PUBLIC HEARING ON

PROPOSED AMENDMENTS TO THE

FEDERAL RULES OF EVIDENCE

JUDICIAL CONFERENCE
ADVISORY COMMITTEE ON EVIDENCE RULES

Videoconference Hearing
January 27, 2023

Advisory Committee on Evidence Rules Public Hearing

Proposed Amendments to Federal Rules of Evidence 611, 613, 801, 804, and 1006

January 27, 2023 – 9:00 A.M. (ET) – Via Videoconference

Witness List

Tab #	Name
1.	Ryan W. Babcock, The Babcock Law Firm, P.C.
2.	W. Mark Lanier, Lanier Law Firm
3.	William A. Rossbach, Rossbach Law Firm
4.	Brian Sanford, Sanford Firm
5.	Tad Thomas, Thomas Law Offices
6.	Tiega-Noel Varlack, Varlack Legal Services

TAB 1

THE BABCOCK
LAW FIRM

January 20, 2023

Advisory Committee on Evidence Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Summary Outline of Testimony as to Proposed Amendment to Rule 611

Dear Members of the Advisory Committee on Evidence Rules:

I refer the Members of the Committee to my previously filed comments, reproduced for your convenience herein:

Comment on Proposed Amendment to Federal Rule of Evidence 611

I am a trial lawyer representing plaintiffs in personal injury cases with my own law firm in Brunswick, Georgia. Previously, I represented large corporate defendants in products liability and other tort cases, and I also worked as a law clerk to a federal judge for several years.

I oppose the proposed amendment to Rule 611. Illustrative aids, or demonstratives, help the jury understand the evidence in the case and should be encouraged. The proposed amendment makes the use of such aids more difficult to present and use. Sometimes in trial work, as a matter of discretion, judges will prevent or restrict certain PowerPoint slides or other illustrative aids from being used during opening statement. That discretionary approach is misguided in my view. The proposed rule takes that approach and puts it on steroids, to the detriment of the trial process. The reason I submit that the discretionary approach described above, with using PowerPoint in opening, is misguided, is because a lawyer could otherwise, and traditionally, going back at least 60+ years, use a blackboard, or more commonly today, a dry erase board or large writing pad on a pedestal to write or draw. And if I as the trial lawyer have a PowerPoint slide that more neatly shows what I could write or draw, it will be quicker to

use, and the jury will better understand, a prepared PowerPoint slide. The proposed rule would act as a prior restraint on the contemporaneous use of a blackboard, dry erase board or the like during trial, a step backward for jury understanding and trial practice, and rule change that would undo generations of prior acceptable trial conduct. We know that teachers write important concepts on the blackboard. Trial lawyers sometimes emulate that practice during trial because they understand that it will help the jurors remember important facts or parts of the trial. The proposed amendment at best discourages, and at worst sometimes bars, that kind of activity, which will not help the jury understand the evidence or achieve its truth-finding function, in my view. For that reason, it is a bad policy proposal that should be rejected.

Likewise, subsection (d)(2) is unhelpful in my view to the trial function and jury deliberations. Certain categories of demonstrative evidence should routinely be admissible and be considered by the jury during deliberations, including photographs and medical illustrations, for example. Whether these pieces of evidence are actually offered into evidence should be within the discretion of counsel and the parties, and will frequently depend on the importance of the evidence. Other categories would not be admissible evidence — such as if I were to write some key phrases from an expert's testimony on a whiteboard or a piece of butcher paper during the testimony. I might return to that paper as a demonstrative during closing to remind the jury of what I view as important testimony in the case, but I don't believe the paper ought to be admitted as evidence or go back with the jury.

I respectfully submit that the rules as they presently exist are appropriate and sufficient to address any concerns with the use and consideration of illustrative aids.

Best regards,

Ryan W. Babcock

TAB 2

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WRITTEN SUBMISSION OF MARK LANIER
IN ADVANCE OF TESTIMONY BEFORE RULES ADVISORY COMMITTEE
January 20, 2023

Advisory Committee on Evidence Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
Rules Committee Secretary@ao.uscourts.gov

Re: Proposed Rulemaking on Federal Rule of Evidence 611 Summary Outline of Testimony at January 27, 2023 Hearing

Dear Members of the Advisory Committee on Evidence Rules:

My name is Mark Lanier. I am the founder of the Lanier Law Firm in Houston, Texas, and I submit these comments in opposition to the proposed addition of Rule 611(d)(1)(B) to the Federal Rules of Evidence.

I have been practicing law since 1985, trying more cases than I can count, mostly civil cases, representing both plaintiffs and defendants. In virtually every one of those trials I have used illustrative aids to help the jury understand the evidence they are hearing—from blackboard drawings in the 1980s to PowerPoint slides and Elmo® and IPEVO® sketches in the 21st century. I agree with the proposed rule's premise that misleading or unfairly prejudicial illustrative aids should not be used. But I take issue with the requirement that parties be given advanced notice of the use of illustrative aids for four reasons.

First, required advanced notice of illustrative aids will interfere with the truth-seeking functions of cross-examination by allowing litigation opponents to woodshed their witnesses on coming illustrative aids and to sculpt and script the witnesses' testimony to explain or avoid the illustrative aid. Effective cross-examination is a bulwark of the trial system. It should be encouraged, not discouraged. Second, the advanced notice requirement will obstruct the efficient progress of the trial and interfere with the attorney's efforts to persuade the jury. Third, the advanced notice requirement carries with it an incorrect implied presumption that the danger in using a spontaneously-created illustrative aid is so great that its use will be incurable. And finally, the proposed amendment is simply not necessary to protect against the use of misleading aids and unduly interferes with the district court's discretion to manage trials.

First, the advance notice requirement obstructs cross-examination. Rule 611(d)'s mandatory disclosure requirement applies to all demonstrative aids even when they are prepared during the trial. When I cross-examine a witness, I often hear that witness give answers that need to be spontaneously clarified or refuted with an illustrative aid. And so, I prepare one on the spot, either to clarify or refute the witness's answer, and further to help the jury understand the importance of a point or a discrepancy in the witness's testimony. I am attaching to this submission several examples of illustrative aids I have prepared during the testimony of a witness, and I will explain how these examples worked when I testify.

The importance of preserving spontaneity during trial, particularly as part of the truth-seeking process during cross-examination, is recognized in the Maine rule of evidence from which the proposed rule was initially derived. Maine's Rule 616 does not require advanced disclosure of all illustrative aids. It instead merely governs the use of "any aid prepared before trial." ME. R. EVID. 616(c). Thus, Maine's rule does not require disclosure for aids developed during the course of an examination. *See* former ME. R. EVID. 616(c) ("Illustrative aids prepared before use shall be disclosed to opposing counsel before use so as to permit reasonable opportunity for objection under Subsection (b)"). As stated in the Advisers' note to former ME. R. EVID. 616 (Feb. 1976), "[t]he [disclosure] rule applies to aids prepared before trial or during trial before actual use in the courtroom. *Of course, this would not prevent counsel from using the blackboard or otherwise creating illustrative aids right in the courtroom*." (emphasis added).

Maine's rule, like the proposed rule, previously included a disclosure requirement, but it was removed in 2014. Doing so eliminates the need for notice—and the ensuing disagreements on the adequacy of the notice—when notice is unnecessary because the display is simple. Even for illustrative aids prepared before trial, the key should be whether a party has a reasonable opportunity to object. For example, I might decide that I want to present a PowerPoint slide displaying three documents side-by-side so that I can compare or contrast what they say. If the documents are in evidence, notice should not be necessary (it will tip off my strategy) and a reasonable opportunity to object will rightly occur spontaneously in the courtroom or during a short break at the bench.

The proposed rule has similarly deleterious effects when applied to illustrative aids prepared before the trial or during trial but before the examination of a witness. Advanced disclosure of illustrative aids will require attorneys to give their opponents previews of their direct and cross-examinations. And with cross-examination, the Rule 611 notice will allow litigants and their lawyers who receive the notice to fashion their witnesses' testimony to avoid the discrepancies the illustrative aid was designed to highlight. Trials should not be scripted events. And lawyers do not aid the jury to find facts that accord with the truth by presenting them with scripted questions, scripted answers, and rehearsed responses to anticipated cross-examination. While lawyers may plan their direct examinations with witnesses, they should not be encouraged to sculpt their witnesses' testimony based on advanced knowledge of their opponents' use of illustrative aids.

Let me give an example that our firm has seen used by defense counsel in cross-examining an expert on general causation. The lawyer had a PowerPoint that included quotations from a number of authoritative articles that disagreed with the expert's causation opinion. Some of the articles had been used already in the trial, some had not but all would be identified as authoritative

by the defendant's expert. Next to each one was a column marked 'agree" or "disagree." Showing the expert disagreed with roughly six to eight articles was effective not only in cross-examination but also in final argument. In short, requiring lawyers to give opposing counsel advanced copies of illustrative aids will not aid in the search for truth, but will instead result in choreographed trial presentations that actually provide less information and understanding to the jury hearing the testimony. Furthermore, an early decision on the advanced notice requirement can work to prevent the court from having the context it may need from other evidence and testimony to make the best decision based upon the witnesses' testimony, evasiveness, and demeanor.

Second, the advance notice requirement will generate more disputes and slow down trials. Many trial lawyers use illustrative aids without objection, drawing on a white-board, highlighting a section of a document, or otherwise diagramming the witnesses' testimony during the examination. If the disclosure rule is enacted, then lawyers will not be able to use illustrative aids spontaneously. Instead, counsel will have to stop, approach the bench, and explain to the court and opposing counsel what he wants to do with the illustrative aid. The court may then allow some time for the opponent to think up objections and then hear and rule on the objections. And these objections may not just relate to the illustrative aid itself, but also to whether sufficient notice has been given for the opponent to develop objections. The requirement therefore has the potential to hopelessly bog down trial proceedings during the examination of witnesses. This kind of substantial interruption will discourage and deter lawyers from using an advocacy tool that is effective for informing and persuading the jury.

Third, the advanced notice requirement implies that illustrative aids are inherently unreliable and therefore mandate advanced judicial scrutiny. In fact, illustrative aids are recognized as a highly effective method of communicating evidence to the jury as they cater to the strong human preference of receiving information visually.[1] This is especially the case today as our jury boxes are filled with men and women who heavily rely on digital information and are therefore subject to increased susceptibility to distraction.[2] Lawyers who seek to use illustrative aids are therefore seeking to use the best available methods to help jurors understand the evidence at issue. Our rules of evidence should encourage the use of effective visual evidence rather than discouraging its use with a mandatory trial interruption penalty.

Finally, the Committee should refuse to adopt the proposed disclosure requirement because it is completely unnecessary to protect against the use of misleading illustrative aids. District courts already have that authority.[3] And as with any other piece of evidence or witness testimony, lawyers

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[1] William S. Bailey, *The Impact of the Digital Revolution on Modern Trials*, National Institute of Trial Advocacy 2023

[2] *Id.,* (citing Eyal Ophir, Clifford Nass, Anthony D. Wagner AD. Cognitive Control in Media Multitaskers, PNAS, Sept. 15, 2009. Available at https://www.pnas.org/doi/10.1073/pnas.0903620106. (last visited January 17, 2023)).

[3] *Brown v. Old Castle Precast E., Inc.*, No. 02–4016, 76 Fed. Appx. 404, 410 (3rd Cir. 2003) ("The District Court did not abuse its discretion when it held that the blown-up chart of the different forms of damages would have placed undue weight and overemphasis on the Plaintiffs' claim of damages, a key disputed issue."); *United States v. Vreeken*, 803 F.2d 1085, 190-91 (10th Cir. 1986) (holding the district court was well within its discretion in denying Defendants the use of a blackboard); *United States v. White*, 766 F.2d 22, 25 (1st Cir. 1985) ("The use of trial aids is committed to the trial court's discretion,

who believe the aids are misleading or unfairly prejudicial can object to the illustrative aid when it is used without significantly interrupting the trial. That rule polices lawyers already since trial lawyers want to avoid having their examinations interrupted with objections that are sustained lest jurors interpret the successful objection as an implicit criticism of counsel by the court. Further, Rule 611(d)'s test for admissibility is very similar to the balancing test required under Rule 403. Both rules require the court to balance the usefulness or relevance of the evidence or aid against the risk of unfair prejudice, confusion, or deception. These decisions require context and should be based on the specific testimony at issue and the state of the evidence at the time the aid is sought to be used.[4]

Relatedly, if Rule 611 is amended, I believe that Rule 403's requirement that its relevance (here its utility) should be *substantially* outweighed by its dangers should be included in the new rule's balancing.[5] The "substantially outweighed" standard has a long history that would be useful to courts conducting any balancing. And using the word "substantially" properly ensures the balance should be in favor of the adversarial process in play. Balancing the factors in favor of using the aids is entirely proper as the aids have a pedagogical purpose and courts should encourage lawyers to assist jurors understand the evidence. The presumption should be in favor of visual aids,

Rule 611(a) gives the court broad discretion to control the mode and order of examining witnesses. That discretion provides the court with flexibility to manage the trial fairly and efficiently. The proposed Rule 611(d)(1)(B) undermines that flexibility and discretion and presumes judges can decide these issues correctly only if they stop the trial every time an illustrative aid is used. The Committee should decline to interfere with the flexibility of district courts to manage their trials and reject the notice requirements proposed in Rule 611(d)(1)(B).

I would also like to briefly observe that the rule does not define illustrative aids, which will require case development and generate unnecessary objections and waste of time. First, words alone written on an Elmo®, PowerPoint, or sketch pad should not be considered illustrative aids regulated by this rule. Sometimes I simply write the witness's words on an Elmo® so I can use them during final argument and the jury will know that I'm not relying on my memory but the actual words. Merely writing on the Elmo® also makes testimony more interesting and memorable for many jurors. If I had to approach the trial judge every time I wanted to write something on an Elmo or sketch pad that is on an easel, the trial would be slowed. The proposed comments also cover "a handwritten chart." A simple drawing of an intersection prepared during an eyewitness's testimony in an automobile collision case should not be governed by these rules. Much of these

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and should only be allowed where they serve to assist the jury in understanding and judging the factual controversy."); *Shipp v. Gen. Motors Corp.*, 750 F.2d 418, 427 (5th Cir. 1985) ("The district court was within its discretion in determining that it would be prejudicial and misleading to allow GM to demonstrate its causation theory using a different vehicle and a different accident.").

[4] *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008) (recognizing that relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules).

[5] The proposed rule has the word "substantially" in brackets, thus inviting comment on whether the word should be included in a final version of the proposed rule.

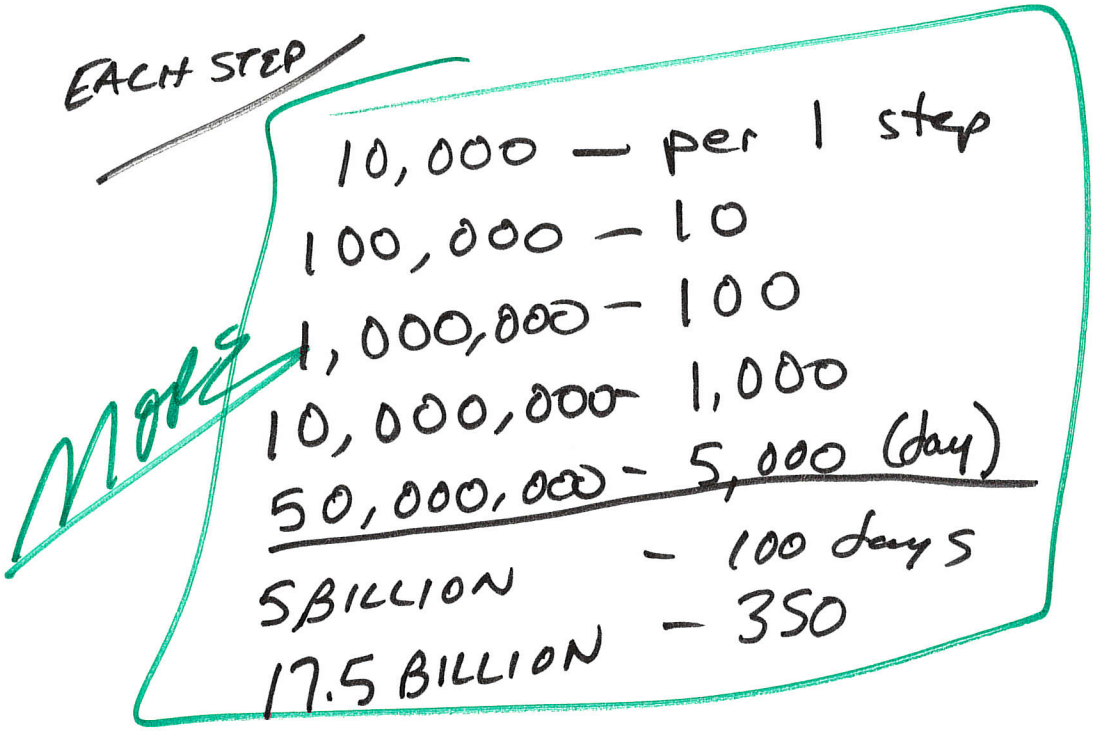
problems can be cured by recognizing, as Maine does, that the rule should only apply to aids prepared in advance of trial.

Sincerely,

W. Mark Lanier

Encl
WML/st
Cc: Dara Hegar
Sadie Turner

EACH STEP THE M/M HIP "DOING OWN THING"



History of Metal on Poly

Conventional poly

Sir John Charnley - BEST KNOWN
"Ultra High Molecular Weight Poly Ethylene"
"UHMWPE" - PLASTIC CUTTING BOARD

Cross linked poly

Gamma Ray sterilization - kills all germs → MRads (mega-rads)
Breaks & reconnects bonds
Wears better

Moderately cross linked poly

Charnley 2.4-4 MRads (normal)
5 → is Moderately form & lasts longer

Highly cross linked poly

8-10 MRads → wears better

WHEN
McKELLOP
AN UNKNOWN in 2000, 2004

LAKE & TRUMBULL COUNTIES
NUMBERS OPIATE RX

CVS	GIANT EAGLE	WALGREENS	WALMART
851,198	1,399,920	1,007,556	275,700

RX NEEDED TO RUN FLAGS

OPIOID RX FILLED IN LAKE & TRUMBULL

RED FLAGS APPLIED (16)

CVS	G.EAG.	WALG	WALM
175,254	164,698	226,843	49,243
	155,764	226,829	48,557

RANDOM

7,800
RX FOR CARMEN CATIZONE TO EXAMINE

KEY:

	LAKE		TRUMBULL	
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CVS	183,352	355,795	129,025	183,026
	191,515	405,260	312,377	490,968
G.EAGLE	~~141,543~~			
WALG	193,826	320,461	128,717	364,552
			26,867	65,541
WALM.	66,726	114,566		

Dr. David Egilman,
M.D. M.P.H.

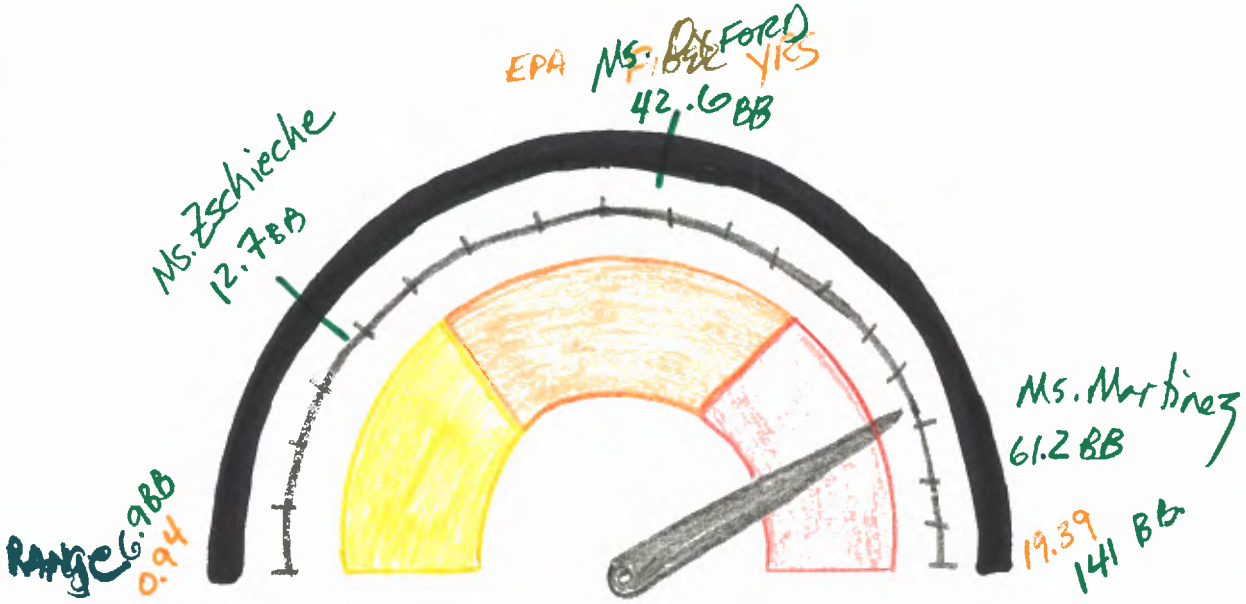
WHO: M.D.
M.P.H.

N.I.H - Epidemiology

NIOSH - Occupational Medicine

I.H.F. - Custodian of Records

DR. EGILMAN'S ASBESTOS EXPOSURE MEASUREMENTS



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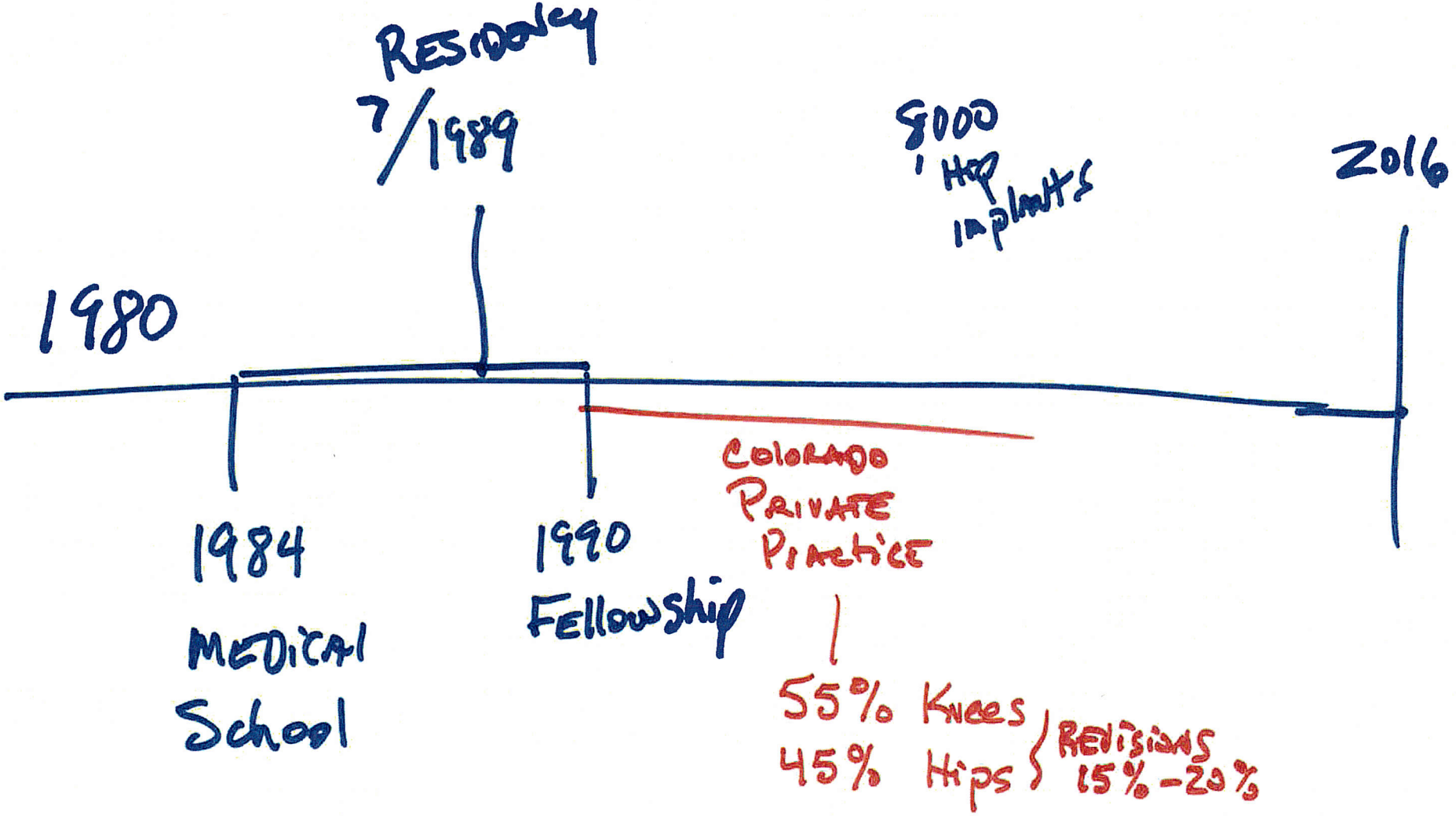
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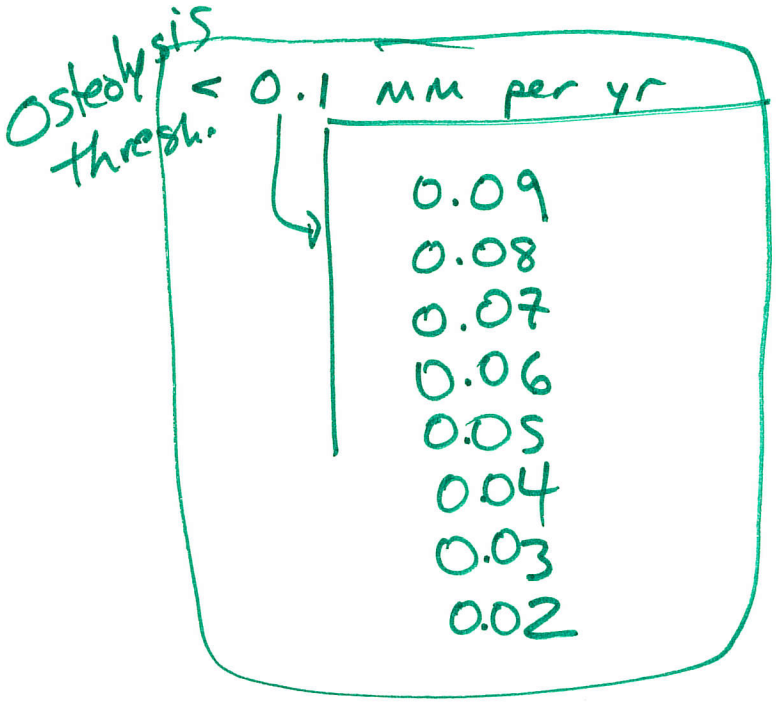
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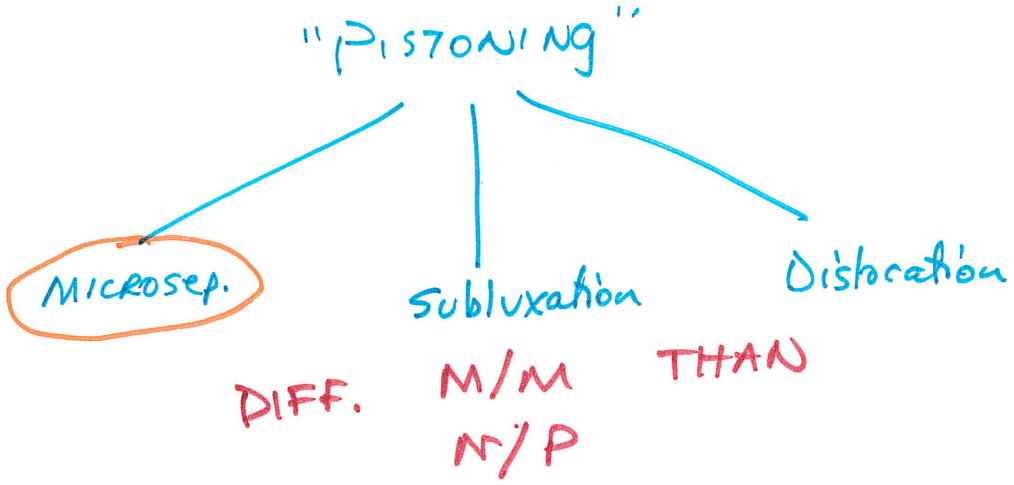
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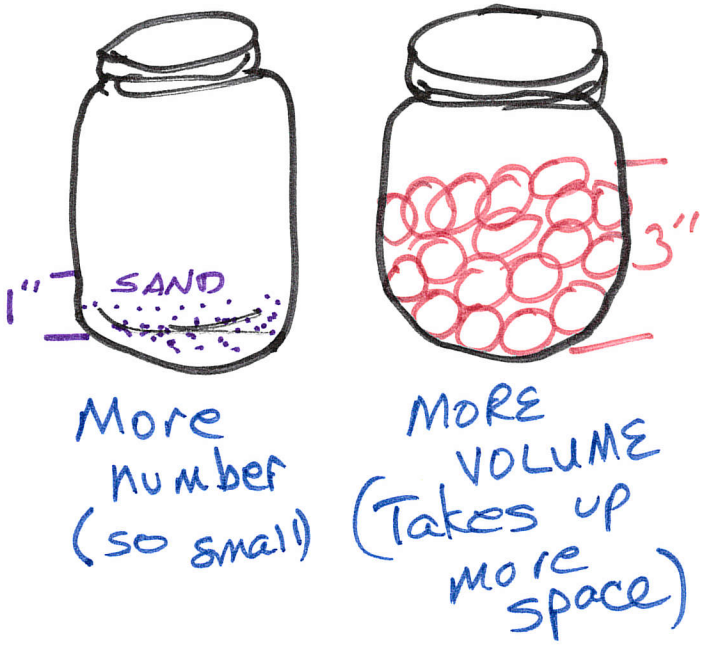
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TAB 3

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January 20, 2023

Advisory Committee on Evidence Rules
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RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Rulemaking on Federal Rule of Evidence 611
Summary Outline of Testimony at January 27, 2023 Hearing

Dear Members of the Advisory Committee on Evidence Rules:

I am a trial lawyer with more than 40 years' experience litigating exclusively plaintiffs' cases involving complex medical, scientific, and engineering issues. I am admitted in four United States District Courts, six Courts of Appeal and the Supreme Court. I have served on the boards of several national and state trial lawyers' organizations. I have tried cases in federal and state courts in 5 states.

More recently, I became a member of the Board of Advisors of IAALS after serving on panels at the IAALS Rule One Symposium on the 2015 federal rule discovery amendments. I have also been nominated and elected by my peers to membership in the American Board of Trial Advocates. My testimony at the hearing is not as a representative of any organization.

In the course of my practice, I have used illustrative aids tens, if not hundreds, of times with witnesses in court, particularly with experts. Illustrative aids come in many forms; sometimes prepared in advance, sometimes, as with flip charts, created

during the testimony. I can say with confidence that while some complex illustrative aids such as digital reconstructions justify advance review by the court and counsel, the flip charts, blackboards, and white boards I have used for 40 years during trial have never required advance notice and have rarely if ever been objected to.

Accordingly, while I can understand the concern that in federal litigation some clarification of Federal Rule of Evidence 611 is justified and support such clarification, I believe that the proposed amended rule goes too far and creates unnecessary barriers to illustrative aid use. A summary outline of my proposed testimony at next week's hearing follows.

- The Maine state court Rule 616 is an excellent starting point but the current draft amendment to FRE 611 makes critical changes to the Maine rule that impose unnecessary burdens on illustrative aid use.
- A trial court has inherent discretion to limit or bar use of illustrative aids to avoid unfair prejudice and the Maine rule makes that explicit. What is important about the Maine rule and which is changed in the proposed amended rule is that there are subtle shifts in the burden imposed on counsel seeking to use an illustrative aids.
- As I read the Maine rule it assumes initially that illustrative aids "may be used" to illustrate testimony or argument. The second section then acknowledges that the trial court may limit or prohibit whether and how they may be used.
- In contrast the proposed amendment to FRE 611 sets forth at the outset that court review is primary and implies that use is not assumed. I fear that this will be viewed as a shift in the burden on counsel seeking to use illustrative aids.
- Likewise, the Maine rule makes an important distinction between aids that may require notice and those that do not. The Maine rule states explicitly that notice and an

opportunity to object is limited to aids "prepared before trial." That is a practical and sensible limitation. Counsel at trial cannot always anticipate what aids she may use, particularly aids that may be created on flip charts, white boards, etc. during testimony. The proposed federal rule is vague on this, requiring "a reasonable opportunity" to object but not making clear what that standard means or making any distinction between aids created before trial such as complex digital reconstructions and counsel creating flip charts during testimony or argument. The comments discuss this but do not acknowledge the distinction in requiring advance notice for all aids, not just those prepared in advance.

- The proposed federal rule unnecessarily inhibits counsel from using reasonable aids in the courtroom during testimony and argument. Creating an aid during testimony or argument is fundamentally no different from asking questions to a witness or making an argument. Opposing counsel always has the opportunity to object if the aid being created is improper at the time.
- The January 2023 Agenda Book at 367 says the proposed amendment "sets forth a distinction between demonstrative evidence and illustrative aids." Unfortunately, the rule itself does not do that. The Committee Note has a detailed discussion about the differences between illustrative aids and admissible evidence but the proposed rule does not provide a definition. Although I rely often on Committee Notes in briefing and argument in federal court, they are not as definitive or concise as actual language in the rule. Further, when federal rules are incorporated into state rules, the Committee Notes are frequently not also incorporated. A concise and clear definition would be important and helpful.

Thank you again for giving me the opportunity to present my comments at the hearing.

Sincerely,

William A. Rossbach

TAB 4

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January 20, 2023

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Re: *Summary Outline of Testimony as to Proposed Amendment to Rule 611*

Dear Members,

I am a trial lawyer specializing in representing individuals damaged by violations of employment and civil rights laws.

I oppose the proposed amendment to 611. The concern is that what isn't broke doesn't need to be fixed. A rule on illustrative aids would add unnecessary grounds for objections and unnecessary concern for judges, ultimately causing delay and injustice.

Illustrative aids appear to be a form of demonstrative aids that have been used from the beginning of common law trials. Technology changes, content doesn't.

If the Committee proceeds with the recommendation of a rule, please remove or reduce the notice requirements and place the presumption with use and not with disuse. If notice is required, it should be limited specific forms, such as simulations and models. The similar Maine rule appears to presume use unless prohibited and would be a better approach.

I do appreciate your service and thank you for your consideration of my comments.

Sincerely,

Brian Sanford

TAB 5

AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

Statement of Tad Thomas

President, American Association for Justice

Before the Advisory Committee on Evidence Rules

January 20, 2023

Thank you for providing an opportunity for public comment on illustrative aids. My name is Tad Thomas, and I'm the President of the American Association for Justice, the largest member plaintiff trial bar whose core mission is to protect the Seventh Amendment right to trial by jury. I am also a trial lawyer and have tried civil jury trials on subjects ranging from routine motor vehicle collisions to complex medical negligence and nursing home neglect and abuse. In each trial, illustrative aids were used by both sides to educate the jury.

To say that our members are not excited about the proposed rule would be an understatement. They believe that judges are perfectly capable of determining the parties' use of illustrative aids in their courtrooms because a one size rule does not fit all trials.

I. Flexibility is Key

Some trials are complex, long in duration, and include large numbers of experts while others are short and may involve a dispute over only one aspect of the case. An illustrative aid developed well in advance of trial differs completely from one developed on the spot to be used to help the jury understand complicated information or during cross-examination. What works in one trial may not work in the other. While AAJ is not opposed to the rule, we are recommending several changes to the rule to ensure that flexibility is provided to both parties and judges.

II. Three Important Changes Must Be Made to the Proposed Rule

First, the draft proposal is based on Maine Rule of Evidence 616. We have spoken with our Maine practitioners and believe that proposed Rule 611(d) is different from the Maine Rule in a crucial respect. The Maine Rule assumes that the illustrative aid can be used at trial. The assumption is a permissive standard of use. The proposed federal rule says that "the court may allow a party to present an illustrative aid" which shifts the assumption from the party seeking to use the aid to one of court approval for use, which places a higher burden on the party seeking to use the aid and makes more work for the court.

The Maine Rule still regulates illustrative aids. Under Maine Rule 616(b), a court can limit or prohibit "the use of an aid to avoid unfair prejudice, surprise, confusion, or waste of time." This language would be preferrable to the balancing test approach provided in 611(d)(1) of the proposed rule. A rule that the illustrative aid is presumed usable at trial, unless the court needs to prohibit or limit its use, is an easier rule for courts to implement than the proposed draft which requires the court first to determine that the aid can be used at trial by using a balancing test, and then requires notice and an opportunity to object.

Second, AAJ agrees with the direction that the Advisory Committee on Evidence Rules seems headed and strongly supports the removal of the notice provision from the rule. For illustrative aids created in advance of trial, the court's scheduling order can provide that counsel exchange them on a date certain prior to trial as part of a routine exhibit exchange. AAJ notes that Maine had a notice requirement in its rule that was originally adopted in 1993, but that it was removed when the rule was updated in 2015. Many illustrative aids are expensive to produce, and plaintiff-side practitioners will prepare them as close to trial as possible. It is especially important for plaintiff-side attorneys to avoid unnecessary trial-related expenses, which would diminish a client's recovery.

Third, AAJ recommends providing some definition or examples of illustrative aids in the rule itself instead of waiting until the third paragraph of the Committee Note. Yes, counsel should be reading the notes, but does that always happen? AAJ thinks that erring on the side of early clarity is the way to go. AAJ further recommends that broad categories be used to describe the illustrative aids.

The FRE 1006 is also in formal comment period, and AAJ does support that proposed rule change. The proposed FRE 1006 does provide examples of voluminous summaries in the first sentence of the rule itself: "The court may admit as evidence a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs…" AAJ suggests that a short list of illustrative aids in Rule 611(d) would be helpful.

Combining these three changes together would result in a draft that looks like this:

(d) Illustrative Aids.

(1) Use in Trials. An illustrative aid is not evidence, but the court

a. may allow a party to use an illustrative aid, including [such as] drawings, photos, diagrams, charts, graphs, videos, and models, to help the finder of fact understand admitted evidence if a reasonable opportunity is provided to object to its use and;

b. may limit or prohibit the use of an illustrative aid as necessary to avoid unfair prejudice, surprise, confusion, or wasting time.

III. <u>Changes to the Committee Note</u>

AAJ will file a more extensive public comment, but notes that it generally recommends removing the word "disputed" before the word "fact" in each instance that it appears. There are many instances where a fact needs to be established or proved, but it may not be actually "disputed." For example, during a damages trial, there may not actually be a dispute about facts, but rather the plaintiff's need to establish future medical costs.

Thank you for your work on the rules, and I would be happy to answer any questions.

TAB 6

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January 20, 2023

Via email to: RulesCommittee_Secretary@ao.uscourts.gov

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Hearing on Proposed Amendments to Evidence Rules

Dear Rules Committee Members,

Thank you for the opportunity to testify about the Proposed Amendments to Evidence Rules, specifically the creation of Rule 611(d) Illustrative Aids. As a member of the California Bar, as well as the, Central, Eastern and Northern District of California, United States District Courts and the Ninth Circuit Court of Appeals, I come across evidentiary rules every day in my practice. I have been a trial attorney since 2006, and was a student attorney of the D.C. Bar in 2005. Since then, I have tried a number of both civil and criminal cases to verdict. In each of them, illustrative aids were used to assist the jury in understanding what happened.

Appreciating the careful consideration and preparation that went into crafting the proposed language of Rule 611(d), I respectfully offer the following suggestions of how to further refine the proposal. As it stands, the proposed rule vests too much power in the trial court to take away counsel's ability to present information to assist the jury. Specifically, the portion of the rule that states that "[t]he court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence . . . ," contains two problematic phrases: may and admitted.

First, in my experience use of illustrative aids or demonstratives is allowed subject to the court's gate keeping function, found at Rules 403 and 611(a). But if the committee succeeds in adding the word "may" into the proposed rule, the past practice of allowing aids or demonstratives would be changed from a right to a possibility. This would hinder counsel's ability to plan in advance for effective presentations to the jury because it adds a layer of uncertainty to an already adversarial process. Further, changing what has been a "right" to present to a "maybe" would vest too much power in the court to take the creativity and originality away from the attorney presentation. Secondly, the term admitted evidence presupposes that the illustrative aid cannot be used in an opening statement absent an early stipulation to the evidence that is the subject of the aid being admitted.

It is common practice to use aids or demonstratives in opening and there is no real need to change that practice by only allowing aids to be used after the evidence is admitted.

Regarding subsection (A) of the proposed rule, which states:
"(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"

I do not think that this language is necessary because the court already has the right to exclude the aid pursuant to Rules 403 or 611(a). Adding the language cited above would add an unnecessary layer of complexity where there does not need to be.

Since illustrative aids are not evidence, but are introduced only to help the jury understand a witness's testimony or a party's argument, there is no utility in complicating how the aids are presented. Because the judge can use the same rules that have been allowed in the past to make sure that the trial runs smoothly and that no side is prejudiced unfairly. Thus, I do not think that subsection (A) is necessary.

While it is true that illustrative aids are not a part of discovery, most judges require attorneys to exchange them before opening statements or if they are presented during the trial before they are shown to the jury. As such, I do not think the proposed rule needs to add a notice requirement because the information is routinely exchanged anyways.

Lastly, I do agree that an illustrative aid should be entered into the record, especially if it is reviewed by the jury during deliberations.

Thank you for the opprtunity to tesify.

Sincerely,

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cc: File