rule language that has been enacted by Congress.

Rules 1007 (Lists, Schedules, Statements, and Other Documents; Time to File), 4004 (Granting or Denying a Discharge), 5009 (Closing a Chapter 7, 12, 13, or 15 Case; Declaring Liens Satisfied), and 9006 (Computing and Extending Time; Motions)

Amended Rule 1007(b)(7) no longer requires that the debtor submit an official form as evidence of taking a postpetition course in personal financial management. Instead, a certificate of completion issued by the course provider must be filed. Amendments to other parts of Rule 1007 and to Rules 4004, 5009, and 9006 change references to the "statement" embodied in the current Official Form to "certificate."

Rule 7001 (Types of Adversary Proceedings)

The amendment to Rule 7001(a) creates an exception from the general requirement that the recovery of money or property be sought by adversary proceeding. It would allow an individual debtor to instead proceed by motion under § 542(a) when seeking the turnover of tangible personal property such as an automobile, thereby permitting a swifter resolution of the matter.

Rule 8023.1 (Substitution of Parties)

Rule 8023.1 deals with the substitution of parties in the appeal of a bankruptcy case to a district court or a bankruptcy appellate panel. Bankruptcy Rule 7025, Civil Rule 25, and Appellate

Rule 43 do not apply to such appeals, and the new rule is intended to fill that gap. It is modeled on Appellate Rule 43.

III. Federal Rule of Civil Procedure 12

Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing) prescribes the time to serve responsive pleadings. The amendment to Rule 12(a) clarifies that a different response time set by statute supersedes the times to serve responsive pleadings set by paragraphs (1), (2), and (3).

IV. New Federal Rule of Evidence 107; and Rules 613, 801, 804, and 1006

New Rule 107 (Illustrative Aids)

This new rule, originally published for public comment as a new subsection of Rule 611, provides standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony.

Rule 613 (Witness's Prior Statement)

The amendment to Rule 613 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. To allow flexibility, the amended rule gives the court the discretion to dispense with the requirement.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The amendment to Rule 801(d)(2) resolves a dispute among the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's successor-in-interest.

Rule 804 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

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. The amendments to Rule 804(b)(3) require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it.

Rule 1006 (Summaries to Prove Content)

The amendments to Rule 1006 clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted. The Rule 1006 amendments work with new Rule 107 to distinguish a summary of voluminous evidence (which summary is evidence and is governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not evidence and is governed by new Rule 107).

~

Thank you for considering these proposed changes. Please let me know if any additional information would assist the Court's review.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 23, 2023

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf
Secretary

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 613, 801, 804, and 1006, and new Rule 107 of the Federal Rules of Evidence, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amendments and new rule be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules and new rule along with committee notes; (ii) an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2023 report of the Advisory Committee on Evidence Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 107. Illustrative Aids

(a) **Permitted Uses.** The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

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

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

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

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Committee Note

The amendment establishes a new Rule 107 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 has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. "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 trier of fact thus fall into two 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 during deliberations and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information offered for the narrow purpose of helping the trier of fact to understand what is being

communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, 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 trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence 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 107.

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. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or 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 or argument. *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 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 prohibit the use of—or order the modification 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.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. 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. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, 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 unduly emphasize the testimony of a witness with whom it was used, or otherwise 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.

If the court does 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.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.

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.

Rule 613. Witness's Prior Statement

* * * * *

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement 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. 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 *before* the introduction of extrinsic evidence of the statement. This requirement of a prior foundation is consistent with the common law approach to impeachment with prior inconsistent statements. *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 existing rule imposes no timing preference or sequence and thus permits 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 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.

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, 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.

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 rule does not apply, however, if the statement is admissible against the agent but not against the principal—for example, if the statement was made by the agent after termination of employment. This is because the successor's potential liability is derived from the principal, not the agent.

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.

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions. * * *

(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 after considering the totality of circumstances under which it was made and any evidence that supports or undermines 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 supporting or undermining it. While most courts have considered evidence independent of the statement, some courts have refused to do so. The rule now provides for a uniform approach and recognizes that the existence or absence of independent evidence supporting the statement is relevant to, but not necessarily 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. The court must also consider 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 undermines the declarant's account.

Although it utilizes slightly different language to fit within the framework of Rule 804(b)(3), 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. The amendment 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 "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 (1913), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible 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 107.

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, however, 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.

Consistent with the original rule, the amendment requires that the proponent of a Rule 1006 summary make the underlying voluminous records available to other parties at a reasonable time and place. The trial judge has discretion in determining the reasonableness of the production in each case but must ensure that all parties have a fair opportunity to evaluate the summary. *Cf.* Fed. R. Evid. 404(b)(3) and 807(b).

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 illustrations 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 107.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

[1] New material is underlined; matter to be omitted is lined through.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Committee Note

The amendment establishes a new Rule 107 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 has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. "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 trier of fact thus fall into two 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 during deliberations and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, 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 trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence 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 107.

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. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or 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 or argument. *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 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 prohibit the use of—or order the modification 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.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. 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. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, 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 unduly emphasize the testimony of a witness with whom it was used, or otherwise 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.

If the court does 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.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.

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.

Rule 613. Witness's Prior Statement

* * * * *

(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 *before* the introduction of extrinsic evidence of the statement. This requirement of a prior foundation is consistent with the common law approach to impeachment with prior inconsistent statements. *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 existing rule imposes no timing preference or sequence and thus permits 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 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.

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, 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.

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 rule does not apply, however, if the statement is admissible against the agent but not against the principal—for example, if the statement was made by the agent after termination of employment. This is because the successor's potential liability is derived from the principal, not the agent.

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.

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions. * * *

(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) <u>if offered in a criminal case as one that tends to expose the declarant to criminal liability,</u> 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 any evidence that supports or undermines 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 supporting or undermining it. While most courts have considered evidence independent of the statement, some courts have refused to do so. The rule now provides for a uniform approach and recognizes that the existence or absence of independent evidence supporting the statement is relevant to, but not necessarily 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. The court must also consider 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 undermines the declarant's account.

Although it utilizes slightly different language to fit within the framework of Rule 804(b)(3), 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. The amendment 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 "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 (1913), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

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 offered to prove the content of voluminous admissible 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 107.

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, however, 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.

Consistent with the original rule, the amendment requires that the proponent of a Rule 1006 summary make the underlying voluminous records available to other parties at a reasonable time and place. The trial judge has discretion in determining the reasonableness of the production in each case but must ensure that all parties have a fair opportunity to evaluate the summary. *Cf.* Fed. R. Evid. 404(b)(3) and 807(b).

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 illustrations 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 107.

Agenda E-19
Rules
September 2023

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 6, 2023. All members participated.

* * * * *

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 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee's recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

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 evidence) is sometimes a difficult one to draw, and 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, originally published for public comment as a new subsection of Rule 611, would

provide standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication in August 2022, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony. In addition, the Advisory Committee determined to remove the notice requirement from the published version of the proposed amendment and to extend the rule to cover opening and closing statements. Finally, the Advisory Committee changed the proposed amendments to provide that illustrative aids can be used unless the negative factors "substantially" outweigh the educative value of the aid, to make clear that illustrative aids are not evidence, and to refer to Rule 1006 for summaries of voluminous evidence.

Rule 613 (Witness's Prior Statement)

The proposed amendment would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule would give the court the discretion to dispense with the requirement. The proposed amendment would bring the courts into uniformity, and would adopt the approach that treats the witness fairly and promotes efficiency.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's 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 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

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 amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.

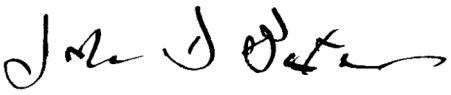
Rule 1006 (Summaries to Prove Content)

The proposed amendments to Rule 1006 would fit together with the proposed new Rule 107 on illustrative aids. The proposed rule amendment and new rule would serve to distinguish a summary of voluminous evidence (which summary is itself evidence and is 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 also clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, 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.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Robert J. Giuffra, Jr.	Gene E.K. Pratter
William J. Kayatta, Jr.	D. Brooks Smith
Carolyn B. Kuhl	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

* * * * *

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

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.

* * * * *

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.

* * * * *

B. Proposed Amendment to Rule 1006, for Final Approval[1]

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.

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

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.

* * * * *

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.

* * * * *

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):

> <u>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.</u>

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.

* * * * *

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) <u>if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it</u> ~~is~~ supported by corroborating circumstances that clearly indicate trustworthiness --- <u>after considering the</u>

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.

* * * * *

April 2, 2024

Honorable Mike Johnson
Speaker, United States House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress amendments and an addition to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and new rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2023; a blackline version of the rules with committee notes; an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and an excerpt from the May 2023 report of the Advisory Committee on Evidence Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 2, 2024

Honorable Kamala D. Harris
President, United States Senate
Washington, DC 20510

Dear Madam President:

I have the honor to submit to the Congress amendments and an addition to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and new rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2023; a blackline version of the rules with committee notes; an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and an excerpt from the May 2023 report of the Advisory Committee on Evidence Rules.

Sincerely,

/s/ John G. Roberts, Jr.

April 2, 2024

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Evidence are amended to include amendments to 613, 801, 804, and 1006, and new Rule 107.

[*See infra* pp. ___ ___ ___.]

2. The foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2024, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2074 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 107. Illustrative Aids

(a) **Permitted Uses.** The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

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

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

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

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Rule 613. Witness's Prior Statement

* * * * *

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement 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. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

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, 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.

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions. * * *

(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 after considering the totality of circumstances under which it was made and any evidence that supports or undermines it.

* * * * *

Rule 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible 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 107.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

October 23, 2023

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf
Secretary

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration proposed amendments to Rules 613, 801, 804, and 1006, and new Rule 107 of the Federal Rules of Evidence, which have been approved by the Judicial Conference. The Judicial Conference recommends that the amendments and new rule be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rules and new rule along with committee notes; (ii) an excerpt from the September 2023 report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) an excerpt from the May 2023 report of the Advisory Committee on Evidence Rules.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

[1] New material is underlined; matter to be omitted is lined through.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Committee Note

The amendment establishes a new Rule 107 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 has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. "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 trier of fact thus fall into two 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 during deliberations and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, 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 trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence 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 107.

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. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or 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 or argument. *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 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 prohibit the use of—or order the modification 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.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. 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. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, 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 unduly emphasize the testimony of a witness with whom it was used, or otherwise 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.

If the court does 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.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.

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.

Rule 613. Witness's Prior Statement

* * * * *

(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 *before* the introduction of extrinsic evidence of the statement. This requirement of a prior foundation is consistent with the common law approach to impeachment with prior inconsistent statements. *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 existing rule imposes no timing preference or sequence and thus permits 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 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.

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, 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.

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 rule does not apply, however, if the statement is admissible against the agent but not against the principal—for example, if the statement was made by the agent after termination of employment. This is because the successor's potential liability is derived from the principal, not the agent.

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.

Rule 804. Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness

* * * * *

(b) The Exceptions. * * *

(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) <u>if offered in a criminal case as one that tends to expose the declarant to criminal liability,</u> 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 any evidence that supports or undermines 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 supporting or undermining it. While most courts have considered evidence independent of the statement, some courts have refused to do so. The rule now provides for a uniform approach and recognizes that the existence or absence of independent evidence supporting the statement is relevant to, but not necessarily 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. The court must also consider 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 undermines the declarant's account.

Although it utilizes slightly different language to fit within the framework of Rule 804(b)(3), 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. The amendment 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 "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 (1913), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

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 offered to prove the content of voluminous admissible 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 107.

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, however, 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.

Consistent with the original rule, the amendment requires that the proponent of a Rule 1006 summary make the underlying voluminous records available to other parties at a reasonable time and place. The trial judge has discretion in determining the reasonableness of the production in each case but must ensure that all parties have a fair opportunity to evaluate the summary. *Cf.* Fed. R. Evid. 404(b)(3) and 807(b).

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 illustrations 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 107.

Agenda E-19
Rules
September 2023

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 6, 2023. All members participated.

* * * * *

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 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee's recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

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 evidence) is sometimes a difficult one to draw, and 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, originally published for public comment as a new subsection of Rule 611, would

provide standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Following publication in August 2022, the Advisory Committee determined that the contents of the rule were better contained in a new Rule 107 rather than a new subsection of Rule 611, reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony. In addition, the Advisory Committee determined to remove the notice requirement from the published version of the proposed amendment and to extend the rule to cover opening and closing statements. Finally, the Advisory Committee changed the proposed amendments to provide that illustrative aids can be used unless the negative factors "substantially" outweigh the educative value of the aid, to make clear that illustrative aids are not evidence, and to refer to Rule 1006 for summaries of voluminous evidence.

Rule 613 (Witness's Prior Statement)

The proposed amendment would provide that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. To allow flexibility, the amended rule would give the court the discretion to dispense with the requirement. The proposed amendment would bring the courts into uniformity, and would adopt the approach that treats the witness fairly and promotes efficiency.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant's 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 (Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness)

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 amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.

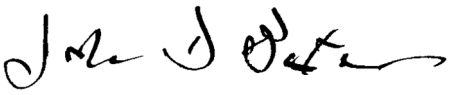
Rule 1006 (Summaries to Prove Content)

The proposed amendments to Rule 1006 would fit together with the proposed new Rule 107 on illustrative aids. The proposed rule amendment and new rule would serve to distinguish a summary of voluminous evidence (which summary is itself evidence and is 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 also clarify that a Rule 1006 summary is admissible whether or not the underlying evidence has been admitted.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, 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.

* * * * *

Respectfully submitted,



John D. Bates, Chair

Paul Barbadoro	Lisa O. Monaco
Elizabeth J. Cabraser	Andrew J. Pincus
Robert J. Giuffra, Jr.	Gene E.K. Pratter
William J. Kayatta, Jr.	D. Brooks Smith
Carolyn B. Kuhl	Kosta Stojilkovic
Troy A. McKenzie	Jennifer G. Zipps
Patricia Ann Millett	

* * * * *

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

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.

* * * * *

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.

* * * * *

B. Proposed Amendment to Rule 1006, for Final Approval[1]

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.

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

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.

* * * * *

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.

* * * * *

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):

> <u>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.</u>

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.

* * * * *

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) <u>if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it</u> ~~is~~ supported by corroborating circumstances that clearly indicate trustworthiness --- <u>after considering the</u>

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.

Excerpt from the May 10, 2023, Report of the Advisory Committee on Evidence Rules

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.

* * * * *

Rule 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

(1) all parties consent; or

(2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

ADVISORY COMMITTEE NOTES

2024 Amendments

The amendment establishes a new Rule 107 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 has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. “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 trier of fact thus fall into two 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 during deliberations and use it to help determine the disputed facts.

The second category--the category covered by this rule--is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, 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 trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence 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 107.

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. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or 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 or argument. *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 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 prohibit the use of--or order the modification 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.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. 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. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, 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 unduly emphasize the testimony of a witness with whom it was used, or otherwise 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.

If the court does 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.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.

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.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

COMMITTEE COMMENT

This rule will replace Rule 43(g)(5) of the Colorado Rules of Civil Procedure.

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Debra Ann Livingston, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 14, 2018

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 26-27, 2018 in Washington, D.C. At the meeting the Committee discussed ongoing projects involving matters such as possible amendments to Rules 404(b), 606(b), 702, 801(d)(1)(A) and 807. It also considered proposals submitted to the Committee suggesting changes to Rules 106 and 609(a)(1), as well as a proposal to adopt a rule governing illustrative aids.

The Committee made the following determinations at the meeting:

● It unanimously approved the proposed amendment to Rule 807, and is submitting it to the Standing Committee for final approval.

● It unanimously approved a proposed amendment to Rule 404(b), and is submitting it to the Standing Committee with the recommendation that it be released for public comment;

● It agreed to consider a possible amendment to Rule 106.

● It agreed to consider possible amendments to Rule 702 and also to explore ways to address problems regarding forensic expert evidence that might not involve rule amendments.

● It cleared agenda items regarding possible amendments to Rules 606(b), 609(a)(1), 611(a) (illustrative evidence), and 801(d)(1)(A).

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The amendments proposed as action items can also be found as attachments to this Report.

II. Action Items

A. Proposed Amendment to Rule 807, for Final Approval

At its June, 2017 meeting, the Standing Committee unanimously approved a proposed amendment to Rule 807 for release for public comment. The project to amend Rule 807 began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation --- including discussion with a panel of experts at a Conference held at Pepperdine Law School --- the Advisory Committee determined that the risks of expanding the residual exception would outweigh the rewards. In particular, the Committee was cognizant of concerns in the practicing bar about increasing judicial discretion to admit hearsay that was not covered by existing exceptions, as well as concerns by academics that expanding the residual exception would result in undermining the standard exceptions.

But in conducting its review of cases decided under the residual exception, and in discussions with experts at the Pepperdine Conference, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems that are addressed by the proposed amendment to Rule 807 are as follows:

● The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions. Statements falling within the Rule 804 exceptions are not as reliable as those admissible under Rule 803 and yet both sets are considered possible points of comparison for any statement offered as residual hearsay. And the bases of reliability differ from exception to exception. Moreover, one of the exceptions subject to "equivalence" review --- Rule 804(b)(6) forfeiture --- is not based on reliability at all. "Equivalence" thus does little or nothing to guide a court's discretion. Given the difficulty and disutility of the

"equivalence" standard, the Committee determined that a better, more user-friendly approach is simply to require the judge to find whether the statement is supported by sufficient guarantees of trustworthiness.

● Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception --- and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness. Thus, trustworthiness can best be defined in the rule as requiring an evaluation of two factors: 1) circumstantial guarantees surrounding the making of the statement, and 2) corroborating evidence. Adding a requirement that the court consider corroboration --- or the lack thereof --- is an improvement to the rule independent of any decision to expand the residual exception.

● The requirements in Rule 807 that the residual hearsay must be proof of a "material fact" and that admission of residual hearsay be in "the interests of justice" and consistent with the "purpose of the rules" have not served any good purpose. The inclusion of the language "material fact" is in conflict with the drafters' avoidance of the term "materiality" in Rule 403 --- and that avoidance was well-reasoned, because the term "material" is used in so many different contexts. The courts have essentially held that "material" means "relevant" --- and so nothing is added to Rule 807 by including it there. Likewise nothing is added to Rule 807 by referring to the interests of justice and the purpose of the rules because that guidance is already provided by Rule 102. Moreover, the interests of justice language could be --- and has been --- used as an invitation to judicial discretion to admit or exclude hearsay under Rule 807 simply because it leads to a "just" result. The Committee has determined that the rule will be improved by deleting the references to "material fact" and "interest of justice" and "purpose of the rules."

● The current notice requirement is problematic in at least four respects:

1) Most importantly, there is no provision for allowing untimely notice upon a showing of good cause. This absence has led to a conflict in the courts on whether a court even has the power to excuse notice no matter how good the cause. Other notice provisions in the Evidence Rules (e.g., Rule 404(b)) contain good cause provisions, so adding such a provision to Rule 807 will promote uniformity.

2) The requirement that the proponent disclose "particulars" has led to unproductive arguments and unnecessary case law.

3) There is no requirement that notice be in writing, which leads to disputes about whether notice was ever provided.

4) The requirement that the proponent disclose the declarant's address is nonsensical when the witness is unavailable --- which is usually the situation in which residual hearsay is offered.

The proposed amendments to the notice requirements solve all these problems.

Finally, it is important to note that the Committee has retained the requirement from the original rule that the proponent must establish that the proffered hearsay is more probative than any other evidence that the proponent can reasonably obtain to prove the point. Retaining the "more probative" requirement indicates that there is no intent to expand the residual exception, only to improve it. The "more probative" requirement ensures that the rule will only be invoked when it is necessary to do so.

Public Comment

The Committee received nine public comments on the Rule 807 proposal. It carefully considered those comments, most of which were positive, and made some changes as a result of the comments --- mainly style suggestions. The Committee also implemented some of the suggestions made by members of the Standing Committee at its June, 2017 meeting --- including adding a reference to Rule 104(a), and a reference to the Confrontation Clause, to the Committee Note. Finally, the Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a "near-miss" of a standard exception. A change to the text and Committee Note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Committee unanimously recommends that the Standing Committee approve the proposed amendment to Rule 807 and the Committee Note, for referral to the Judicial Conference.

The amendment to Rule 807, and the Committee Note, are attached to this Report.

B. Proposed Amendment to Rule 404(b), for Release for Public Comment

The Committee has been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have suggested that the rule needs to be more carefully applied, and have set forth criteria for that more careful application. The focus has been on three areas:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 807. Residual Exception

(a) In General. Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~admissible under a hearsay exception in Rule 803 or 804~~:~~

(1) the statement ~~has equivalent circumstantial~~is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

~~**(2)** it is offered as evidence of a material fact;~~

(3~~2~~) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~; and~~

[1] New material is underlined in red; matter to be omitted is lined through.

~~**(4)** admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ —including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Committee Note

Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard" has not

served to guide a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. See Rule 104(a). As with any hearsay statement offered under an exception, the court's threshold finding that admissibility requirements are met merely means that the jury may consider the statement and not that it must assume the statement to be true.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. 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 should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

The amendment does not alter the case law prohibiting parties from proceeding directly to the residual exception, without considering admissibility of the hearsay under Rules 803 and 804. A court is not required to make a finding that no other hearsay exception is applicable. But the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

The rule in its current form applies to hearsay "not specifically covered" by a Rule 803 or 804 exception. The

amendment makes the rule applicable to hearsay "not admissible under" those exceptions. This clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a "near-miss" of one of the Rule 803 or 804 exceptions. If the court employs a "near-miss" analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been deleted. These requirements have proved to be superfluous in that they are already found in other rules. See Rules 102, 401.

The notice provision has been amended to make four changes in the operation of the rule:

· First, the amendment requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. See Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence).

· Second, the prior requirement that the declarant's address must be disclosed has been deleted. That requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

· Third, the amendment requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

· Finally, the pretrial notice provision has been amended to provide for a good cause exception. Most courts have applied a good cause exception under Rule 807 even though the rule in its current form does not provide for it, while some courts have read

the rule as it was written. Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins; or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

Changes Made After Publication and Comment

The provision on the relationship between the residual exception and Rules 803 and 804 was changed in two respects: 1) it was moved back from a subdivision to the preface, where it was initially; and 2) the phrase "not specifically covered" was changed to "not admissible under."

The Committee Note was revised slightly to address such matters as the "near-miss" analysis, the applicability of Rule 104(a), and the relationship of Rule 807 to the Confrontation Clause.

Summary of Public Comment

Daniel Church of Morris, Wilnauer Church (EV-2017-003), supports the amendment because it "would reduce the

surprise element to an adversary and gives the court the discretion needed to make an informed ruling."

Brian Roth (EV-2017-004), supports the amendment as being "more clearly worded" than the original.

Karl Romberger (EV-2017-005), supports the Committee's proposed changes, and "endorse[s] the observations about how best to assess the trustworthiness of residual hearsay." He concludes that "[t]he Committee's efforts should improve legal practices in all fora where evidence is received."

Aniello Ceretto (EV-2017-006), opposes the amendment insofar as it adds a good cause exception to the pretrial notice requirement. He states that it is "going to lead to many more adjournment requests or if not, then bad court decisions undermining public confidence in the reliability of court decisions based on hearsay."

Sara Lessard (EV-2017-007), believes that the proposed amendment "is an amazing opportunity for ordinary people to understand the rule better."

Julius King (EV-2017-009), states that "the current FRE 807 is problematic for several reasons and the new proposed FRE 807 properly addresses most of those issues." He states that "the proposed change to the trustworthiness requirement of FRE 807 is satisfactory because it would clarify the rule by removing the 'comparative trustworthiness' standard and foster consistency among trial courts by requiring judges to consider, if any, corroborating evidence that strengthens the requirement." Mr. King approves most of the changes to the notice requirement, but opposes the deletion of the declarant's address from the notice requirement.

The American Association for Justice (EV-2017-011), "generally supports the proposed amendments to Federal Rule of Evidence 807" and suggests some stylistic changes to "help clarify the purpose and intent of the amendments. The Association generally supports the changes to the notice requirement, but states that the term "substance" is vague and that the Committee Note should provide more guidance on the meaning of the term.

The Federal Magistrate Judges' Association (EV-2017-012), suggests that the trustworthiness requirement should be evaluated in comparison with testimony given under oath and subject to cross-examination. The Association also suggests that corroboration should not be singled out as a factor in the trustworthiness analysis, and if it is, the court should limit consideration to corroborating evidence that is reliable.

The National Association of Criminal Defense Lawyers (EV-2017-013), agrees that "the existing requirement that the residual hearsay have 'circumstantial guarantees of trustworthiness' equivalent to those required for Rule 803 or 804 exceptions has not been a workable standard, given the differences in trustworthiness among the recognized hearsay exceptions themselves." The Association also states that the changes to the notice requirement "are generally well-taken" but it recommends that language be added to the Committee Note to make clear that disclosures by the defendant in a criminal case need not be detailed, and that the good cause exception should be liberally applied to protect a defendant in a criminal case who fails to give pre-trial notice.

PRELIMINARY DRAFT

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence

Request for Comments on Amendments to:

Appellate Rule	15
Bankruptcy Rule	2002 Official Forms 101 and 106C
Civil Rules	7.1, 26, 41, 45, and 81
Criminal Rule	17
Evidence Rules	609 and 707

Written Comments Due By February 16, 2026

Prepared by the
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
August 2025

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

MEMORANDUM

TO: The Bench, Bar, and Public

FROM: Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure

DATE: August 15, 2025

RE: Request for Comments on Proposed Amendments to Federal Rules and Forms

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The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) has approved for publication and public comment the following proposed amendments to existing rules and forms, as well as one new rule:

- Appellate Rule 15;
- Bankruptcy Rule 2002 and Official Forms 101 and 106C;
- Civil Rules 7.1, 26, 41, 45, and 81;
- Criminal Rule 17; and
- Evidence Rule 609 and new Rule 707.

The proposals, supporting materials, and instructions on submitting written comments are posted on the Judiciary's website at:

https://www.uscourts.gov/forms-rules/proposed-amendments-published-public-comment

Opportunity to Submit Written Comments

Comments concerning the proposals must be submitted electronically no later than **February 16, 2026**. Please note that comments are part of the official record and publicly available.

Opportunity to Appear at Public Hearings

On the following dates, the advisory committees will conduct virtual public hearings on the proposals:

- Appellate Rules on January 16, 2026, and February 6, 2026;
- Bankruptcy Rules on January 23, 2026, and January 30, 2026;
- Civil Rules on January 13, 2026, and January 27, 2026;
- Criminal Rules on January 22, 2026 and February 5, 2026; and
- Evidence Rules on January 15, 2026, and January 29, 2026.

If you wish to appear and present testimony regarding a proposed rule or form, you must notify the office of Rules Committee Staff **at least 30 days before the scheduled hearing** by emailing RulesCommittee_Secretary@ao.uscourts.gov. Hearings are subject to cancellation or consolidation based on the number of requests to testify.

At this time, the Standing Committee has only approved the proposals for publication and comment. After the public comment period closes, all comments will be carefully considered by the relevant advisory committee as part of its consideration of whether to proceed with a proposal.

Under the Rules Enabling Act, 28 U.S.C. §§ 2072-2077, if any of the published proposals are later approved, with or without revision, by the relevant advisory committee, the next steps are approval by the Standing Committee and the Judicial Conference, and then adoption by the Supreme Court. If adopted by the Court and transmitted to Congress by May 1, 2027, absent congressional action, the proposals would take effect on December 1, 2027.

If you have questions about the rulemaking process or pending rules amendments, please contact the Rules Committee Staff at 202-502-1820 or visit https://www.uscourts.gov/forms-rules.

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

MEMORANDUM

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

FROM: Hon. Jesse M. Furman, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 15, 2025

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 2, 2025, at the Administrative Office in Washington, D.C. * * * The Committee recommends * * * that two proposed amendments be released for public comment: an amendment to Rule 609 and a new Rule 707 to regulate machine-generated evidence.

* * * * *

II. Action Items

* * * * *

B. Proposed Amendments to Rule 609 for Release for Public Comment

The Committee recommended publication for public comment a modest proposed amendment to Rule 609(a)(1)(B), which currently allows for impeachment of criminal defendant witnesses with convictions not involving dishonesty or false statement if the probative value of the conviction in proving the witness's character for truthfulness outweighs the prejudicial effect. The proposed amendment approved by the Committee would result in the provision becoming somewhat more exclusionary. To be admitted, the probative value of the conviction would have to *substantially* outweigh its prejudicial effect. The amendment is narrower than other suggestions for change made to, and rejected by, the Committee in the last two years, namely a proposal to eliminate Rule 609 entirely and a proposal to delete Rule 609(a)(1), which would have meant that all convictions not involving falsity would be inadmissible to impeach a witness's character for truthfulness.

The Committee concluded that the amendment was warranted because a fair number of courts have misapplied the existing test to admit convictions that are either similar to the crime charged or otherwise inflammatory and because that error is not likely to be remedied through the normal appellate process. That is because the Supreme Court has held that a defendant may appeal an adverse Rule 609 ruling only if he or she takes the stand at trial, so appeals by defendants of adverse Rule 609 rulings are relatively rare.

The amendment, through its slightly more protective balancing test, would promote Congress's intent, which was to provide more protection to criminal defendants so that they would not be unduly deterred from exercising their rights to testify. The Committee believes that the tweak to the applicable balancing test would encourage courts to more carefully assess the probative value and prejudicial effect of convictions that are similar or identical to the crime charged, or that are otherwise inflammatory or less probative because they involve acts of violence. The proposal leaves intact Rule 609(a)(2), which governs admissibility of convictions involving dishonesty or false statement.

In addition, the Committee proposes a slight change to Rule 609(b), which covers older convictions. The rule is triggered when a conviction is over ten years old. That ten-year period begins running from the date of conviction or release from confinement, whichever is later. But the current rule does not specify the end date of the ten-year period. The absence of any guidance in the rule has led courts to apply varying dates, including the date of indictment for the trial at issue, the date that trial begins, and the date that the witness to be impeached actually testifies. The Committee approved a change to Rule 609(b) that would end the ten-year period on the date that the relevant trial begins. The Committee determined that the date of trial is the date that is most easily administered, the least amenable to manipulation, and that it is a proper date for determining the credibility of a witness who is going to testify at the trial.

At its meeting, the Committee, by a vote of 8-1, recommended the proposed amendments to Rule 609 for release for public comment. The Department of Justice voted in favor of the proposal.

The Committee recommends that the proposed amendments to Rule 609, and the accompanying Committee Note—which are attached to this Report—be released for public comment.

C. Proposed New Rule 707 to Regulate Machine-Generated Evidence for Release for Public Comment

For the past three years, the Committee has been researching and investigating whether the existing Evidence Rules are sufficient to assure that evidence created by artificial intelligence ("AI") will be properly regulated for reliability and authenticity. The Committee has determined that there are two evidentiary challenges raised by AI: (1) evidence that is a product of machine learning, which would be subject to Rule 702 if propounded by witness; and (2) audiovisual evidence that is not authentic because it is a difficult-to-detect deepfake.

At its Fall meeting, the Committee considered proposals to amend the Evidence Rules to regulate machine learning and deepfakes. As to machine learning, the concern is that it might be unreliable, and yet the unreliability will be buried in the program and difficult to detect. The hearsay rule is likely to be inapplicable because the solution to hearsay is cross-examination, and a machine cannot be cross-examined. The Committee determined that the reliability issues attendant to machine output are akin to those raised by experts under Rule 702. Indeed, Rule 702 would be applicable to machine-learning if it was used by a testifying expert to reach her conclusion. But Rule 702 is not clearly applicable if the machine output is admitted without any expert testimony – either directly or by way of a lay witness.

After extensive discussion, the Committee has determined that a new rule of evidence may be appropriate to regulate the admissibility of machine evidence that is introduced without the testimony of any expert. The Committee concluded that amending Rule 702 itself would not be workable, for two reasons: (1) that Rule was just amended in 2023; (2) it is a rule of general applicability, and a separate subdivision dealing with machine evidence would be inappropriately specific and difficult to draft. The Committee's solution was to draft a new Rule 707 providing that if machine-generated evidence is introduced without an expert witness, and it would be considered expert testimony if presented by a witness, then the standards of Rule 702(a)-(d) are applicable to that output. Examples of such possibilities include machine output analyzing stock trading patterns to establish causation; analysis of digital data to determine whether two works are substantially similar in copyright litigation; and machine learning that assesses the complexity of software programs to determine the likelihood that code was misappropriated. In all these examples, it is possible that the machine output may be offered through a lay witness, or directly with a certification of authenticity under Rule 902(13). The Committee is of the opinion that, in such instances, a showing of reliability must be made akin to that required under Rule 702.

The rule provides that it does not apply to the output of basic scientific instruments, and the Committee Note provides examples of such instruments, such as a mercury-based

thermometer, an electronic scale, or a battery-operated digital thermometer. The Committee concluded that such an exception is warranted to avoid litigation over the output of instruments that can be presumed reliable but that, given the wide range of potential instruments and technological change, it is better to leave it to judges to determine whether a particular instrument falls within the exception than to try to be more specific in the rule. The Committee Note also provides that the rule not apply to output that can be judicially noticed as reliable.

The Committee agreed that disclosure issues relating to machine learning would be better addressed in the Civil and Criminal Rules, not the Evidence Rules. General language about the importance of advance notice before offering machine-generated evidence was added to the Committee Note.

At its meeting, the Committee, by a vote of 8-1, recommended the proposal to add a new Rule 707 for release for public comment. The Department of Justice voted against the proposal.

The Committee recommends that the proposed new Rule 707, and the accompanying Committee Note—which are attached to this Report—be released for public comment.

It is important to note that the Committee is not treating release for public comment as a presumption that the rule should be enacted. The Committee believes that it will receive critically important information during the public comment period about the need for this new rule and that it will get input from experts on the kinds of machine-generated information that should be subject to the rule or that should be exempt from the rule. Given the fast-developing field of AI, and the limits of the Committee's expertise on matters of technology, the Committee believes that the best way to obtain the necessary information to support or reject the rule is through public comment—which is sure to be extensive.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence

[1] New material is underlined in red; matter to be omitted is lined through.

substantially outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed ~~since~~ between the witness's conviction or release from confinement for it~~,~~ (whichever is later) and the date that the trial begins. Evidence of the conviction is admissible only if:

(1) the probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

* * * * *

Committee Note

Rule 609(a)(1)(B) has been amended to provide that a non-falsity-based conviction should not be admissible to impeach a criminal defendant unless its probative value *substantially* outweighs the risk of unfair prejudice to the defendant. Congress allowed such impeachment with non-falsity-based convictions under Rule 609(a)(1), but imposed a reverse balancing test when the witness was the accused. That test is more protective so as not to infringe on the accused's constitutional right to testify. The amendment underscores the importance of applying a protective balance. The amendment also makes the balancing test consistent with that in Rule 703. Courts are familiar with the formulation "substantially outweighs" as the same phrase is used throughout the rules of evidence to describe various balancing tests. Cf. Rule 403.

If a conviction is inadmissible under this rule, it is inappropriate to allow a party, under Rule 608(b), to inquire into the specific instances of conduct underlying that conviction. Rule 608 permits impeachment only by specific acts that have not resulted in a criminal conviction. Evidence

relating to impeachment by way of criminal conviction is treated exclusively under Rule 609.

Nothing in this rule prohibits the use of convictions to impeach by way of contradiction. Such impeachment is governed by Rule 403. So for example, if the witness affirmatively testifies that he has never had anything to do with illegal drugs, a prior drug conviction may be admissible for purposes of contradiction even if not admissible under Rule 609. *See United States v. Castillo*, 181 F.3d 1129 (9th Cir. 1999) (unequivocal denial of involvement with drugs on direct examination warranted admission of the witness's drug activity under Rule 403).

A number of courts have, in a kind of compromise, admitted only the fact of a conviction to impeach a defendant in a criminal case. Thus the jury hears only that the defendant was convicted of a felony, not what the crime was. Absent agreement by the parties, that solution is problematic because convictions falling within Rule 609(a)(1) have varying probative value, and admitting only the fact of conviction deprives the jury of the opportunity to properly weigh the conviction's effect on the witness's character for truthfulness.

In addition, Rule 609(b) has been amended to set an endpoint by which the rule's 10-year period is to be measured. The lack of such an endpoint in the existing rule has led courts to apply various endpoints, including the date of the charged offense, the date of indictment, the date of trial, and the date the witness testifies. The rule provides for

the date that trial begins as the endpoint, as that is a clear and objective date and it is the time at which the factfinder begins to analyze the truthfulness of witnesses.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 707. Machine-Generated Evidence

When machine-generated evidence is offered without an expert witness and would be subject to Rule 702 if testified to by a witness, the court may admit the evidence only if it satisfies the requirements of Rule 702(a)-(d). This rule does not apply to the output of simple scientific instruments.

Committee Note

Expert testimony in modern trials increasingly relies on software- or other machine-based conveyances of information. Machine-generated evidence can involve the use of a computer-based process or system to make predictions or draw inferences from existing data. When a machine draws inferences and makes predictions, there are concerns about the reliability of that process, akin to the reliability concerns about expert witnesses. Problems include using the process for purposes that were not intended (function creep); analytical error or incompleteness; inaccuracy or bias built into the underlying data or formulas; and lack of interpretability of the machine's process. Where a testifying expert relies on such a method, that method—and the expert's reliance on it—will be scrutinized under Rule 702. But if machine or software output is presented

[1] New material is underlined in red.

without the accompaniment of a human expert (for example through a witness who applied the program but knows little or nothing about its reliability), Rule 702 is not obviously applicable. Yet it cannot be that a proponent can evade the reliability requirements of Rule 702 by offering machine output directly, where the output would be subject to Rule 702 if rendered as an opinion by a human expert. Therefore, new Rule 707 provides that if machine output is offered without the accompaniment of an expert, and where the output would be treated as expert testimony if coming from a human expert, its admissibility is subject to the requirements of Rule 702(a)-(d).

The rule applies when machine-generated evidence is entered directly, but also when it is accompanied by lay testimony. For example, the technician who enters a question and prints out the answer might have no expertise on the validity of the output. Rule 707 would require the proponent to make the same kind of showing of reliability as would be required when an expert testifies on the basis of machine-generated information.

If the machine output is the equivalent of expert testimony, it is not enough that it is self-authenticated under Rule 902(13). That rule covers authenticity, but does not assure reliability under the preponderance of the evidence standard applicable to expert testimony.

This rule is not intended to encourage parties to opt for machine-generated evidence over live expert witnesses. Indeed the point of this rule is to provide reliability-based protections when a party chooses to proffer machine-generated evidence instead of a live expert.

It is anticipated that a Rule 707 analysis will usually involve the following, among other things:

- Considering whether the inputs into the process are sufficient for purposes of ensuring the validity of the resulting output. For example, the court should consider whether the training data for a machine learning process is sufficiently representative to render an accurate output for the population involved in the case at hand.

- Considering whether the process has been validated in circumstances sufficiently similar to the case at hand.

The final sentence of the rule is intended to give trial courts sufficient latitude to avoid unnecessary litigation over the output from simple scientific instruments that are relied upon in everyday life. Examples might include the results of a mercury-based thermometer, an electronic scale, or a battery-operated digital thermometer. Moreover, the rule does not apply when the court can take judicial notice that the machine output is reliable. *See* Rule 201.

The Rule 702(b) requirement of sufficient facts and data, as applied to machine-generated evidence, should focus on the information entered into the process or system that leads to the output offered into evidence.

Because Rule 707 applies the requirements of admitting expert testimony under Rule 702 to machine-generated output, the notice principles that would be applicable to expert opinions and reports of examinations and tests should be applied to output offered under this rule.

APPENDIX

§ 440 Procedures for Committees on Rules of Practice and Procedure

This section contains the "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees," last amended in September 2011. JCUS-SEP 2011, p. 35.

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its advisory committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1). These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 Functions

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate advisory committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rule Changes

(a) Meetings

Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Preparing Draft Changes

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) Considering Draft Changes

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 Publication and Public Hearings

(a) Publication

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The proposed change must be published in the *Federal Register* and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and

(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) Public Comment Period

A public comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.

(c) Hearings

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be transcribed. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) Expedited Procedures

The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) Summary of Comments

When the public comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) Advisory Committee Review; Republication

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) Submission to the Standing Committee

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

(1) be accompanied by a separate report of the comments received;

(2) explain the changes made after the original publication; and

(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b) Records

The advisory committee's records consist of:

- written suggestions received from the public;
- written comments received from the public on drafts of proposed rules;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;
- approved drafts of rule changes; and
- reports to the Standing Committee.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the AO and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee's functions include:

(a) coordinating the work of the advisory committees;

(b) suggesting proposals for them to study;

(c) considering proposals they recommend for publication for public comment; and

(d) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 Procedures

(a) Meetings

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the

reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Attendance by the Advisory Committee Chairs and Reporters

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) Action on Proposed Rule Changes or Committee Notes

The Standing Committee may accept, reject, or modify a proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) Transmission to the Judicial Conference

The Standing Committee must transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee's report includes its own recommendations and explains any changes that it made.

§ 440.30.30 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The Secretary prepares minutes of Standing Committee meetings.

(b) Records

The Standing Committee's records consist of:

- the minutes of Standing Committee and advisory committee meetings;
- agenda books and materials prepared for Standing Committee meetings;
- reports to the Judicial Conference; and
- official correspondence about rule changes, including correspondence with advisory committee chairs.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the AO and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

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