Advisory Committee on Evidence Rules
Minutes of the Meeting of April 28, 2023
Thurgood Marshall Federal Judiciary Building
Washington, D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 28, 2023 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. Shelly Dick
Hon. Mark S. Massa
Hon. Thomas D. Schroeder
Hon. Richard J. Sullivan
Hon. Marshall L. Miller, Principal Associate Deputy Attorney General, Department of Justice
Arun Subramanian, Esq.
James P. Cooney III, Esq.
Rene Valladares, Esq., Federal Public Defender

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee
Hon. M. Hannah Lauck, Liaison from the Civil Rules Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
H. Thomas Byron III, Esq., Rules Committee Chief Counsel
Timothy Lau, Esq., Federal Judicial Center
Bridget M. Healy, Esq. Administrative Office of the U.S. Courts
Shelly Cox, Management Analyst, Administrative Office of the U.S. Courts
Christopher I. Pryby, Esq., Rules Clerk
Anton DeStefano, Office of Military Justice
Cammy Goodwin, Wheeler Trigg O'Donnell LLP
Kaiya Lyons, American Association for Justice
Sue Steinman, American Association for Justice
John McCarthy, Smith Gambrell & Russell LLP

Present via Microsoft Teams
Professor Daniel J. Capra, Reporter to the Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Elizabeth J. Shapiro, Esq., Department of Justice
John Hawkinson, Journalist

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting and invited all participants to introduce themselves. He explained that the Reporter would be participating on Microsoft Teams.

The Chair then explained that Judge Shelly Dick, Judge Tom Schroeder, and Arun Subramanian would all be rotating off the Committee. The Chair thanked all three for their terrific service to the Committee and noted that all three would be greatly missed. Mr. Subramanian thanked the Chair for his leadership and thanked Professors Capra and Richter for their educational materials. He noted that he hoped to return to the Committee in the future. Judge Schroeder stated that his service on the Committee was one of the most rewarding things he had done as a judge. He was impressed by the work and the friendships and thanked the Chair and Professors Capra and Richter for their leadership and superb work. Judge Dick remarked that she had learned so much from her work on the Committee and commented that the agenda materials had made her a better judge. The entire Committee thanked all three for their wonderful service.

Approval of Minutes

A motion was made to approve the minutes of the October 28, 2022, Advisory Committee meeting. The motion was seconded and approved by the full Committee.

Report of Standing Committee Meeting

The Chair explained that he and the Reporter had reported to the Standing Committee on the progress the Evidence Advisory Committee was making on pending amendment proposals. He explained that comments received from the Standing Committee, if any, would be shared as the Committee discussed specific proposals.

II. Proposed Illustrative Aid Amendment

The Chair opened the discussion with the topic of illustrative aids and the proposal to add a provision to the Federal Rules of Evidence regulating their use. The Reporter directed the Committee's attention to page 93 of the agenda book to see the proposal published for notice and comment. He explained that illustrative aids are utilized in every trial and yet are not governed by any rule. He noted that the proposed amendment would bring some clarity and uniformity to the issue and would distinguish illustrative aids from demonstrative evidence offered to prove a fact and from Rule 1006 summaries designed to prove the content of voluminous writings or recordings. The Reporter explained that 130 public comments had been received on the proposal and that the agenda materials suggested changes to address issues raised in the public comment.

A. ***Notice of Illustrative Aids***

The Reporter reminded the Committee that the published amendment included a notice requirement for the use of illustrative aids that could be excused for good cause. He explained that much of the public comment opposed any notice requirement due to the impossibility of giving notice for certain illustrative aids created on the fly in the courtroom, as well as to concerns about attorney work product if notice were required of aids used in opening and closing arguments. Due to negative feedback on a notice requirement at the symposium hosted by the Committee in October 2022, the Committee determined at the Fall 2022 meeting to delete the notice requirement from the text of the amended rule. The Reporter explained that the deletion of the notice requirement would resolve most concerns raised in public comment. He proposed that the committee note could discuss the issue of notice and the importance of leaving it to the trial judge on a case-by-case basis to determine what notice, if any, is appropriate for a particular illustrative aid. The Reporter directed the Committee's attention to proposed note language designed to make this point on page 94 of the agenda materials.

One Committee member expressed support for deleting the notice requirement in the text of the amendment. He suggested that the note language should make clear that a notice requirement might apply to some illustrative aids and not apply at all to others. He opined that the note should clarify that the trial judge remains free to pick and choose according to the type of illustrative aid. The Chair commented that the note language proposed by the Reporter was very flexible and would capture the trial judge's discretion to craft notice requirements fit for all the different types of illustrative aids. The Committee member replied that the note should be clearer that notice does not apply to all types of aids. The Reporter pointed to the language in the proposed note stating that the amendment "leaves it to trial judges to decide *whether, when, and how* to require advance notice of an illustrative aid."

The Chair explained that some members of the Standing Committee had suggested that the Committee might be abandoning the notice requirement too quickly but that other members had disagreed, arguing that the Committee was right to delete the notice requirement. The Chair explained that the amendment would get stopped at the Standing Committee level if it included a notice requirement. The Reporter agreed, noting that most trial judges already require notice of illustrative aids such that the amendment loses little by omitting a notice requirement. Several members of the Committee agreed that notice was typically already required for anything that wasn't created during trial testimony. They pointed out that a failure to require notice results in disruption to the trial because the court needs to break to allow opponents to view and object to an illustrative aid. The Reporter emphasized that the notice requirement in the published amendment was the red flag that drew negative attention to the amendment and that eliminating it would chart a constructive path forward. Committee members agreed to delete the notice requirement from the text of the amendment and to include the proposed note language on page 94 of the agenda materials emphasizing the trial judge's discretion in handling notice.

One Committee member queried whether subsection three of the proposed amendment requiring illustrative aids to be made a part of the record was necessary. The Chair responded that it was because many trial judges do not make aids a part of the record. He noted that the failure to make illustrative aids part of the record hampers appellate review.

B. *Extending the Amendment to Opening Statements and Closing Arguments*

The Reporter next raised the question of extending the amendment to cover aids used during opening statements and closing arguments. He explained that this issue was controversial during public comment due to concern about disclosing work-product material to be used in opening and closing to opposing counsel in advance. With the notice requirement gone, this concern disappears. The Reporter noted that illustrative aids used during opening and closing are subject to regulation in the same manner as other trial aids and that there was no reason to treat them differently with respect to the balancing test used to determine their utility. In addition, he noted that it would be problematic for the amendment to regulate illustrative aids used during trial testimony and for the court to regulate illustrative aids used during opening and closing outside the rule. The Reporter directed the Committee's attention to proposed changes to the rule text and committee note on pages 96 and 97 of the agenda materials to extend the amendment to cover opening statements and closing arguments.

One Committee member noted that the proposed changes would extend the rule to cover a "party's argument" and expressed concern that this would *not* cover opening statements because opening statements are supposed to be a forecast of the evidence and *not* an argument. He suggested adding language to specifically cover "forecasts of the evidence" as well as a "party's argument." The Reporter explained that this concern was addressed by the proposed committee note that would state that the amendment governs the use of an illustrative aid at any point in trial, "including opening statements and closing argument." Committee members agreed to this solution.

C. *Is the Amendment "Hostile" to Illustrative Aids?*

The Reporter informed the Committee that several public comments emphasized the importance of illustrative aids for juror understanding and suggested that the amendment was discouraging illustrative aids. He noted that there was no intent to be hostile to illustrative aids. To the contrary, the goal of the amendment was to bring clarity and uniformity to the consideration of illustrative aids by articulating the standard courts already use to evaluate them in rule text. He conceded that the notice requirement could be seen as an obstacle to illustrative aids. The Reporter suggested that the deletion of the notice requirement would reduce concerns about hostility to illustrative aids.

The Reporter explained that the balancing test included in the amendment to evaluate illustrative aids could also encourage or discourage illustrative aids depending upon how it is drafted. Specifically, he noted that the amendment was published with the modifier "substantially" in brackets. Including the term "substantially" would align the balancing test with the balance used in Rule 403 and would favor use of illustrative aids, rejecting them only if the risk of unfair prejudice "substantially outweighs" their utility. Thus, a balancing test that includes the modifier "substantially" is the most encouraging of illustrative aids. In contrast, removing the term "substantially" would reject illustrative aids whenever their utility is outweighed to *any extent* by the risk of unfair prejudice, etc. A balancing test that eliminates

"substantially" would be less encouraging of illustrative aids. The Reporter pointed out that it would also differ slightly from the test outlined in Rule 403, perhaps creating confusion.

To further address concerns about the amendment's hostility to illustrative aids, the Reporter suggested including the modifier "substantially" in the balancing test and adding language to the committee note stating, "Illustrative aids can be critically important in helping the trier of fact understand the evidence or the argument and this rule should be read to promote their use."

One Committee member queried whether the amendment would simply put the Rule 403 balancing test into the illustrative aids rule. The Chair responded that the Rule 403 test was distinct from the test used in the amendment because Rule 403 deals with the admissibility of evidence. Because illustrative aids are not evidence, the test in the amendment assesses the utility of the illustrative aid in assisting comprehension rather than its probative value. Thus, the two tests remain distinct. Another Committee member opined that the language in the committee note "promoting" the use of illustrative aids should not be used. She noted that some illustrative aids can be inappropriate and should not be "promoted." The Chair agreed, explaining that the amendment should be regulating illustrative aids and not promoting them. He suggested deleting the final part of the sentence in the committee note stating "and this rule should be read to promote their use." The Committee agreed with the Chair's suggestion. The Chair remarked that there is some irony in the public comment that the amendment is "hostile" to illustrative aids. He noted that adding a rule regulating juror questions was thought to "promote" the practice, while adding a rule regulating illustrative aids was seen as "hostile" to the practice.

The Reporter recommended that the Committee add the word "substantially" to the text of the Rule. The Federal Public Defender reminded the Committee that the agenda materials referenced Judge Campbell's argument against including the term "substantially." He opined that, because illustrative aids are not evidence (and are merely aids to comprehension), they should not be allowed to inject *any* risks into the trial process. Unlike evidence with probative value, illustrative aids should be rejected if they introduce prejudice or confusion at all. The Federal Public Defender argued that the modifier "substantially" should be omitted from the amendment. The Principal Associate Deputy Attorney General agreed, arguing that aids should only be used if they help and should not be permitted if, on balance, they cause delay, confusion, or prejudice. He also pointed out that lawyers create many illustrative aids in advance and have the ability to control what they include. He suggested that the test in the rule ought to strike the appropriate balance to direct lawyers' efforts.

The Chair explained that he appreciated the theory but expressed concern about deleting the modifier "substantially" because it would create a more stringent test for illustrative aids than the one used for evidence. He noted that the line between what is demonstrative evidence and what is merely an aid can be elusive and that a balancing test that treats the two differently would place more pressure on proper classification. If the same balancing test is applied to both, the classification is less significant and creates fewer opportunities for error. Another Committee member agreed with the Chair, asking why the amendment should require more of a mere aid than it requires of evidence. He noted that rejection of the "substantially" modifier could undermine the use of illustrative aids and create concerns about hostility to the practice described

in public comment. Another Committee member argued that the case against using the modifier "substantially" could be made in the Rule 403 context as well. He expressed a preference for keeping the balance between Rule 403 and the amendment the same to avoid confusion. A majority of the Committee agreed that adding the modifier "substantially" was the superior alternative.

The Reporter noted that some public comment suggested that the language "The court may allow" was hostile to illustrative aids because it suggested that parties must first ask the court for permission to use aids. The comment suggested changing the language to read: "A party may use an illustrative aid if . . . ." The Reporter explained that the majority of the Evidence Rules utilize the "court may allow" language and that it doesn't require advance permission in practice. The Chair agreed, explaining that nobody asks for advance permission except in a motion *in limine*. The Committee agreed to retain the "court may allow" language.

D. ***Including a Definition of Illustrative Aids***

The Reporter explained that some public comment suggested that the amendment should define illustrative aids. He explained it would be challenging to come up with a comprehensive definition that would encompass all possible types of illustrative aids. The Reporter explained that he would be hesitant to include a precise definition in rule text but suggested that the committee note could include a sentence in the first paragraph loosely defining illustrative aids. The proposed sentence would read: "An illustrative aid is any presentation offered not as evidence, but rather to assist the trier of fact to understand other evidence or argument."

The Chair asked whether the sentence would need to refer to any "visual presentation." Another Committee member responded that an illustrative aid need not be "visual" and could be an "auditory" aid. The Reporter inquired whether it would be better to refer to "material" as opposed to a "presentation." The Committee member suggested it could be a musical composition played for the jury that wouldn't be "material." Another participant asked whether the word "item" would work. The Reporter noted that "item" sounds like evidence and that illustrative aids are not evidence. The Committee decided to characterize illustrative aids as "any presentation offered not as evidence, but rather to assist the trier of fact to understand evidence or argument."

E. ***Is a Rule Necessary?***

The Reporter explained that several public comments suggested that there is no need for a rule regulating illustrative aids because courts already regulate their use in the absence of a specific rule. He explained that the reason to add a specific rule was to bring some clarity and uniformity to the regulation already being done by the courts and to place the standard routinely utilized by courts in accessible rule text rather than requiring parties to hunt for standards in the case law. The Committee agreed that adding a rule on illustrative aids was helpful.

F. ***Adding a Cross-Reference to Rule 1006***

The Reporter reminded the Committee that courts are not infrequently confused about the difference between an illustrative aid and a summary admitted to prove the content of voluminous records under Rule 1006. He explained that an amendment to Rule 1006 had also been published to help distinguish the two and that the Rule 1006 proposal contained a cross-reference to the illustrative aid rule. The Reporter informed the Committee that some public commenters thought that the illustrative aid rule should contain a parallel reference (or direction-finder) back to Rule 1006 to provide further clarity. He explained that a fourth subsection could be added to the illustrative aid amendment as reflected on page 104 of the agenda materials to serve this purpose. The Reporter explained that the Rules do not contain any other two-way references, and that lawyers are likely to start with Rule 1006 when they seek to use a summary (which will direct them to the illustrative-aid provision if they cannot meet the Rule 1006 foundation). Still, he noted that the double cross-references could help the novice. The Reporter noted that the style consultants had preferred not to add a cross-reference to the illustrative aid rule but were not opposed to it if the Committee wished to include it. Committee members noted that the companion amendments to Rules 1006 and 611 were designed to clear up confusion and that cross-references in both rules would create the most clarity. All members agreed that the cross-reference to Rule 1006 should be added to the text of the illustrative-aid amendment.

G. ***Moving the Amendment to Article I***

The Reporter explained that some public comments suggested moving the illustrative-aid amendment out of Rule 611(d) where it was placed for purposes of publication. The Reporter reminded the Committee that the proposed amendment was included in Rule 611 because trial judges have utilized their authority under Rule 611(a) to regulate illustrative aids. Public comment noted that Article VI of the Federal Rules of Evidence governs "Witnesses" and that the illustrative-aid rule does not deal with witnesses. Public comment suggested moving the illustrative-aid rule to Article X. The Reporter opined that Article X would not be a good fit both because the new rule could get lost at the back of the rulebook and because Article X deals with the best-evidence rule, which is also not connected to illustrative aids.

The Reporter suggested that Article I containing "General Provisions" might be a better fit and that the new rule on illustrative aids would be more visible in the front of the rulebook. He suggested that the Committee could consider whether to propose the illustrative-aid amendment as new Rule 107. All Committee members favored adding the illustrative-aid amendment as Rule 107 for the reasons suggested by the Reporter.

H. ***The (Not so) Elusive Line Between Illustrative Aids and Demonstrative Evidence***

A Committee member noted that a new paragraph had been proposed for the committee note regarding the "elusive distinction" between illustrative aids and demonstrative evidence as reflected on page 109 of the agenda materials. The Committee member suggested that the point of the amendment was to create a clear line and to tell litigants that illustrative aids are *not evidence* and that they must comply with the Federal Rules of Evidence to admit something as evidence. He expressed concern that the new note paragraph could create confusion, particularly

with respect to sending aids to the jury room. If trial judges are told that the line between evidence and aids is a fuzzy one, they may be inclined to send more back to the jury room. The Chair responded that the distinction is quite clear in theory but can be difficult in application. Still, he explained that the proposed paragraph was drafted to respond to public comment and may do little to help in applying the rule. Accordingly, the Chair said he was inclined to delete the paragraph from the note. Another Committee member suggested that the second sentence of the paragraph regarding the "elusive" distinction might be deleted, with the remainder of the paragraph retained. A different Committee member favored deleting the entire paragraph because it would not help a trial judge solve a problem. The Chair agreed, characterizing the paragraph as more of a "P.R. campaign" than useful. The Committee agreed to delete the entire proposed paragraph from the note.

I. *"Trier of Fact"*

The Reporter explained that the amendment published for notice and comment referenced the "finder of fact" but that the Rules typically refer to the "trier of fact." He suggested that the term should be changed to conform to the convention utilized throughout the Rules. The Committee agreed.

J. *"Admitted Evidence"*

A Committee member noted that Rule 107(a) on page 119 of the agenda materials references presenting an illustrative aid to help the trier of fact understand "admitted evidence." He suggested that this terminology would not fit when an aid is used to explain evidence that has not yet been admitted or is presented simultaneously with the aid. The Chair agreed with the concern and suggested deleting the modifier "admitted" from subsection (a) such that it would read "to help the trier of fact understand evidence or argument." Committee members concurred. The Reporter also noted that Rule 107(b) had been slightly modified due to a helpful suggestion from Judge Bates such that it now reads: "An illustrative aid *is not evidence and* must not be provided to the jury during deliberations unless . . . ."

K. *Illustrative Aids in the Jury Room*

The Reporter noted that the amendment published for notice and comment provided that illustrative aids should not go to the jury room during deliberations absent consent of all parties or a finding of good cause by the trial judge. One Committee member queried why something that is *not evidence* should ever go to the jury room absent the consent of all parties. The Chair explained that it does happen, noting that in a recent trial there was a helpful map used throughout the trial that was permitted in the jury room over objection. Another Committee member agreed that jurors refer to the illustrative aids throughout trial and then want to have access to them while deliberating. A different Committee member expressed concern about this reality, arguing that the jury always *wants* the illustrative aids but that government PowerPoint slides shouldn't go to the jury room over a defense objection nonetheless. He queried whether "good cause" exists under the amendment merely because the jury asks for an illustrative aid. He further suggested that allowing illustrative aids into the jury room opens the door to mischief.

Another Committee member echoed these concerns, asking whether the amendment would bestow discretion to allow nonevidence in the jury room.

The Chair opined that the Committee could not prohibit sending illustrative aids to the jury room over objection without republishing the amendment because that would effect too big a change to the proposal. Judge Bates agreed that the Committee could not ban sending illustrative aids to the jury room except in the case of consent without republication. He stated that the Committee should feel free to republish the amendment if it felt that was the appropriate result because it was important to wait to get the right rule. A Committee member opined that the existing proposal was satisfactory given that any illustrative aid sent to the jury room would be accompanied by a limiting instruction cautioning the jury that it is not evidence. The Chair agreed, emphasizing that the aid is something the jury has been allowed to view during the trial. A Committee member asked why *all* illustrative aids shouldn't be sent to the jury room under that theory. He opined that consent is a different situation but that a "good cause" exception could be problematic. The Principal Associate Deputy Attorney General explained that in complex organizational prosecutions, nonargumentative aids like organizational charts are commonly very helpful to the jury simply to keep names and parties straight. The Chair agreed, describing a complex tax-malpractice case in which jurors needed an illustrative aid to understand the relationships among parties. Another Committee member asked whether any other Rules allow admission with consent. The Reporter stated that consent wasn't expressly used in other provisions but that it makes sense in dealing with illustrative aids and tees up an exception for "good cause."

The Chair then queried whether the Committee would need to republish the amendment if the "good cause" standard were strengthened slightly to an "exceptional circumstances" standard. Judge Bates opined that slight tweaking of the standard would be fine without republication but not a wholesale change. The Reporter reminded the Committee that it did discuss the possibility of a prohibition on sending illustrative aids to the jury room absent consent prior to publication of the proposal and rejected a prohibition. The Chair asked whether the text of the amendment could be retained but the committee note strengthened to signal that judges should not send illustrative aids to the jury room absent consent frequently but that the rule conferred some discretion to do so.

The Reporter directed the Committee's attention to the final paragraph of the committee note on page 121 of the agenda materials addressing illustrative aids in the jury room and suggested that it already signaled sparing transmission to the jury absent consent. The Chair asked whether the note language was too generous. Judge Bates opined that modification of the note language would not require republication. A Committee member proposed retaining the "good cause" standard in rule text but modifying the note reference to sending an illustrative aid to the jury room whenever the jury asks for it. Professor Coquillette stated that the historic standard used to determine whether republication is necessary is "whether the public would feel ambushed by a change" about which they were unable to provide commentary. The Reporter noted that the issue of the circumstances under which an aid could go to the jury room *was* included in the published amendment and that it was commented on by some. He suggested that the Committee could change the requirement in the rule text without another round of publication if it so desired but that he understood the Committee did not wish to do so. The

Reporter for the Standing Committee opined that republication would be necessary for a change to the rule text but that no republication would be needed for modifications to the committee note. The Reporter suggested deleting the examples of "good cause" in the committee note that stated that the trial judge's discretion "is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid." Committee members who were concerned with the good-cause exception were satisfied by that solution. Other Committee members also agreed.

L. ***Final Proposal***

The Reporter explained that the question for the Committee was whether to recommend adoption of Rule 107 on pages 119–122 of the agenda materials with the agreed-upon changes. One Committee member suggested deleting the words "exercise its discretion" from the final sentence of the committee note discussing the "good cause" exception, and all agreed. Another member suggested adding the word "statement" after "opening" in the penultimate paragraph of the committee note. In the third paragraph on page 120 of the agenda materials, the Chair suggested adding the word "may" so that the second sentence would begin: "Examples may include". He also suggested removing the commas from around "during deliberations" in the last sentence of the second paragraph on page 120. In the first sentence of that second paragraph, the Chair also recommended deleting the word "separate" so that it would read "two categories."

Another Committee member asked whether the paragraph in the note regarding sending illustrative aids to the jury room should state that the court "should" give a limiting instruction instead of "must" give one. The Reporter responded that Rule 105 on limiting instructions uses the word "must" and that the note should use the same word to remain consistent. The Chair agreed. The Rules Clerk suggested that the language of Rule 107(b) would allow the trial judge to decline to send an illustrative aid to the jury room even *with consent* due to the combination of the language "must not"–"unless." The Reporter noted that the stylists had approved the language, and the Chair recommended leaving the text as it is. Judge Bates recommended deleting the word "other" in the fifth line of the first paragraph of the committee note because illustrative aids are not evidence and so do not explain "other evidence." Judge Bates also suggested removing the comma between "voluminous, admissible" in Rule 107(d) and to ensure that all references to "voluminous admissible" information in Rules 107 and 1006 are consistent.

Another Committee member commented that the example of PowerPoint presentations had been removed from the examples listed in the third paragraph of the committee note. He noted that PowerPoint presentations are the most frequently used illustrative aid and questioned its removal. The Reporter agreed that PowerPoint presentations are common illustrative aids currently but explained that the Rules have to avoid referencing specific technologies that could become outdated. While PowerPoint presentations are certainly regulated by the amendment, it is best not to refer to them directly. On that note, another Committee member suggested removing the reference to "blackboard" drawings in the note. All Committee members agreed.

With all the discussed changes, the Committee unanimously approved new Rule 107.

III. Rule 1006 Summaries

Professor Richter directed the Committee's attention to Tab 3 of the agenda book and the proposed amendment to Rule 1006. She reminded the Committee that the Rule 1006 proposal was a companion amendment to the illustrative aid amendment to address confusion in the courts regarding the distinction between a summary offered as an illustrative aid and one offered as alternate proof of the content of voluminous materials. She explained that courts sometimes incorrectly caution juries that Rule 1006 summaries are "not evidence." In order to prove the content of materials too voluminous to be conveniently examined in court, Rule 1006 summaries *must* be admitted as evidence and the amendment so provides. In addition, Professor Richter reminded the Committee that courts sometimes refuse to permit a Rule 1006 summary when the underlying voluminous materials it summarizes are not admitted into evidence at trial. Because the Rule 1006 summary is supposed to offer *alternative* evidence of the content of underlying voluminous materials, those underlying materials need not be admitted into evidence. In contrast, some courts refuse to allow use of a Rule 1006 summary if underlying materials *have been* admitted into evidence. Professor Richter explained that the amendment would permit a Rule 1006 summary to be used upon a proper foundation "whether or not" the underlying materials have been admitted into evidence.

Professor Richter noted two changes to the proposed amendment since it was published for notice and comment. First, she explained that the materials underlying a Rule 1006 summary must be *admissible* even if they need not be *admitted*. Because courts displayed no confusion regarding this element of the Rule 1006 foundation, the original published amendment did not specify this requirement. Because other elements of the Rule 1006 foundation were made express in the amendment, the Committee concluded at the Fall 2022 meeting that it was best to include this part of the foundation in rule text as well. The word "admissible" was placed in Rule 1006(a) after the word "voluminous" to clarify that the underlying materials must be admissible. In addition, the Committee made one stylistic change to a sentence in the final paragraph of the committee note distinguishing between illustrative aids and Rule 1006 summaries.

Professor Richter explained that only seven comments were received on Rule 1006 and that they were mostly supportive of the amendment. A few commenters suggested that the Committee should include the requirement that the underlying records be "admissible" in rule text. As already noted, this change was made by the Committee at its Fall 2022 meeting.

Another commenter suggested that the committee note regarding the application of Rule 403 to Rule 1006 summaries ought to be strengthened. This commenter suggested that inaccurate and argumentative summaries inherently lack probative value such that they should not be admitted through Rule 1006. Professor Richter explained that the Committee could consider modifying the committee note as shown on page 149 of the agenda materials to address this concern. Alternatively, Professor Richter noted that courts have long required Rule 1006 summaries to accurately reflect underlying voluminous content and be nonargumentative. She suggested that the Committee might consider placing this portion of the Rule 1006 foundation in rule text given that all other aspects of the foundation were included in the text.

The Chair expressed reluctance to include "accurate and nonargumentative" in rule text as part of the Rule 1006 foundation. He explained that everything presented in chart form can be said to be "argumentative." He offered the example of a chart blowing up text messages. He noted that even "accurate" texts could be said to be "argumentative" because they were enlarged and made more compelling. He also offered an example of a chart showing presents given to child victims by a defendant that included a picture of a victim with a present. The Chair also opined that the modification to the committee note suggested by public comment was not helpful because even argumentative summaries have *some* probative value. Accordingly, the Chair stated that he was inclined to stick with the published version of the note and rule with respect to the issue of accurate and nonargumentative summaries. All Committee members agreed.

A Committee member queried whether the word "admissible" was necessary in the heading of subsection (a) now that the modifier "admissible" had been placed in rule text. Professor Richter explained that the two uses of the term "admissible" referred to distinct concerns and that both references are needed. The heading refers to the fact that the Rule 1006 summary is itself "admissible as evidence" and should not be accompanied by a limiting instruction cautioning the jury against its substantive use. The term "admissible" in rule text refers to the fact that the *underlying voluminous material* summarized must meet admissibility requirements. Accordingly, both references are necessary. The Committee agreed.

Professor Richter next informed the Committee that one public comment had suggested adding a specific time-period for the production of the underlying voluminous materials to the other side under Rule 1006(b). She noted the sparing use of specific time-periods in the Evidence Rules due to the need for flexibility in the trial process as well as the lack of a time-counting provision in the Rules. She explained that the Committee had carefully considered utilizing a specific time-period during the amendment process for the notice provision of Rule 404(b) in 2018 and had rejected the concept. For those reasons, Professor Richter suggested that the Committee not add a specific time-period to Rule 1006(b).

Professor Richter alerted the Committee to the fact that recent amendments to notice provisions in Rule 404(b) and Rule 807 had utilized language ensuring that an opponent receive a "fair opportunity to meet the evidence." She suggested that the Committee could consider whether to add similar "fair opportunity" language to the text of Rule 1006(b) or to the committee note to create consistency among recent amendments. She pointed out bracketed material in Rule 1006(b) on page 148 of the agenda materials as well as a proposed addition to the committee note on page 149 of the agenda to track the "fair opportunity" standard. The Reporter explained that the Criminal Rules Committee had recently borrowed the "fair opportunity" language for an amendment to the Criminal Rules.

All Committee members agreed that Rule 1006(b) should not include a specific time-period within which to produce underlying materials. The Federal Public Defender opined that the "fair opportunity" language would be helpful, however, and should be included. The Chair agreed that the "fair opportunity" language could provide help in a criminal case where the government dropped a set of voluminous materials underlying a summary on the defense on the eve of trial. Another Committee member argued that the "fair opportunity" language should not be included in the rule text. He stated that a "reasonable time" and a "fair opportunity" mean the

same thing, such that adding "fair opportunity" language would be redundant. Another Committee member disagreed, explaining that there is a difference between a "reasonable time" and giving the opponent a "fair opportunity" to meet the evidence. He suggested that the production of underlying materials presents Confrontation Clause issues in a criminal case and that including "fair opportunity" language reminds judges and litigants of those issues.

Another Committee member noted that the notice provisions in Rules 404(b) and 807 require "pre-trial" disclosure. He suggested that Rule 1006 could include a pretrial production requirement as well. The Chair disagreed, stating that the production could be permitted at trial and that it would be problematic to add a pre-trial requirement to Rule 1006. The Reporter noted that issues of pre-trial notice were more significant in the Rule 404(b) and Rule 807 contexts such that there could be a good reason for a pre-trial requirement in those contexts and not in Rule 1006.

Another Committee member pointed to draft language in Rule 1006(b) on page 148 of the agenda requiring a "fair opportunity to meet the evidence." He queried whether "the evidence" referred to the Rule 1006 summary or to the underlying documents. Professor Richter explained that it referred to the summary because production of the underlying documents is necessary for the proponent to evaluate the foundation for the Rule 1006 summary. The Chair asked whether the language was sufficiently clear that "the evidence" refers to the summary.

A Committee member opined that it was better to omit the "fair opportunity" language from the rule text because it was superfluous. Another Committee member disagreed, stating that he felt strongly that the "fair opportunity" language added an important component to the production requirement. He argued that it might be perfectly "reasonable" for the government to turn over voluminous documents two days before trial because a summary could be prepared close to trial but that two days would not give the defense a "fair opportunity" to meet the summary. The Federal Public Defender agreed, noting that a fair opportunity is important when the government turns over thousands of documents. Another Committee member argued that the Federal Rules of Criminal Procedure will require pretrial production in any event. Still, another Committee member stated that it was a habit of the government in criminal cases to turn over a lot at the end and that it is important for Rule 1006 to clarify that the opponent should have a "fair opportunity" to meet a summary. A Committee member asked whether it was possible for production to take place at a "reasonable time" but still deny the opponent a "fair opportunity" to meet the evidence. Another Committee member responded in the affirmative, suggesting that the government in a criminal case might be perfectly reasonable in producing underlying information when it does but that the time might yet be inadequate for the recipient to respond to the summary. Another Committee member proposed keeping the "fair opportunity" language out of the text of Rule 1006(b) but putting a modified paragraph in the committee note ensuring a "fair opportunity" to meet the summary. Committee members agreed that this would be a reasonable solution. The members arguing for "fair opportunity" language in rule text were satisfied with this outcome so long as the note provides that the court "must ensure" that all parties have a fair opportunity to meet the summary.

The Committee unanimously approved the proposed amendment to Rule 1006 with the agreed-upon changes.

IV. Rule 613(b) Extrinsic Evidence of Prior Inconsistent Statements

Professor Richter directed the Committee's attention to Tab 4 of the agenda materials and the proposed amendment to Rule 613(b). The amendment would require a witness to receive an opportunity to explain or deny a prior inconsistent statement *before* the opponent may offer extrinsic evidence of the statement unless the court allows the opportunity to be delayed or eliminated entirely. Professor Richter explained that this prior foundation requirement would align the rule with the common-law practice with respect to extrinsic evidence of prior inconsistent statements. She informed the Committee that there were only four public comments offered on Rule 613(b).

The public comment offered three suggestions for altering the proposal. The first opined that the amendment would give trial courts unbridled discretion to deviate from the prior-foundation requirement and proposed some limit on the court's authority to do so, such as "good cause." Professor Richter explained that this change could easily be made but suggested that there was no need to cabin the trial judge's discretion to depart from the prior-foundation rule. Since the requirement was primarily designed to protect the efficiency of the trial process, there would seem to be no need to restrict a judge's ability to forgive a prior foundation in circumstances where the judge felt it was appropriate and that it would not create inefficient disruptions. Further, Professor Richter noted that the amendment to Rule 613(b) would align the provision with the Rule 611(b) scope-of-direct rule, which requires parties to confine cross-examination questions to the subject matter of the direct and matters affecting credibility unless the judge orders otherwise. Both provisions would state default rules with broad discretion granted to the trial judge to deviate. The Chair agreed, noting that there was no need to require the trial judge to make findings to support a decision to depart from the prior foundation requirement. All Committee members concurred that there should be no "good cause"—or other limit—placed on the trial judge's discretion to depart from the prior-foundation requirement.

Professor Richter explained that another commenter had proposed adding a requirement to the committee note that a party seek leave of court to offer extrinsic evidence of a prior inconsistent statement before offering a witness an opportunity to explain or deny. The commenter opined that a litigant should not be permitted to simply offer extrinsic evidence first in the hopes of drawing no objection and should be required to seek advance permission. Professor Richter explained that this change would be easy to make as well but recommended against it. She noted that the Rules generally require no prior permission for offering evidence except in the case of Rule 412 governing the sexual history of sexual assault victims. She noted that the decision to ask for permission reflected a strategic choice rather than a requirement of the Evidence Rules. The Chair agreed and the Committee was unanimous that no "prior permission" requirement should be added to the note.

Finally, Professor Richter explained that one commenter recommended deleting the reference to preventing "unfair surprise" as a justification for the prior-foundation requirement from the committee note, arguing that a prior foundation does not necessarily minimize surprise and that unfair surprise recalls a bygone era of gentility in impeachment that no longer applies. She agreed with the comment and suggested that the reference to "unfair surprise" be deleted

from the committee note. The Committee unanimously agreed and unanimously approved Rule 613(b) with that single change.

V. Rule 801(d)(2) and Party–Opponent Statements Offered Against Successors

The Reporter introduced the amendment to Rule 801(d)(2) that would make the statements of a declarant that would be admissible against the declarant or against the declarant's principal admissible against a successor party whose claim, defense, or liability is directly derived from that declarant or that principal. The Reporter explained two minor proposed modifications to the amendment. First, he noted that the term "defense" should be added to the text of the rule because sometimes a party derives a defense only from a predecessor party and would derive no claim or liability. All Committee members agreed to add the word "defense" to the text of the amendment. The Reporter then noted a minor change to the first sentence of the committee note to better clarify the declarant-as-agent scenario. All agreed to this change to the note language as well.

The Reporter explained that there were some public comments on Rule 801(d)(2). The Magistrate Judges' Association suggested using the term "successor in interest" in rule text to make clearer the intent of the amendment to admit statements admissible against predecessor parties against their successors. The Reporter agreed that the "successor in interest" term might be more succinct but explained that the Committee should not use that terminology because the former-testimony hearsay exception uses the term "predecessor in interest" to describe the relationship required to allow admissibility of former testimony in civil cases. He explained that the "predecessor in interest" language has been interpreted very flexibly by the courts to require only motivational symmetry between parties and not a true legal relationship. The Reporter noted that flexible treatment makes sense in the context of the former-testimony exception because it is grounded in notions of reliability. In contrast, he explained that a true legal relationship is necessary in the context of Rule 801(d)(2) because it is grounded in notions of adversarial fairness and not in reliability. Admission against a successor is only "fair" for purposes of Rule 801(d)(2) if there is a true legal relationship. Therefore, he suggested that the Committee should not use the term "successor in interest" in Rule 801(d)(2). The Committee agreed.

Next, the Reporter noted a potential interpretive problem highlighted by the Rules Clerk. The Reporter explained that if a declarant–agent made a work-related statement after being fired by a corporation, that statement would be admissible against the declarant–agent personally, but not against the corporation. If the corporation were acquired, the declarant–agent's statement should not be admissible against the successor where it would not have been admissible against the predecessor corporation. The Rules clerk suggested that the double conjunctive in the text of the amendment could be read as allowing the statement to be admitted against the successor if it would be admissible against *either* the declarant–agent *or* the predecessor corporation. The Reporter expressed skepticism that a court would read the rule that way. But he noted that the text of the rule could be modified as illustrated on page 169 of the agenda materials to clarify that the statement must be admissible against the party *from whom the successor* derives its claim or liability. Alternatively, the Committee could add a sentence to the committee note as illustrated on page 169 of the agenda materials to deal with the potential issue. The Reporter

stated his preference to add note language only to avoid further complicating the text of the amended rule.

The Chair agreed with the Reporter and proposed leaving the text of the amendment as published, adding only the word "defense" as previously discussed, and using note language to address the concern about the double conjunctive. The Committee unanimously agreed to propose the amendment with only those changes.

VI. Rule 804(b)(3) "Corroborating Circumstances"

Professor Richter directed the Committee's attention to Tab 6 in the agenda materials and introduced the proposed amendment to Rule 804(b)(3), the statements-against-interest hearsay exception. She reminded the Committee that the exception requires a proponent to show "corroborating circumstances clearly indicating the trustworthiness" of a statement against criminal interest offered in a criminal case. She explained that courts conflict about the information that may be utilized to make this finding. Most consider both the inherent guarantees of trustworthiness surrounding the making of the statement (such as its timing, spontaneity, and motivations) as well as independent information corroborating or contradicting it. Some courts refuse to consider evidence independent of the statement, however. To resolve this conflict, and to align Rule 804(b)(3) with the 2019 amendment to Rule 807, the amendment clarifies that courts should use independent evidence, if any exists, as well as inherent guarantees of reliability in looking for "corroborating circumstances clearly indicating" the trustworthiness of a statement against interest.

Professor Richter explained that only five comments were received on the amendment, but that several of them expressed confusion over the use of the term "corroborating" twice in the amended language. The amendment references the *finding* required for admission of statements against criminal interest in criminal cases: "corroborating circumstances clearly indicating" trustworthiness. The amendment also references "corroborating" evidence in describing the *information* courts may use in making that finding. The amendment used the term twice to track the language of the 2019 amendment to Rule 807 and to avoid using different language to describe the same concept in two different rules. Commenters were confused, however, as to the distinction between the two uses of the same term: "corroborating." Professor Richter explained that the language of the amendment might be slightly altered to avoid two references to "corroborating," explaining that the Chair had proposed using the term "supporting" to describe the independent evidence courts may look to in finding "corroborating circumstances." Professor Richter noted that the Committee could also consider adding a paragraph to the committee note instructing courts and litigants on the distinction. The Reporter added that Rule 807 does not have the same "corroborating circumstances" finding that is part of Rule 804(b)(3) and that it may make sense to vary the language slightly for that reason.

The Chair noted that clear drafting was challenging in the context of this amendment because the "corroborating circumstances" finding was a term of art that had been in the hearsay exception since it was first enacted and could not be changed and also because the Committee wanted to track the language used to describe the same concept in Rule 807. He suggested that amendment language describing evidence "that supports or contradicts" the statement could be

superior to the published language. The Reporter noted that the word "supported" is also used earlier in the rule, but that he thought "supports or contradicts" was superior to using the term "corroborating" twice in the amendment. Committee members posed alternative terminology, such as "consistent" evidence, "confirming" evidence, or evidence that "reinforces" the statement. Ultimately, Committee members found these alternative word choices too weak or too strong to capture the notion of "corroborating" evidence and agreed that "any other evidence that supports or contradicts" the statement best captures the intended concept. With that modification to the text of the rule, the Committee agreed not to add a new paragraph to the committee note distinguishing "corroborating circumstances" from "corroborating evidence."

The Committee agreed to make other, modest changes to the committee note to replace the term "corroborating" with the term "supporting" where appropriate and to signal to courts and litigants that the amendment remains consistent with the 2019 amendment to Rule 807 despite its use of slightly different language. The Committee approved the proposed amendment unanimously with those changes.

VII. Procedural Safeguards for Juror Questions

The Reporter directed the Committee's attention to Tab 7 of the agenda materials and the issue of procedural safeguards when jurors are permitted to ask questions at trial. He reminded the Committee that there was a symposium on the issue at the Fall 2022 meeting in Phoenix. The Standing Committee expressed concern that an evidence rule offering procedural safeguards for jury questions might encourage more use of jury questions. The Reporter explained that he had been asked to examine two issues regarding juror questions: 1) how common is the practice of permitting juror questions? and 2) have appellate courts found error in the procedural safeguards used by the courts that have allowed the practice?

As to the first question, the Reporter noted the difficulty in obtaining precise data about prevalence but posited based upon available data that 15-20% of federal courts allow juror questions at least in some cases. The practice appears more common in civil cases than in criminal cases. He explained that the practice is used in many states and by law in some, including Washington and Arizona. As to the second question, the Reporter explained that there have been appellate errors found with respect to the use of juror questions in four major areas: 1) failure to allow lawyers to object to juror questions; 2) active solicitation or encouragement of more juror questions; 3) allowing jurors to interrupt testimony to proffer their own questions; and 4) allowing too many juror questions.

The Reporter directed the Committee's attention to the draft Rule 611(e) on page 202 of the agenda materials that would set forth procedural safeguards required to be used when juror questions are allowed. He emphasized that the amendment would *not* regulate whether juror questions should be permitted but would provide protections when a judge chooses to allow them. He noted that the terminology "when a question is submitted" had been changed to "if a question is submitted" to more clearly signal that the amendment is not encouraging juror questions. He explained that the committee note was also modified to emphasize that the amendment is not designed to promote juror questions.

The Chair stated that the proposed rule had been sent to the Standing Committee and that Standing had sent it back to the Advisory Committee. The Standing Committee identified no concerns with the procedural safeguards articulated in the proposed rule, but some members did not favor juror questions and were concerned that covering the practice in a rule would encourage the practice to be adopted more widely. The Chair explained that the question for the Advisory Committee was whether to send the proposal up to Standing again, explaining that changes had been made and additional research performed, or whether to give up on the proposed amendment for the time being.

Ms. Shapiro offered the results of her survey of criminal chiefs in U.S. Attorneys' offices regarding the practice. She explained that the criminal chiefs all brought up both pros and cons to the practice of allowing jury questions. Some like the practice, others do not. She said that the sense was that the practice is more common in the western half of the country, that more federal judges allow jury questions in jurisdictions where state courts do, and that more judges are experimenting with the practice. She noted that Judge Bates had expressed concern that jury questions could tip off prosecutors to a gap in the evidence needed to carry their burden of proof in criminal cases. Ms. Shapiro reported that criminal chiefs did not a perceive a benefit to one side or the other in a criminal case and opined that juror questions could help or hurt either side depending on the case.

Judge Bates suggested that perhaps federal defenders ought to be surveyed about whether *they* think juror questions give the prosecution an advantage. He asked how important the prevalence of the practice is to the Committee in proposing a rule regulating it, querying whether use in 5% of federal courts is sufficient or whether something above 20% is necessary to make the proposed rule a priority. Judge Bates suggested that almost all jury questions are focused in four places: New Mexico, Arizona, Alaska, and the Eastern District of Michigan. The Chair noted that the data on the use of jury questions is incomplete, recounting that judges from Kansas City and Arkansas have reported regular use of jury questions. The Chair opined that a rule would be urgently needed if 50% of federal judges were permitting jury questions and that a rule would be less necessary if the number were 10% or less.

The Reporter suggested that the prevalence of a particular issue is not necessarily the most important driver for an amendment. He noted that the issue of use of party–opponent statements against successors covered by the proposed amendment to Rule 801(d)(2) is one that arises rarely. Still, having the Rules applied fairly and uniformly is an important objective that should be promoted even in circumstances that arise less frequently. A Committee member commented that an amendment governing jury questions would be qualitatively different from an amendment to a hearsay exception. He noted that the hearsay exceptions are well-accepted and used frequently such that getting them right is critical. But he argued that the practice of allowing juror questions fundamentally changes the nature of a trial and for that reason is only permitted by a minority of courts. The Committee member opined that the real question is whether jury questions should be allowed at all and that the Committee should not be regulating a practice that should not be adopted.

Judge Bates asked whether the Advisory Committee could recommend a rule *banning* jury questions. He opined that the Committee probably would have the authority to do so as

questioning witnesses is a procedural question and not a substantive one. He noted that Rule 614 already regulates questioning by the trial judge and that the Rules could likely regulate questioning by the jury. Another Committee member added that there is no split of authority regarding juror questions for the Committee to resolve and that recommending a rule regulating the practice could encourage it. Another Committee member suggested that the Committee should be more focused on the *trend* with respect to jury questions than on the practice's current *prevalence*. She suggested that if the trend was more toward experimentation with jury questions, the Committee could take two approaches. It could seek to get ahead of the trend and regulate the practice before it becomes more prevalent, or it could wait and allow the courts to hash it out further before weighing in.

Another Committee member asked what the optimal mechanism of regulation would be. He suggested that a Federal Rule of Evidence is a very formal and extreme method of regulation and that a benchbook could be a superior method of recommending safeguards around jury questions. The Federal Public Defender agreed that issues of uniformity are important and that concerns regarding juror questions in criminal cases deserve consideration. He suggested that the Committee should let things play out in the courts and that a benchbook could be a helpful method of imposing some safeguards in the meantime. The Reporter explained that the question of benchbooks has been raised in Committee before but that the Committee does not draft benchbooks or guidelines. The role of the Committee is to recommend rules changes. Professor Coquillette agreed. Tim Lau of the FJC pointed out that a judicial survey was the optimal way for the Committee to get a more accurate sense of the prevalence of the practice of allowing juror questions. He also noted that prevalence is a nuanced issue. Some courts might allow juror questions but very infrequently. Others might allow them in most cases. Some courts that permit jurors to ask questions may receive very few questions, while others may receive many. Mr. Lau suggested that a judicial survey might reveal more granular data and trends.

A Committee member stated that he had been in favor of studying a possible amendment to regulate jury questions but that he was concerned that the practice could alter the nature of a trial and that a rule could have the unintended consequence of encouraging the practice. If an amendment were to be proposed, he suggested that it should consider the allowable scope of juror questions to eliminate questions that go beyond witness testimony. Another Committee member stated that it did not make sense to have a mandatory rule regulating a discretionary practice. He suggested that he would favor banning juror questions but at the very least opposed regulating a practice before deciding whether the practice should even be permitted. Another Committee member reported that his state permitted juror questions and that he has observed no ill effects but that he agreed that the Committee should probably decline to regulate at this point. A different Committee member stated his preference to table the issue for now, but to continue studying the practice to see whether a trend emerges that would justify reexamining the issue. Other members agreed and several suggested that the Reporter should explore other methods (such as a benchbook) of getting the needed safeguards to the judges who are allowing juror questions. Another Committee member suggested that a judicial survey by the FJC could also be useful in determining the true prevalence of the practice.

The Chair noted that efforts had been made to reduce the number of surveys sent to federal judges due to the sheer volume they receive. Judge Bates noted that a survey would make

sense if prevalence were the issue with which the Committee was struggling. But if the Committee is not interested in going forward at this time regardless of prevalence, a survey would not make sense. Judge Bates suggested that the Committee could communicate the need for benchbook safeguards for juror questions to the FJC. The Reporter queried whether the FJC would think that benchbook coverage of juror questions would promote the practice. Committee members all agreed to table the proposal. Judge Kuhl commented on the significant, excellent work done by the Reporter on the issue and suggested that it should be shared with circuit committees that draft pattern instructions as well as with the FJC for possible inclusion in a benchbook. Mr. Lau suggested that the Reporter's work could be forwarded to the benchbook committee that is currently working on a new edition. With that, the issue of an amendment regulating juror questions was tabled.

VIII. Closing Matters

The Chair announced that the fall meeting will be held on October 27, 2023. He noted that with all pending proposals concluded, the Committee will be working with a clean slate. He explained that the Reporter will invite a half dozen Evidence scholars to the fall meeting to present their ideas for updating the Rules. The Reporter noted that two topics on the agenda for the fall meeting will be: 1) the issue of deepfakes and authentication and 2) the possibility of expanding the Rule 801(d)(1)(A) hearsay exception to encompass more inconsistent statements. The Chair suggested finding an expert on artificial intelligence and deepfakes to educate the Committee. The meeting was then adjourned.