ADVISORY COMMITTEE
ON
EVIDENCE RULES

November 5, 2021

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

November 5, 2021

I. Committee Meeting --- Opening Business

Opening business includes:

- Approval of the minutes of the Spring, 2021 meeting.
- Report on the June, 2021 meeting of the Standing Committee.

II. Rules Issued for Public Comment

Three proposed amendments were released for public comment in August: amendments to Rules 106, 615, and 702. The public comment period ends on February 15, 2022.

Behind Tab 2 are short reports on each of the proposed amendments --- setting forth the amendment and Committee Note, and reporting on any public comments received as of October 1, 2021.

III. Possible Amendments to Rule 407

The Committee has expressed interest in considering two possible amendments to Rule 407, both of which are addressed to disputes in the courts about the Rule. One amendment would address whether the defendant's subsequent remedial measure has to be causally related to the plaintiff's injury in order to be excluded by the rule. The other is whether protections of the rule can apply in contract actions. A memorandum on both these questions, and draft language for amendments to the rule, is behind Tab 3.

IV. Possible Amendments Regarding Demonstrative Evidence, Illustrative Aids, and Summaries

The agenda book contains two memos regarding problems that courts are having in

distinguishing demonstrative evidence, illustrative aids, and summaries of admissible evidence. At its last meeting the Committee determined that it wished to consider possible amendments to Rules 611 and 1006 to help the courts clarify these distinctions. The first memo, prepared by the Reporter, is a proposed amendment that would provide specific regulations for using illustrative aids, and would distinguish between illustrative aids (which are not evidence) and demonstrative evidence offered to prove a fact. The second memo, prepared by Professor Richter, discusses problematic case law in which courts have difficulty in distinguishing illustrative aids from summaries of evidence governed by Rule 1006. Professor Richter also discusses other disputes in the courts on the proper use of summaries, and sets forth draft language for amendments to the rule.

Both of these memoranda are behind Tab IV.

V. Possible Amendment to Add a New Subdivision to Rule 611 to Impose Safeguards When Jurors Are Allowed to Ask Questions of Witnesses

At its last meeting, the Committee expressed interest in considering an amendment that would add a new subdivision to Rule 611, that would impose safeguards to be employed when the court decides that jurors will be allowed to ask questions of witnesses. The Reporter's memo, behind Tab V, discusses the possible safeguards, and sets forth possible language for the new subdivision.

VI. Possible Amendment to Rule 801(d)(2)

At the last meeting the Committee determined that it would consider an amendment to Rule 801(d)(2) to treat the situation in which a party has succeeded to a claim or defense and the predecessor has made a hearsay statement that would have been admissible against the predecessor under Rule 801(d)(2). Courts are split on whether the statement is admissible against the successor. A memorandum analyzing the split and providing draft language for an amendment is behind Tab VI.

VII. Possible Amendment to Rule 804(b)(3)

The Committee has expressed interest in considering an amendment to Rule 804(b)(3), the hearsay exception for declarations against interest, to specify that corroborating evidence must be considered in determining whether a declaration against penal interest is supported by "corroborating circumstances" that clearly indicate the trustworthiness of the statement. The courts are in dispute about whether corroborating evidence may be considered. A memorandum prepared by Professor Richter, discussing the split in the courts and providing draft language for an

amendment, is behind Tab VII.

VIII. Possible Amendment to Rule 806

Rule 806 provides that a hearsay declarant is subject to the same impeachment as a witness. But courts are in dispute about whether a declarant's bad act --- that could be inquired into under Rule 608(b) if the declarant were testifying --- may be proven at a trial where the declarant does not appear. The Committee has expressed interest in considering an amendment that would rectify the dispute. A memorandum on the circuit split, with proposed language to rectify it, is behind Tab VIII.

IX. Possible Amendment to Rule 613(b)

At the last meeting, the Committee agreed to consider a possible amendment to Rule 613(b), which eliminated the common-law requirement of presenting a prior inconsistent statement to a witness before offering it into evidence. A circuit split has arisen on the application of the rule. A memorandum prepared by Professor Richter, analyzing the split and providing draft language for an amendment, is behind Tab IX.

TAB 1

TAB 1A

ADVISORY COMMITTEE ON EVIDENCE RULES

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

Members

Honorable James P. Bassett New Hampshire Supreme Court Concord, NH	Honorable John P. Carlin Principal Associate Deputy Attorney General (ex officio) United States Department of Justice Washington, DC
Honorable Shelly Dick United States District Court Baton Rouge, LA	Traci L. Lovitt, Esq. Jones Day Boston, MA
Honorable Thomas D. Schroeder United States District Court Winston Salem, NC	Arun Subramanian, Esq. Susman Godfrey L.L.P. New York, NY
Honorable Richard J. Sullivan United States Court of Appeals New York, NY	

Consultants

Professor Liesa Richter
University of Oklahoma School of Law
300 Timberdell Road
Norman, OK

Liaisons

Honorable Robert J. Conrad, Jr. (*Criminal*) United States District Court Charlotte, NC	Honorable Carolyn B. Kuhl (*Standing*) Superior Court of the State of California Los Angeles, CA
Honorable Sara Lioi (*Civil*) United States District Court Akron, OH	

Advisory Committee on Evidence Rules

Members	Position	District/Circuit	Start Date		End Date
			Member:	2020	----
Patrick J. Schiltz	D	Minnesota	Chair:	2020	2023
James P. Bassett	JUST	New Hampshire		2016	2022
John P. Carlin*	DOJ	Washington, DC		----	Open
Shelly Dick	D	Louisiana (Middle)		2017	2023
Traci L. Lovitt	ESQ	Massachusetts		2016	2022
Thomas D. Schroeder	D	North Carolina (Middle)		2017	2023
Arun Subramanian	ESQ	New York		2021	2023
Richard J. Sullivan	C	Second Circuit		2021	2023
Daniel J. Capra Reporter	ACAD	New York		1996	Open

Principal Staff: Bridget Healy 202-502-1820

* Ex-officio - Principal Associate Deputy Attorney General

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Honorable Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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TAB 1B

Advisory Committee on Evidence Rules
Minutes of the Meeting of April 30, 2021
Via Microsoft Teams

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 30, 2021 via Microsoft Teams.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. James P. Bassett
Hon. Shelly Dick
Hon. Thomas D. Schroeder
Hon. Richard J. Sullivan
Traci L. Lovitt, Esq.
Arun Subramanian, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Timothy Lau, Esq., Federal Judicial Center
Andrew Goldsmith, Esq., Department of Justice
Bridget M. Healy, Counsel, Rules Committee Staff
Shelly Cox, Administrative Analyst, Rules Committee
Brittany Bunting, Rules Committee Staff
Julie Wilson, Administrative Office
Kevin Crenny, Administrative Office, Rules Clerk
Joe Cecil, Fellow, Berkeley Law School
Sri Kuehnlenz, Esq., Cohen & Gresser LLP
Amy Brogioli, Associate General Counsel American Association for Justice
Abigail Dodd, Senior Legal Counsel Shell Oil Company
Alex Dahl, Strategic Policy Counsel
Sam Taylor, Managing Associate, CLS Strategies
John G. McCarthy, Esq., Smith, Gambrell & Russell LLP
Susan Steinman, Senior Director of Policy & Sr. Counsel, American Association for Justice
Lee Mickus, Esq., Evans Fears & Schuttert LLP
Leah Lorber, Assistant General Counsel, GSK
Shawn Meehan, Esq., Guidepoint
Andrea B. Looney, Executive Director, Lawyers for Civil Justice

James Gotz, Esq., Hausfield
Mark Cohen, Esq., Cohen & Gresser LLP
Jessica M. Ochoa, Esq.
John Hawkinson, Freelance Journalist
Sai, Pro se Litigant

I. Opening Business

The Chair opened the meeting by welcoming everyone and by introducing two new members of the Committee, the Honorable Richard J Sullivan and Arun Subramanian, Esq. The Chair also noted that a new Department of Justice representative would soon join the Committee, John Carlin, Esq.

The Minutes of the Fall 2020 meeting of the Evidence Advisory Committee were unanimously approved. Thereafter, the Chair gave a brief report on the January 2021 Standing Committee meeting. He explained that the Evidence Advisory Committee had no action items before the Standing Committee, but that the Committee had provided an update on the ongoing work on FRE 106, 615, and 702. He further noted that work on emergency rules was on track and that he was hopeful that emergency rules would be released for public comment. The Chair also informed the Committee that there was significant support from district judges at the March 2021 meeting of the Judicial Conference for the continued use of virtual platforms for preliminary criminal proceedings, sentencings and other proceedings post-pandemic. The Chair noted that all judges had realized significant savings in time and resources in utilizing virtual platforms for some of these preliminary proceedings.

II. Federal Rule of Evidence 702

The Chair opened the discussion of Federal Rule of Evidence 702 by noting that the Committee had been discussing and studying potential amendments to Rule 702 for many years --- starting when the Committee began investigating the challenges to forensic evidence. The Chair reminded the Committee that two alternative draft amendments to Rule 702 had come from that lengthy consideration: 1) one that would make a modest change to the language of existing Rule 702(d) to focus the trial judge on the opinion expressed by an expert, as well as on the reliability of principles and methods and their application and 2) another that would add a new subsection (e) to the Rule to regulate "overstatement" of conclusions by expert witnesses. Both drafts would add language to the beginning of the Rule alerting trial judges that they must find all requirements of Rule 702 satisfied by a preponderance of the evidence according to Rule 104(a) before admitting an expert opinion over objection --- this language is intended to address the separate concern that many courts have found that the questions of sufficiency of basis and reliability of application are questions of weight and not admissibility.

The Chair noted that Committee sentiment was divided on the draft that would add a new subsection (e) to Rule 702, with some Committee support but also strong opposition, both on the Committee and in the stakeholder population. Given the lack of consensus on the draft that would add an "overstatement" limitation to the Rule, the Chair suggested that the Committee focus its

discussion on the draft that would modify the language of existing Rule 702(d) and expressed hope that some consensus might be achieved on that draft. The Committee unanimously agreed to focus its discussion and efforts on the draft that would alter Rule 702(d), and to reject the addition of a new subsection (e).

The Reporter then suggested that the Committee discuss the text of a proposed amendment to Rule 702 before proceeding to any discussion of the accompanying Committee note. The Reporter also alerted Committee members that prior drafts of the Rule 702(d) amendment had alternated between language "limiting" an expert's opinion and language requiring that the expert's opinion "reflect" a reliable application of principles and methods. The Reporter explained that the "limiting" language was considered precisely because it would signal a restriction on the expert's ultimate opinion. But he noted that the Department of Justice had objected to the "limiting" language and that he had replaced it with the "reflects" language in the discussion draft for the meeting. The Reporter acknowledged that such a change to the Rule would be mild, but suggested that it could be helpful in getting courts to focus on the opinion ultimately expressed by the expert. He further noted that there had been questions prior to the meeting about amendment language requiring judicial findings by a preponderance "of the evidence." Of course, he acknowledged, trial judges are not limited to admissible "evidence" in making Rule 104(a) preliminary findings, and there was some concern expressed that including the term "evidence" in rule text could undermine the well-settled judicial flexibility to utilize whatever information is appropriate under Rule 104(a). The Reporter suggested that the "preponderance of the evidence" language would not cause any confusion because it is a term of art well understood by all and because trial judges do consider "evidence" in a *Daubert* hearing – even if it need not be otherwise "admissible" evidence. He stated that a passage was added to the draft Advisory Committee to clarify that the amended language "preponderance of the evidence" did not mean admissible evidence. With that introduction, the Reporter invited comments on the text of the draft amendment.

Judge Bates inquired as to why the draft amendment provided that expert opinion testimony could be admitted if "the court finds that" the requirements of Rule 702 are satisfied by a preponderance of the evidence. He inquired whether it was purposely added to emphasize gatekeeping or whether it was superfluous language that could be eliminated. The Reporter explained that the language as added to emphasize the gatekeeper function because some courts were delegating matters to the jury that the court must resolve itself. The Reporter opined that the amendment could function well without those four words requiring the court to "find" the requirements met. The Chair concurred, noting that the problem of punting to jurors was addressed in the draft Committee note. One Committee member inquired whether the language requiring the court to make findings could be problematic in circumstances in which expert opinion is admitted without objection. Could trial judges read the amendment to require findings on the record even in the absence of objection? The Reporter responded that none of the admissibility requirements in the Evidence Rules are triggered without objection and that Rule 702 would not require findings by the trial judge to admit expert opinion testimony without an objection by the opponent. Still, the Reporter suggested that the amendment could serve its purpose without the "finding" language, and that he would delete it as a friendly amendment if Committee members were in agreement. The Committee agreed to delete the words "the court finds that" from the draft amendment.

The Reporter then explained modifications made to the draft Committee note prior to the meeting. Both changes were made to the paragraph regarding application of the amendment to forensic expert testimony. The first was a minor style change to make "forensic expert" the subject of a sentence in place of the ambiguous word "such." The other was a suggestion by Judge Kuhl to include a sentence in the note acknowledging that substantive state law sometimes requires opinions to be stated to a "reasonable degree of certainty" and clarifying that the note language disapproving opinions stated to a "reasonable degree of certainty" would not affect cases in which state law governs and requires such opinion testimony. The Reporter noted that prior versions of the note had included such language and that he had added it back in to the draft Committee note.

Another concern expressed prior to the meeting was that the opening paragraphs of the note came down too hard on federal judges by suggesting that they had "failed" to apply certain requirements or "ignored" them. The Reporter explained that it was important to emphasize that the courts that sent Rule 702 admissibility questions, such as the sufficiency of an expert's basis, to the jury were incorrectly applying the Rule. It was those incorrect applications that led to a draft amendment emphasizing the Rule 104(a) standard that already governed the Rule. He further noted that there was no intention to come down too hard on federal judges and that suggestions from stakeholders to include more aggressive disapproval of specific federal opinions in the Committee note had been rejected for that very reason.

Finally, the Reporter stated that the Department of Justice had objected to a sentence in the eighth paragraph of the draft Committee note suggesting that jurors are "unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion and lack a basis for assessing critically the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support." The Reporter suggested that the sentence needed to remain in the Committee note because jurors' inability to spot overstatement by experts was the reason for the proposed amendment and because Committee notes must explain the rationale for any change. The Reporter then invited discussion on the draft Committee note.

Ms. Shapiro explained that the Department felt that jurors *are able to* evaluate expert testimony once it clears gatekeeping and is admitted by the trial judge and are frequently called upon to do so. The Reporter responded that this is true so long as the trial judge has first performed appropriate gatekeeping --- but that jurors are not able to make a meaningful evaluation of expert testimony without real gatekeeping. The Chair suggested that changing the language in the note to "may" could help, suggesting that jurors "may lack a basis" for evaluating expert opinion testimony rather than that they "are unable to evaluate" expert opinion testimony. Mr. Goldsmith agreed that the change to the word "may" would be helpful but argued that the paragraph would still go too far. He noted that the Reporter had emphasized that jurors may be unable to evaluate expert opinion without adequate gatekeeping and that this qualifier should also be added. The Reporter agreed that the whole point was to tie gatekeeping to the concern about jurors' inability to evaluate expert opinion testimony. Mr. Goldsmith suggested adding language, such as: "Judicial gatekeeping is critical because jurors may be unable…." Committee members agreed that language emphasizing the connection to gatekeeping was helpful and the language "Judicial gatekeeping is essential" was added to the eighth paragraph of the note along with the change to "may".

Another Committee member suggested that the first sentence of the same paragraph -- "Testimony that mischaracterizes the conclusion that an expert's basis and methods can reliably support undermines the purposes of the Rule and requires intervention by the judge" -- was superfluous. The Committee agreed to delete that sentence and to bring the revised remaining sentence up into the preceding paragraph. Ms. Nester suggested that the sentence about expert mischaracterization of conclusions was important in order to articulate the concern about expert overstatement addressed by the amendment. She noted that the draft amendment adding a new subsection (e) prohibiting "overstatement" explicitly in rule text had been dropped and that retaining this crucial limit in the Advisory Committee note was important. The Chair suggested that other language in the note emphasized that experts must stay "in bounds" with their expressed conclusions and that judicial gatekeeping is "essential" --- offering strong support for regulation of overstatement. The Reporter suggested that the word "should" could be changed to "must" in the sentence that read: "A testifying expert's opinion should stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology." This would provide an even stronger admonition regarding unsupported conclusions by experts. Committee members agreed to delete the first sentence of the eighth paragraph, to move the revised second sentence of the eighth paragraph up into the seventh, and to replace "should" with "must" in the sentence regarding experts staying "within bounds" in expressing an opinion.

Another Committee member expressed concern about the example given in the fourth paragraph of the Committee note regarding matters that may continue to go to the weight, rather than the admissibility, of expert testimony. The draft note stated: "For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility." The Committee member suggested that this particular example could be capable of mischief and noted the recurring situation in which there are 20 studies on a particular matter, only four of which an expert has consulted and which reach conclusions unsupported by the other 16. The Committee member suggested that such a circumstance could go to the admissibility of the expert's opinion under Rule 104(a) and not just to the weight of the opinion, and that the example in the Committee note could be utilized to suggest otherwise. The Committee member recommended finding another example to avoid affecting this common scenario. The Reporter explained that the note needed to provide some example to illustrate that there still may be matters of weight even after proper application of the Rule 104(a) preponderance standard by the trial judge. After some Committee discussion of this example, the Chair suggested revised language stating: "For example, if the court finds by a preponderance of the evidence that an expert has a *sufficient basis* to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility." This language would avoid study counting and would emphasize the need for the trial judge to first find a "sufficient basis" for an opinion before passing it on to the jury to resolve remaining questions of weight. The Committee member who raised the concern agreed that this revised language would be less troubling. Committee members were generally in agreement that the Chair's modification should be adopted.

Judge Bates raised the first paragraph of the draft Committee note that may treat federal judges too harshly in connection with their application of Rule 702. He suggested that the final six words of the first paragraph "and are rejected by this amendment" could be eliminated to soften the note

without effecting a substantive change. The Reporter noted that it is not uncommon to explain in a Committee note that an amendment is designed "to reject" a certain application of the Rule. Judge Kuhl also highlighted language in the second paragraph of the draft note suggesting that judges have "ignored" the Rule 104(a) standard in applying Rule 702. She suggested that the proper standard might not have been briefed and that judges may not have actively ignored the controlling standard. Another Committee member noted that trial judges may have improperly deferred to the adversarial process due to language in *Daubert* emphasizing matters that should be left to the jury, rather than ignoring the Rule 104(a) standard. The Chair suggested that the note might state that judges "have incorrectly applied" the standard, rather than stating that judges have ignored the standard. The Reporter explained that it's not that some judges have applied Rule 104(a) "incorrectly" – rather, they have not applied the Rule 104(a) standard at all. Committee members then discussed appropriate modifications to the note language, ultimately determining that it would be most accurate to note that judges have "failed to correctly apply" Rule 104(a) to the admissibility requirements of Rule 702. Thus, the Committee agreed to remove the "and are rejected by this amendment" language from the first paragraph of the note and to replace the "ignored" language with "failed to correctly apply."

Another Committee member queried whether a litigant would still be permitted to allow her opponent's "mickey mouse" expert to take the stand notwithstanding a failure to satisfy Rule 702, in the hopes of exposing the inadequacy of the expert's opinion on cross-examination before the jury. A Committee member asked whether the amendment should be qualified with language, such as "upon invocation" or "in the event of an objection" to preserve a litigant's ability to make this strategic choice. The Reporter reiterated that *all* the Federal Rules of Evidence assume an objection that triggers the trial judge's obligation to apply the admissibility limits, and that nothing in the proposed amendment to Rule 702 would require a trial judge to make *sua sponte* findings of admissibility in the absence of an objection to an expert's opinion. The Chair agreed, noting that there might be negative implications for other rules if such a proviso were added. The Chair suggested publication of the proposed amendment without such language and that the Committee could revisit the issue if the concern were to be raised in public comment.

Thereafter, the Advisory Committee unanimously approved publication of the proposed amendment to Rule 702 and accompanying Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.

The Chair remarked on the unique difficulty in achieving consensus on a rule as important as Rule 702, and commended the Committee, the former Chair Judge Livingston, and the Reporter on remarkable work. The Reporter thanked Ms. Shapiro from the Department of Justice for all of her work prior to the meeting to help bring the Department on board. Another Committee member noted the important contributions made by Judge Collins before he left the Committee as well. The Chair opined that the proposal would make real improvements to Rule 702 practice.

The proposed amendment to Rule 702 and the Committee Note are attached to these Minutes.

III. Rule 106

The Reporter introduced the discussion of Rule 106, the rule of completeness, noting that the Committee had been exploring potential amendments to the rule for several years. He explained that the draft amendment included in the agenda addressed two concerns. First, the amendment would allow completion over a hearsay objection to the completing portion of a statement. The Advisory Committee note would leave it up to the trial judge whether to allow the completing statement to be used for its truth or only for context, as may be appropriate in the particular circumstance. But the amendment would prevent a party who had presented a statement in a misleading manner from foreclosing completion with a hearsay objection. Second, the amendment would permit completion of oral statements under Rule 106. The Reporter reminded the Committee that the majority of federal courts already permit completion of oral statements under their Rule 611(a) discretion or through the remaining common law of completion. The Reporter highlighted the benefits of avoiding a hodgepodge approach to completion of oral statements and noted that the Committee generally favored adding oral statements to Rule 106 to create a streamlined and more trial-friendly approach.

The Reporter noted that the proposed text of the amendment to Rule 106 had not changed since the circulation of the Agenda and invited discussion of the text of proposed Rule 106. Hearing no discussion of the proposed text, the Reporter turned to discussion of the draft Committee note. The Reporter highlighted two changes to the Committee note suggested prior to the meeting. First, he explained that a short paragraph had been added at the end of the note explaining that the amendment to Rule 106 would serve to displace the remaining common law of completeness. Second, the Reporter explained that the original draft Advisory Committee note had a paragraph at the end cautioning courts that the amendment would not affect the narrow fairness trigger that permits completion only if the proponent of a partial statement creates a misleading impression of the statement. The Reporter informed the Committee that the Department of Justice had asked that this cautionary paragraph be moved to the beginning of the draft Advisory Committee note. The Reporter opined that he would prefer to keep the cautionary paragraph concerning the fairness trigger at the conclusion of the note and explained that there is precedent for such a placement. For example, the Reporter explained that there was concern about expansive application of amended Rule 801(d)(1)(B) in 2014 that might have permitted admission of an avalanche of prior consistent statements. The Committee placed a cautionary paragraph at the conclusion of the Committee note to address that concern, after fully describing the operation of the amendment.

The Chair stated that it did not make sense to place the limiting paragraph at the beginning of the Committee note – such a placement would tell the reader what the amendment does *not* do before advising her of what the amendment *does* do. The Chair further opined that a judge or lawyer who consults the brief Committee note for guidance is likely to read all the way to the end and to encounter the cautionary paragraph. Ms. Nester suggested that the language in the cautionary paragraph noting that the amendment "does not change the basic rule" was ambiguous and that a reader might be confused about which "basic rule" the note refers to. The Chair suggested that the sentence might be redrafted to state that the amendment "does not change the rule of completeness, which applies only…"

Ms. Shapiro expressed the Department of Justice concern that trial judges do not always adhere to the narrow fairness trigger in Rule 106 in practice. She suggested that it could be considered easier to allow the defense to "complete" to avoid an issue on appeal than to enforce the strict

fairness limit in the Rule. The Department suggested moving the cautionary paragraph to the beginning of the note to allay concerns that an amendment could raise the profile of Rule 106 and exacerbate this problem in practice. But Ms. Shapiro offered that the cautionary paragraph could serve that important function if it were placed at the very end of the Committee note as well. All agreed that the cautionary paragraph would serve its purpose and be most powerful at the very end of the Committee note.

Ms. Shapiro also noted that the Reporter had removed the word "extreme" from the Committee note's discussion of Rule 403 at the Department's suggestion. Finally, she noted that the Department has suggested adding a sentence to the note emphasizing that a party who wants to complete with an oral statement must have admissible evidence that the completing oral remainder was made.

Another Committee member noted that placing the cautionary paragraph at the very end of the Committee note would make the paragraph on *Beech Aircraft* and the displacement of the common law the penultimate paragraph. This Committee member suggested a mechanism for a smooth transition into that penultimate paragraph which was generally accepted by the Committee. Another Committee member noted with approval that a citation to the *Williams* case out of the Second Circuit had been added to the final cautionary paragraph to highlight the much more common circumstance in which completion is *not* required.

Another Committee member noted that the current Rule 106 text refers to "writings" but that the amended Rule 106 would speak of "written or oral statements." The Committee member pointed out that litigants frequently seek to complete with portions of documents – like contracts – that might not be thought of as "statements" per se and queried whether removing the term "writings" from Rule 106 could improperly signal that completion of documents is no longer permissible. The Committee member suggested that the amended rule retain the nomenclature "writings or oral statements" to ensure that litigants know that they can seek to complete documents like tax records or a deed of sale. The Reporter responded that documents do qualify as "written statements" that would be subject to completion under the amended rule and that there was absolutely no intent to make a substantive change with respect to the completion of documents. Nonetheless, the Reporter thought the amendment could refer to "writings or oral statements" if that would avoid confusion. That would mean simply eliminating the word "recorded" in rule text and replacing it with the word "oral." The Reporter suggested that the Committee could await public comment to ascertain whether there would be any confusion regarding writings. The Chair opined that the concern could also be handled in the Committee note by clarifying that the amendment "covers any writing."

Ms. Shapiro inquired about the elimination of the word "recorded" from the amended rule, asking whether a recorded statement would now be treated as an "oral statement" for purposes of completion. The Chair suggested that it may be important for the Committee note to provide that the amendment covers everything – documents, recorded statements, oral statements, etc. Another Committee member suggested that the text of the amended rule should be altered to reflect its coverage, opining that Rule 106 could continue to cover "writings" and "recorded statements" and that the amendment could simply add the modifier "oral" to statements as well to indicate added coverage and that nothing has been taken away.

Committee members ultimately determined that, with respect to "writings," it would be best to leave the text of the proposed amendment unchanged and to add a sentence to the draft Committee note clarifying that the completion right applies to all forms of writings and statements – whether written, recorded or oral.

The Chair then asked for a vote on publication of the proposed amendment to Rule 106 with the accompanying Advisory Committee note, as modified. The Committee unanimously approved the amendment and Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.

The proposed amendment to Rule 106 and the Committee Note are attached to these Minutes.

IV. Rule 615

The Reporter introduced the proposal to amend Rule 615 on witness sequestration. He explained that the existing Rule language covers only the physical exclusion of witnesses from the courtroom and does not address witness access to trial testimony outside the courtroom. The Reporter noted that a circuit split had arisen over the Rule. Some courts interpret Rule 615 according to its plain language and hold that an order entered under the Rule operates only to exclude witnesses physically from the courtroom. Although these courts recognize trial judges' discretion to enter additional orders extending protections outside the courtroom, they hold that no such protections apply in the absence of an express, additional order. Conversely, other federal courts hold that even a basic Rule 615 order extends automatically beyond the courtroom, reasoning that sequestration fails to serve its purpose if witnesses may freely access trial testimony from outside the courtroom.

The Reporter explained that the draft amendment would specify that an order of exclusion would apply only to exclude witnesses from the courtroom; but the amended rule would state that the trial judge could enter additional orders extending protections beyond the courtroom on a discretionary basis. The Reporter explained that the draft of proposed Rule 615(b) regarding additional discretionary orders breaks down the distinct ways in which a witness might access trial testimony from outside the courtroom – either by accessing it themselves or having it provided to them by another. The Reporter then solicited Committee feedback on the proposed text of an amended Rule 615.

One Committee member noted that it is subsection (a) of the draft Rule that mandates physical exclusion from the courtroom, but that it is the first sentence of subsection (b) governing "additional orders" that explains the effect of orders entered under subsection (a), providing that "An order under (a) operates only to exclude witnesses from the courtroom." The Committee member contended that it is unusual to have rule text devoted to what a provision does not do. The Chair explained that the problem in the existing caselaw is that courts are applying Rule 615 orders more expansively than they are written, and that a draft amendment needs to specify its effect in order to address that problem. The rule needs to be written to assist neophytes, and a specific

statement about the limits of the first provision would be useful to those unfamiliar with the basic rule. The Committee member queried whether it would be better to place the sentence regarding the effect of an amended Rule 615(a) in subsection (a) rather than as the opening sentence of subsection (b). The Chair suggested that the first sentence of the draft of subsection (b) might be removed from rule text entirely with the issue of the effect of a basic Rule 615(a) order addressed in the Committee note. Ms. Nester remarked that she would be concerned about removing the limiting first sentence of subsection (b) from rule text. She explained that lawyers assume they have taken care of witness sequestration issues when they simply "invoke" Rule 615. If that simple invocation does not include extra-tribunal protections and lawyers need to seek "additional orders" to obtain those protections, the rule needs to spell that out clearly. Otherwise it becomes a trap for the unwary. The Chair acknowledged that Rule 615 is a courtroom rule and not an office rule and needs to be drafted very clearly for use on the fly in court.

The Committee member who raised the issue suggested that, in light of the concerns raised, it might be best to retain the limiting first sentence in the draft of subsection (b). Judge Bates inquired what the outcome would be if a lawyer using the rule on the fly in court as is commonly done "invokes" both subsections (a) and (b) of an amended Rule 615. If the court grants the request, does that lawyer now enjoy extra-tribunal protections to prevent witnesses from accessing testimony outside the courtroom? The Chair suggested that the lawyer would not enjoy any such protection as the draft currently stands; additional orders extending protection beyond the courtroom would need to be written to provide proper notice.

A Committee member again suggested moving the limiting first sentence of subsection (b) up into subsection (a) which it limits. He suggested it could be placed at the end of subsection (a). The Reporter noted that placing the sentence at the end of subsection (a) would create a hanging paragraph, which presents a style problem. The Reporter suggested that public comment might provide helpful feedback on the limiting first sentence currently in subsection (b). The Committee concluded that it would be best to leave the text of the draft amendment unchanged and to evaluate any feedback on the first sentence of subsection (b) from public comment and from stylists.

Ms. Shapiro turned the discussion to the witnesses exempted from sequestration under subsection (a)(1)-(4) of the draft amendment, noting that the exception for designated entity representatives was limited to "one" in the draft amendment. Ms. Shapiro suggested that there was no strong reason to limit entity parties to a single designated representative, that there was not a true "circuit split" on the issue, and that in certain situations individual parties are allowed multiple representatives. She offered the example of a class action suit against the government, in which each individual class member would have a right to be in the courtroom, while the government would be entitled to only a single representative.

The Reporter responded that the purpose of the automatic exemptions for parties was to offer one representative per party and that limiting entities to a single representative, in the way that individual persons are limited to one, is consistent with the purpose of the existing Rule. He further explained that the party exemptions from sequestration operate "automatically" and that there is no basis or methodology for a trial judge to utilize in deciding to permit more than one entity representative to be "designated." Another Committee member inquired as to how an entity exemption limited to one designated representative would operate in the context of an eight-week

trial during which no single corporate representative could remain for the entire trial. The Committee member suggested that there ought to be an escape clause allowing a trial judge to permit entities to "swap out" designated representatives in such a circumstance. Another Committee member echoed that concern, noting that it is often impossible to have one designated representative in lengthy corporate trials. The Reporter explained that the draft Committee note contained two bracketed options addressing swapping out – one permitting it and one prohibiting it under the automatic exemption for designated entity representatives. He agreed that the note would have to address the issue of swapping out representatives were the Committee to propose a limit of "one" designated entity representative. Ms. Nester emphasized the importance of sequestration for effective cross-examination and noted that meaningful cross-examination is severely undermined when the government is permitted to have all five case agents in the courtroom listening to all the testimony during trial.

In response to this discussion, the Reporter asked the Committee whether an amendment to the text of Rule 615 specifically limiting entity parties to "one" designated representative would cause more trouble than it was worth. He noted that most of the caselaw limits entities to a single representative and suggested that the Committee could rely on caselaw to regulate the issue. One Committee member responded that amending the entity representative exemption to limit it to "one" would be fair and appropriate given that it is a provision that operates as of right. The Committee member further noted that Rule 615 allows parties to make a showing of "essentiality" to exempt additional witnesses beyond those automatically exempt from sequestration. The Committee member opined that a party could make the necessary essential showing even to justify swapping out representatives during a lengthy trial. Another Committee member agreed that "one" designated representative made sense, with the option to "pitch" for more under the essentiality exemption. Two additional Committee members promptly agreed that a limit to one designated entity representative would be optimal, with the option of seeking the ability to swap out representatives in appropriate circumstances. The Chair noted that a majority of the Committee favored limiting entities to one designated representative with a swap-out option. There was some discussion of whether "swapping" representatives would occur under Rule 615(a)(2) or whether an entity would have to make the "essential" showing required by (a)(3) to swap designated representatives throughout a trial. Though all agreed that the trial judge would need to approve swapping out, the consensus was that trial judge discretion to do so should exist under Rule 615(a)(2). The draft Committee note was modified slightly to reflect this consensus.

Ms. Shapiro stated that the Department of Justice would not object to the change but that it did not feel that the change was necessary or justified. She suggested that the sentence in the draft Committee note stating that the change would "provide parity" for individual and entity parties should be removed because the exemptions would be capable of operating unfairly as her class action example showed. The Reporter responded that it would be inappropriate to remove that sentence because it explains the reason for the amendment. The Chair also responded that the "parity" described by the draft note is parity *per party* and not parity across the "v" – as drafted, the amended rule would treat all parties alike by giving each a single representative in the courtroom as of right. The Reporter suggested that the sentence in the note could be softened to state that limiting entity parties to one designated representative "generally provides parity" to address the Department's concern.

The Chair next called the Committee's attention to a slight change in the draft Committee note concerning the application of the amended Rule to counsel. The draft note previously stated that the amendment did not "address" admonitions to counsel about providing witnesses access to trial testimony. Although the amendment does not dictate to trial judges how to handle counsel, the amendment technically could apply to counsel by allowing additional orders preventing witness access to testimony outside the courtroom. To better capture the import of the amendment as to counsel, the Chair proposed revised language for the Committee note, stating: "Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness." The amended Rule does not tell trial judges to apply protections to counsel, but nor does it prohibit such action. Rather, it leaves the matter to judges on a case-by-case basis considering the ethical and constitutional implications unique to each case.

A Committee member queried whether the Committee should reconsider the language of Rule 615(a) that mandates exclusion from a physical "courtroom" in light of the increase in virtual trials in which there is no physical courtroom from which to be excluded. Another Committee member suggested that the term "courtroom" in Rule 615(a) could be changed to "proceedings" to eliminate a physical component to exclusion. The Reporter explained that the issue of a virtual proceeding was addressed by language in the draft Committee note directing trial judges to utilize their discretion to enter "additional orders" under subsection (b) to tailor exclusion from virtual proceedings. The Chair suggested that trial judges should not have to enter an "additional order" under subsection (b) to keep testifying witnesses out of virtual proceedings and that a basic sequestration order under subsection (a) should operate automatically to exclude testifying witnesses from the virtual proceedings just as they would be excluded physically from courtroom proceedings. Committee members agreed that a Rule 615(a) order should operate automatically to prevent testifying witnesses from accessing virtual proceedings. The Committee agreed that the text of Rule 615(a) did not need to be changed to address virtual proceedings; instead, the Committee note would be altered to clarify that Rule 615(a) orders block witnesses from trial proceedings – whether in a physical courtroom or on a virtual platform.

The Chair then asked for Committee members to vote on approving Rule 615 and the accompanying Advisory Committee note, as modified at the meeting, for publication. **The Committee unanimously approved the amendment and Committee note, with the recommendation that it be referred to the Standing Committee to seek release for public comment.**

The proposed amendment to Rule 615 and the Committee Note are attached to these Minutes.

V. The Best Evidence Rule and Foreign Language Recordings

The Chair next turned the Committee's attention to the possibility of pursuing an amendment to Article X of the Federal Rules of Evidence to exempt foreign-language recordings from the Best Evidence rule. Professor Richter introduced the issue concerning the application of the Best Evidence Rule, found in FRE 1002, to writings and recordings made in a language other than English. She noted that the application of the Best Evidence Rule to English language writings and recordings is well-settled and requires a party seeking to prove the content of such writings or recordings to offer an "original" or "duplicate" into evidence. Although transcripts are often used

to assist jurors in deciphering a conversation originally recorded in English, transcripts are only an aid to understanding and jurors are instructed that the original recording is the primary evidence upon which they should rely in determining content.

Foreign-language recordings present a unique problem in the federal court system because proceedings are conducted in English and because jurors cannot decipher content from original recordings for themselves. In the case of foreign-language recordings, two questions arise: 1) whether the original foreign-language recordings must be admitted into evidence and presented to the jury and 2) whether an English translation transcript may be offered as substantive evidence of content rather than merely as an aid to understanding. Professor Richter explained that the majority in the recent Tenth Circuit opinion in *United States v. Chavez* performed a plain language interpretation of Rule 1002 and held that the Best Evidence rule applies to foreign-language recordings in the same way that it applies to English language recordings, requiring admission of the original recording as primary evidence with an English transcript offered only as an aid to understanding. The majority reversed a drug distribution conviction where the trial court permitted the prosecution to admit an English transcript of a mostly Spanish recording as substantive evidence without admitting the original recording itself.

Professor Richter noted that there was a lengthy dissent in *Chavez*. The dissent pointed out the common-sense impossibility of requiring English-speaking jurors to rely upon a foreign-language recording as primary evidence. It further noted that, while an original foreign-language recording might be relevant and helpful in resolving disputes about the identity of speakers or the general tenor of a conversation in some cases, foreign-language recordings might be excluded as irrelevant or as unduly prejudicial in others. The dissent further pointed out that an English translation may nonetheless be admitted as substantive evidence because it qualifies as an expert opinion grounded in specialized knowledge of the foreign language at issue. The fact that the original recording might be excluded would not prevent the expert translator from relying upon it as basis because Rule 703 permits an expert to rely on inadmissible information so long as other experts in the field would reasonably rely on the information. Finally, the dissent pointed out that the Advisory Committee's note to Rule 1002 acknowledges an expert's ability to rely upon an original writing, recording or photograph without violating the Best Evidence rule. In this way, the dissent argued that an English transcript could be offered as substantive evidence of the content of the conversation captured on the recording without running afoul of the Best Evidence rule.

Professor Richter explained that the majority and dissent in *Chavez* also disagreed sharply over the treatment of foreign-language recordings by the federal courts. She stated that she had researched federal cases on the admissibility of foreign-language recordings and English translation transcripts and had discerned several patterns: 1) there are many federal opinions regarding the admissibility of foreign-language recordings, suggesting that this issue arises at trial with some frequency; 2) there is very little discussion or analysis of the Best Evidence rule in the federal cases dealing with foreign-language recordings; 3) most federal courts acknowledge the distinction between English and foreign-language recordings and permit English transcripts of foreign-language recordings to be admitted as substantive evidence, rather than as aids to understanding only; 4) most federal cases involve the admission of *both* the original foreign-language recordings *and* the English transcripts into evidence; very few cases involve the *Chavez* scenario in which the English transcripts are admitted *in lieu of* the original foreign-language

recordings; and 5) some federal cases have suggested that original foreign-language recordings may be "admitted" into evidence but withheld from the jury.

Based upon this research, Professor Richter opined that the Committee could refrain from any amendment to Article X. The federal courts seem to be handling the admissibility of foreign-language recordings appropriately and the dissent in *Chavez* set out a detailed path to the substantive admissibility of English transcripts that does not run afoul of Rule 1002. On the other hand, Professor Richter noted that the Committee could explore the addition of a new Rule 1009 to Article X that would exempt foreign-language writings and recordings from the ambit of the Best Evidence Rule if it were so inclined. She noted that such an amendment would be a narrow one. It would simply mean that a party (most often the government in a criminal case) seeking to prove the content of a foreign-language recording would not *be required to* admit the original recording as evidence of that content under Rule 1002. The parties could still seek admission of the original recording under Rule 402 to the extent that the recording might assist the fact-finder in resolving issues other than content, such as the identity of speakers, the tone of a conversation, or the timing of a recorded conversation. Thus, an amendment to Rule 1002 to remove foreign-language recordings would make their admission *discretionary* rather than *mandatory*. Professor Richter observed that an exemption for foreign-language recordings would be consistent with other exemptions from the Best Evidence Rule. Rule 1004 permits alternate proof of content where an original has been lost or destroyed and Rule 1006 permits summary proof of records too voluminous to be examined in court. An exemption for foreign-language recordings would be based upon similar pragmatic concerns – the inability of jurors to discern content from the original.

Professor Richter closed by emphasizing that *many* evidentiary problems remain with the admission of English translation transcripts that would *not* be addressed by an amendment to the Best Evidence rule. These issues include the admissibility of an expert translation, as well as issues of hearsay and confrontation where a transcript itself is offered as evidence of the expert's translation. She suggested that an Advisory Committee note would need to acknowledge the many remaining issues surrounding the admissibility of English language transcripts that are simply not addressed under Article X of the Evidence Rule were the Committee ultimately to proceed with a proposal to amend the Best Evidence rule.

The Chair began the discussion by noting that the issue of foreign-language recordings comes up most commonly in criminal cases and that the prosecutor and defense counsel typically work together to stipulate to an agreed transcript. He remarked that he had never had a translator qualified as an expert and that he would not wish to inject any requirement that translators be treated as Rule 702 experts into the Rules. Another judge on the Committee noted that he had not run into this issue either and that he was not persuaded of the overall need for an amendment. He opined that an original foreign-language recording should not go to the jury because jurors could try to translate it for themselves; the evidence should be the translation. Another judge on the Committee stated that he had encountered the issue frequently in connection with the translation of wiretap evidence and text messages in foreign languages. He explained that if there is no Rule 702 objection to the translator or to the accuracy of the translation, an English transcript comes in as evidence and there is no Best Evidence problem. The Chair added that if there is a dispute about the translation, both prosecution and defense translators testify and the jury resolves the dispute. He noted that there were no expert reports or *Daubert* motions connected with the translation

evidence. Another judge agreed, but noted that lawyers just do not object to translators under Rule 702. He suggested that there would need to be expert disclosures and other *Daubert* protections granted if an objection were to be raised. Judge Bates noted that many recordings are in multiple languages – portions in English and portions in other languages. He observed that any amendment would need to deal with the issue of mixed recordings. Another Committee member counseled caution, noting that lawyers and federal courts are generally handling foreign-language recordings capably and that the admissibility of the recordings and the transcripts touched on many issues that an amendment would not want to address. Another Committee member agreed, suggesting that the *Chavez* opinion was an outlier and that the Committee might benefit from letting the issue percolate in the courts longer.

Ms. Nester suggested that federal defenders often litigate the accuracy of foreign-language recordings and that they do object to an English transcript being sent to the jury where there is a dispute as to its accuracy. That said, she noted that federal defenders attempt to reach an agreement with the government as to the translation where possible and try to get the original recording sent to the jury for its consideration. The Reporter commented that an amendment removing foreign-language recordings from the ambit of the Best Evidence rule would not prohibit admitting those recordings and sending them to the jury under Rule 402 in appropriate cases. It would just make their admission discretionary rather than mandatory. Ms. Nester suggested that she would like to check with her litigation team to ascertain whether there is a problem with admissibility of foreign-language recordings that might be addressed through an amendment.

Thereafter, the Committee agreed unanimously to table the issue of amending Article X to exempt foreign-language writings and recordings, pending some request by the Federal Public Defender to reconsider the issue.

VI. Rule 611(a)

The Reporter turned the Committee's attention to Rule 611 and the Agenda memoranda describing possible amendments to that provision. He explained that there were three separate issues under Rule 611 to discuss: 1) the wide variety of actions trial judges take in reliance on Rule 611(a) and the possibility of amending the broad provision to better reflect practice under the Rule; 2) the possibility of adding some safeguards for federal judges to utilize when exercising their discretion to allow jurors to ask questions of witnesses; and 3) the possibility of providing guidance about the proper use of illustrative aids at trial.

First, the Reporter informed the Committee that trial judges rely upon Rule 611(a) to justify a wide variety of rulings, some of which do not fit neatly within the existing language of the Rule. He reminded the Committee that Rule 611(a) addresses things that a trial judge may regulate (e.g., the mode and order of examining witnesses) as well as the purposes for which a trial judge may act (e.g., to avoid wasting time). He observed that some actions -- such as authorizing a virtual trial as a result of covid to protect public health and safety -- might not fit neatly within the described justifications. He explained that the Agenda memo on Rule 611(a) was prepared to help the Committee think about whether to amend Rule 611(a) to add actions or purposes to the enumerated list to better capture what trial judges are already doing. The Reporter explained that

he had prepared a draft amendment, in the agenda materials, to expand the list of actions and purposes authorized by Rule 611(a) for the Committee's consideration.

After conducting significant research, the Reporter opined that he was not persuaded that an amendment was necessary, because the trial court always possesses inherent authority regardless of the precise language of Rule 611(a). Further, he observed that Rule 611(a) does not appear to be causing any difficulties in practice, except potentially in rare areas where trial judges are using Rule 611(a) to countermand other evidence rules (e.g., Rule 613(b)). Finally, the Reporter expressed concern that trial judges might interpret an amendment further enumerating authorized actions as actually *limiting* their discretion when the purpose of an amendment would be exactly the opposite. One Committee member remarked that it was troubling for judges to rely upon Rule 611(a) to countermand other specific provisions, but agreed that amending Rule 611(a) would be opening a Pandora's box.

Ultimately the Committee decided not to proceed with an amendment to Rule 611(a).

The Committee next discussed the possibility of amending Rule 611 to add safeguards that trial judges could utilize if they were inclined to allow jurors to pose questions for witnesses. The Chair emphasized that an amendment would take no position on whether a trial judge should allow juror questions but would simply provide safeguards for judges who opt to do so. The Reporter agreed, noting that it would be inappropriate for the Committee to take a position on the controversial and political issue of jury questions, but that a new subsection (d) to Rule 611 could at least offer protections when jury questions are permitted. The Chair noted that many of his colleagues do permit jurors to pose questions and that the Committee might create some consistency and uniformity surrounding the practice with an amendment. Another Committee member stated her interest in placing the issue on the Committee's agenda, noting that trial judges might be more willing to consider allowing juror questions if there were some accepted safeguards surrounding the practice. Another Committee member suggested that the language of the tentative draft amendment that referenced "the" safeguards should be altered because it sounds as if the identified safeguards are exhaustive. He opined that any safeguards placed in an amended rule should be would establish a minimum protection, but trial judges would be allowed to exercise their discretion to add additional safeguards.

Judge Kuhl noted that there had been a long-standing push in the state courts to allow jurors to ask questions and that many state court judges permit juror questions. She explained that jurors were allowed to submit written questions to court personnel and that they were cautioned that questions ultimately might not be asked for many good reasons, and that jurors should draw no negative inferences from the fact that a juror question did not get asked of a witness. The Reporter inquired whether jurors are allowed to question parties or only witnesses. Judge Kuhl replied that juror questions were limited to witnesses and that the practice was about 90% jury management and about 10% evidence. Judge Kuhl also explained that she had been allowing juror questions for approximately 15 years and that she could count on one hand the number of times that jurors posed questions. She suggested that the practice was more about keeping jurors engaged in the trial than about eliciting important questions. Judge Lioi remarked that she, too, allowed juror questions in civil cases and that her experience was largely positive. She noted that jurors sometimes do come up with outstanding questions. The Chair concluded the discussion by promising the Committee

that the Reporter would include a draft Rule 611(d) on jury questions, with an accompanying Advisory Committee note for the Fall meeting.

The Chair turned the discussion to the final Rule 611 issue – the proper use of illustrative aids at trial. He noted that illustrative aids are used in almost every federal trial and that they create a host of issues, such as: 1) is a particular exhibit illustrative only or does it qualify as "substantive" evidence; 2) is notice to the opposing party required before an illustrative aid may be used; 3) must the trial judge give a limiting instruction when an illustrative aid is used; 4) may illustrative aids go to the jury room; and 4) are illustrative aids part of the record on appeal? The Chair noted that illustrative aids are often prepared the night before they are used in court and that there are no Federal Rules of Evidence governing their use. He observed that trial judges often have different philosophies regarding illustrative aids and that a Federal Rule of Evidence providing guidance about their use might be helpful.

The Reporter explained that Maine has a specific provision -- Evidence Rule 616 -- that governs illustrative aids. He noted that the Maine rule was utilized as a starting point for crafting a potential federal rule. He explained that Maine Rule 616 distinguishes between illustrative aids and demonstrative evidence that can be offered as proof of a fact. He noted that the Maine Rule also offers significant instruction on the use of illustrative aids during trial proceedings.

The Committee agreed unanimously to keep the possibility of an amendment to govern illustrative aids on the agenda for the fall. All noted that the issue comes up routinely and that there is little uniform guidance on the treatment of illustrative aids. The Reporter promised to work up a draft amendment and Advisory Committee note for the next meeting.

VII. Rule 1006 Summaries

The Chair next raised the related issue of Rule 1006 summaries and interpretive difficulties surrounding them, in order to gauge the Committee's interest in exploring a possible amendment to that provision. Professor Richter, who had prepared the report for the Agenda materials, reminded the Committee that Rule 1006 is an exception to the Best Evidence Rule that permits a party to use "a summary, chart, or calculation" to prove the content of writings, recordings, or photographs that are too "voluminous" to be conveniently examined in court. She noted that the Rule requires that the underlying records be admissible, though they need not be admitted into evidence – the idea behind Rule 1006 is to permit alternate proof of the content of voluminous records. The underlying records must be made available to the opponent and the trial court has the discretion to order that they be produced in court.

Professor Richter pointed out several interpretive issues that plague Rule 1006 --- many of which arise due to the confusion of summaries offered under Rule 1006 and illustrative charts and summaries offered through Rule 611(a). The Rule 1006 interpretive issues include: 1) some federal courts erroneously hold that the summary itself is "not evidence" and that the trial judge must give a limiting instruction cautioning the jury against its substantive use; 2) some federal courts have held that the underlying voluminous records must be admitted into evidence before a Rule 1006 summary may be used; 3) other federal courts have held that a Rule 1006 summary may

not be used if any of the underlying records have been admitted into evidence; 4) some federal courts have held that a Rule 1006 summary may contain argument and inferences and need not simply replicate or summarize underlying data; and 5) federal courts have authorized an oral "testimonial" summary of voluminous records by a testifying witness under Rule 1006. Professor Richter pointed out that many of these holdings conflict with the letter or underlying purpose of Rule 1006 to permit proof of an accurate summary *in lieu of* proving voluminous writings, recordings, or photographs. Professor Richter directed the Committee's attention to a tentative draft of an amendment to Rule 1006 in the Agenda materials that would aim to correct and clarify the precedent under Rule 1006. She further noted that Rule 1006 speaks of records too voluminous to examine "in court" and of production of records "in court." Although this language has not caused any confusion in the reported federal cases to date, Professor Richter highlighted the locational nature of this language. She suggested that the Committee might consider altering the language in favor of something like "during court proceedings" to accommodate the possibility of virtual trial proceedings that do not take place "in court" if it were inclined to pursue other amendments to the Rule.

The Chair opened the Committee discussion by suggesting that a potential amendment to Rule 1006 could be a nice project to pair with consideration of Rule 611(a) illustrative aids given that much of the confusion in the federal courts stems from conflation of the two distinct types of summaries. He explained that the question before the Committee was whether to keep Rule 1006 on the Agenda for the fall. One Committee member suggested that this is an issue that causes confusion in practice, particularly with respect to how much inferential material can be added to a Rule 1006 summary. This Committee member opined that an amendment and Committee note that would help in drawing appropriate lines would be beneficial. Another Committee member stated that the use of overview witnesses is problematic in criminal cases and that clarifying whether and to what extent a Rule 1006 summary may be purely testimonial (as opposed to written or recorded) could help alleviate that concern. The Chair agreed, noting that it might be difficult to address line-drawing issues in rule text but that guidance could be offered in a Committee note. Thereafter, the Committee unanimously agreed that Rule 1006 should remain on the Agenda for consideration together with illustrative aids under Rule 611(a).

VIII. Party-Opponent Statements and Predecessors/Successors in Interest

The Reporter next called the Committee's attention to a circuit split regarding Rule 801(d)(2) and statements made by a party's predecessor or successor in interest. The Chair explained that if the estate of deceased declarant were to bring suit against a defendant, some circuits would permit the statements made by the decedent to be offered against the estate as party-opponent statements under Rule 801(d)(2)(A), while others would foreclose access to those statements because they are not statements of "the estate" that is the technically the party-opponent in the case. He suggested that this issue rarely comes up, but that it has the potential to cause significant unfairness when access to highly relevant statements is foreclosed by a death or by something more intentional like assignment of a claim to another. With both federal and state courts in disarray on this point, the Chair suggested that the Committee might consider a potential amendment to Rule 801(d)(2) to address the question.

The Reporter agreed with the Chair, noting that the rule should be that the statement of a predecessor in interest, like the decedent in the Chair's example, should be admissible against a successor like the estate. In considering whether to amend Rule 801(d)(2) to resolve the circuit split in that way, the Reporter suggested that the Committee would need to consider a few issues, including: 1) whether the issue arises with sufficient frequency to justify an amendment to Rule 801(d)(2); 2) how to choose appropriate amendment language or labels to cover all types of successorship relationships; and 3) how to apply the rule to all of the exceptions for party opponent statements under Rule 801(d)(2). The Chair agreed, noting that there is a clear circuit split and also a clear answer; the only question for the Committee is whether the issue merits consideration. The Reporter stated that he felt that the rule was probably worth fixing given that the issue is capable of occurring in many contexts. The Committee members all agreed that it was worthy of consideration because a small tweak to the Rule could prevent an injustice. The Chair stated that the issue would remain on the Agenda for the fall.

IX. Circuit Splits

The Chair reminded the Committee that the Reporter had prepared an extensive memorandum an all remaining circuit splits involving the Federal Rules of Evidence for the Committee's consideration. The purpose of the memorandum was to allow the Committee to identify splits, if any, that merit further consideration and placement on the Agenda. Because the memorandum addressed so many issues, the Chair requested that each Committee member make a note of all the splits that the Committee member would favor putting on the Agenda. Committee members expressed interest in the following circuit splits:

- Rule 407 --- does it exclude subsequent changes in contract cases?
- Rule 407 --- does it apply when the remedial measure occurs after the injury but not in response to the injury?
- Rule 613(b) --- to rectify the dispute in the courts on whether a witness must be provided an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence is admitted;
- Rule 701 --- clarifying the line between lay and expert testimony;
- Rule 804(b)(3) --- to specify that corroborating evidence may be considered in determining whether the proponent has established corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest in a criminal case;
- Rule 806 --- to rectify the dispute over whether bad acts that could be inquired into to impeach a witness under Rule 608(b) can be offered to impeach a hearsay declarant.

In addition, the Committee listed as "maybes" an inquiry into whether Rule 803(3) should be amended to limit state of mind statements to those that are spontaneous, and whether to prohibit admissibility of state of mind statements offered to prove the conduct of a third party; and a possible amendment to regulate admissibility of grand jury testimony being offered against the government under Rule 804(b)(1).

The Reporter noted that the Committee may want to hold off on placing Rule 701, involving the distinction between lay and expert opinion testimony, on the Agenda. He explained that prior Committees had worked to resolve this issue and that it may be simply impossible to articulate the

line between lay and expert testimony in rule text --- any better than it had already been done in 2000. He suggested that continuing to monitor the cases while pursuing other issues might be the best course. The Chair and Committee agreed to hold off on Rule 701. The other items, referred to above, remain on the agenda.

X. Closing Matters

The Chair thanked everyone for their contributions and noted that the fall meeting of the Committee will be held on Friday, November 5, 2021 in San Diego, with a Committee dinner to be held the night before. Both the Chair and Reporter commented on the remarkable accomplishment of the Committee in approving unanimously three amendments for publication, and thanked all involved in the lengthy and thorough process. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra
Liesa L. Richter

TAB 1C

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 22, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 22, 2021. The following members were in attendance:

Judge John D. Bates, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia A. Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the advisory committees:

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

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

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

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

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

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Rules Committee Staff Acting Chief Counsel; Bridget Healy and Scott Myers, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate at the FJC. Rebecca A. Womeldorf, the former Secretary to the Standing Committee, attended briefly at the start of the meeting.

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

OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He expressed hope that next January's meeting could be in person and began by reviewing the technical procedures by which this virtual meeting would operate. He welcomed new ex officio Standing Committee member Deputy Attorney General Lisa O. Monaco, though she was not available to join the meeting, and thanked the other DOJ representatives joining on her behalf. He also acknowledged and thanked Daniel Girard and Professor Bill Kelley, both completing their service on the Standing Committee.

Judge Bates next acknowledged Rebecca Womeldorf, former Secretary to the Standing Committee. She departed the Administrative Office in January of this year to become the Reporter of Decisions of the U.S. Supreme Court. Judge Bates thanked Ms. Womeldorf for her years of tremendous service to the rules committees and her friendship. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the January 5, 2021 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 53 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2020. It also sets out proposed amendments (to the Appellate and Bankruptcy Rules) that were recently adopted by the Supreme Court and transmitted to Congress; these will go into effect on December 1, 2021, provided Congress takes no action to the contrary. The chart also includes rules at earlier stages of the REA process.

JOINT COMMITTEE BUSINESS

Emergency Rules Project Pursuant to the CARES Act

Judge Bates introduced this agenda item, included in the agenda book beginning at page 77. The emergency rules project has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He extended his thanks and admiration to everyone who worked on these issues. In particular, he acknowledged Professor Daniel Capra's instrumental role in guiding the drafting of the proposed amendments and promoting uniformity among them.

Section 15002(b)(6) of the CARES Act directed the Judicial Conference and the Supreme Court to consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In January 2021, the Committee reviewed draft rules from each advisory committee, with the exception of the Advisory Committee on Evidence Rules, which had determined that no emergency rule was necessary. The Standing

Committee offered feedback at that point, focusing primarily on broader issues. During their Spring 2021 meetings, the advisory committees considered this feedback and revised their proposed amendments accordingly. The advisory committees now sought permission to publish the resulting proposals for public comment in August 2021. Any emergency rules approved for publication would be on track to take effect in December 2023 (if approved at each stage of the REA process and if Congress were to take no contrary action).

Professor Struve echoed Judge Bates's thanks to Professor Capra and all the participants in the emergency-rules project. She invited Professor Capra to frame the discussion of issues for the Standing Committee to consider. Professor Capra reminded the Committee members that uniformity issues had been discussed in detail during the January 2021 meeting of the Standing Committee. The advisory committees, he reported, had taken the Standing Committee's feedback to heart when finalizing their proposals at their spring meetings. As to most of the issues discussed at the January meeting, the advisory committees had achieved a uniform approach.

One such issue was who should declare a rules emergency. Should only the Judicial Conference be able to do this, or might any other bodies also be authorized to do so? The advisory committees understood the members of the Standing Committee to be in general agreement that it would be best if only the Judicial Conference had the power to declare emergencies. All four proposed emergency rules are now consistent on this point.

The definition of a rules emergency was also discussed at the January meeting. With one exception, the advisory committees' proposals now use the same definitional language. The proposals all state that a rules emergency may be declared when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to" a court, "substantially impair the court's ability to perform its functions in compliance with these rules." The proposed emergency Criminal Rule adds a requirement that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The understanding of the Advisory Committee on Criminal Rules was that the Standing Committee was comfortable with this remaining difference given the constitutionally-based interests and protections uniquely implicated by the Criminal Rules. With the goal of uniformity in mind, each of the other three advisory committees developing emergency rules had considered adding this "no feasible alternative" language to their own proposals; however, each of those advisory committees ultimately determined this was unnecessary.

Another issue discussed in January was the relatively open-ended nature of the draft Appellate Rule. The Advisory Committee on Appellate Rules thought this would be appropriate because Appellate Rule 2 was already very flexible and allowed the suspension of almost any rule in any particular case. There was some concern among members of the Standing Committee that, to offset this open-ended rule, more procedural protections might be useful. The Advisory Committee responded by revising its proposal to include safeguards that track those adopted by the other advisory committees.

The termination of rules emergencies was also discussed. This issue involves whether the rules should mandate that the Judicial Conference terminate an emergency declaration when the emergency condition no longer exists. The advisory committees agreed that it would be

inappropriate to impose such an obligation on the Judicial Conference and that termination would likely occur toward the end of the emergency period anyway, such that it would be useful to accord the Judicial Conference discretion to simply let the declaration's original term run its course.

The advisory committees also discussed whether there should be a provision in the emergency rules to account for the possibility that, during certain types of emergencies, the Judicial Conference itself might not be able to communicate, meet, or declare an emergency. The advisory committees did not think it was necessary to include such a provision because it would take extreme if not catastrophic circumstances to trigger this provision and, under such circumstances, a rules emergency is unlikely to be a priority. The courts would probably want to have plans in place for these kinds of circumstances, but the rules of procedure did not seem like the appropriate place for them, nor were the rules committees in the best position to work them out.

Finally, the advisory committees had discussed what Professor Capra termed a "soft landing" provision—a provision addressing what should happen when a proceeding that began under an emergency rule was still ongoing when a rules emergency terminated. The advisory committees had addressed this issue in different ways. Proposed Criminal Rule 62 would allow a proceeding already underway to be completed under the emergency procedures (if resuming compliance with the ordinary rules would be infeasible or unjust) so long as the defendant consented, while proposed Bankruptcy Rule 9038 and Civil Rule 87 deal with the "soft landing" issue on more of a rule-by-rule basis.

One provision that remained nonuniform was the provision laying out what the Judicial Conference's rules emergency declaration would contain. The proposed Bankruptcy and Criminal Rules provide that the Judicial Conference declaration must state any restrictions on the provisions (set out in these emergency rules) that would otherwise go into effect, while the proposed Civil Rule provides that the declaration must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." Professor Capra described this as a "half-full / half-empty" distinction.

Professor Capra thanked the Standing Committee members for the valuable input they provided at their January meeting and he observed that the proposals were in a good place with regard to uniformity. Most provisions were uniform and the reasons for any remaining points of divergence had been well explained. Judge Bates invited questions or comments on Professor Capra's presentation regarding uniformity. There were none.

Judge Bates next invited Judge Kethledge and Professors Beale and King to present proposed Criminal Rule 62. Judge Kethledge thanked Judge Dever, the chair of the Rule 62 Subcommittee, as well as the reporters, Judge Bates, and Judge Furman for their input on the proposed rule. He began by describing the Advisory Committee's process. The Subcommittee held a miniconference at which it heard from practitioners and judges describing their experiences during the COVID-19 emergency and prior emergencies. Judge Dever also surveyed chief district judges for their input. Judge Kethledge noted an overarching principle that had guided the drafting effort: The Subcommittee and Advisory Committee are stewards of the values protected by the Criminal Rules—protections historically rooted in Anglo-American law. The paramount concern

is not efficiency but, rather, accuracy. Accordingly, proposed Criminal Rule 62 authorizes departures from normal procedures only when absolutely necessary. The "no feasible alternative measures" requirement contained in the proposed rule reflected that approach. Proposed Rule 62 takes a graduated approach to remote proceedings, with higher thresholds for holding more important proceedings by videoconference or other remote technology. Concerns about the importance of in-person proceedings reach their apex with respect to pleas and sentencings.

Judge Kethledge pointed out that many of the recent changes to the proposed rule responded to helpful feedback from members of the Standing Committee. Proposed Rule 62(e)(4), for example, has been revised to make clear that its requirements (for conducting proceedings telephonically) apply whenever any one or more of the participants will be participating by audio only. Thus if one or more of the participants in a videoconference proceeding lose their video connection, and Rule 62(e)(4)'s requirements are met, the proceeding can continue as a videoconference in which those specific participants participate by audio only. Professors Beale and King added that the committee was grateful to Professor Kimble and his style-consultant colleagues and to Julie Wilson for helping finalize late-breaking changes to the proposed rule. Judge Kethledge and Professor Beale noted that some minor changes to the proposed rule—indicated in brackets in the copy of the draft rule and committee note at pages 161, 170, and 174-75 of the agenda book—had been made after the Advisory Committee's spring meeting and therefore had not been approved by the full committee; but those changes had the endorsement of Judges Kethledge and Dever and the reporters.

Judge Bates suggested that the reporters open discussion of proposed Rule 62 by highlighting two changes that were made after publication of the agenda book. Professor King explained the first, located in paragraph (e)(3), found on page 159 line 101 in the agenda book. In the agenda book's version, Rule 62(e)(3)'s requirements for the use of videoconferencing for felony pleas and sentencings incorporated by reference the requirements of Rules 62(e)(2)(A) and (B) (which apply to the use of videoconferencing at other, less crucial proceedings). Judge Bates had pointed out that it was not necessary to incorporate by reference Rule 62(e)(2)(A)'s requirement, because Rule 62(e)(3)(A)'s requirement is more stringent. The suggestion, which the reporters and chair endorsed, was that line 101 be revised to read "the requirement in (2)(B)," eliminating the reference to (2)(A).

Another change not reflected in the agenda book was in the committee note on page 166 line 274. This too was in response to a suggestion by Judge Bates, this time concerning Rule 62's "soft landing" provision. As noted previously, the "soft landing" provision addresses what happens if there is an ongoing proceeding that has not finished when the declaration terminates. The committee note to Rule 62(c), as approved by the Advisory Committee, explained that the termination of an emergency declaration generally ends the authority to depart from the ordinary requirements of the Criminal Rules but "does not terminate … the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3)." Judge Bates had suggested that it would be helpful to explain how this statement in the committee note (shown at lines 271-74 at page 166 of the agenda book) related to the text of proposed Rule 62. To provide that explanation, the chair and reporters proposed to augment the relevant sentence in the committee note so that it would read: "It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the

proceeding authorized by (d)(3) is the completed impanelment." This explanation reflected the consensus view at the spring Advisory Committee meeting.

Judge Kethledge suggested that the Standing Committee discuss the proposed rule section-by-section. Judge Bates agreed. There were no comments on subdivisions (a) through (c), which lay out the emergency declaration and termination provisions that Professor Capra had already summarized, and which are largely consistent with those employed in the other proposed emergency rules. Discussion then moved to subdivision (d), which details authorized departures from the rules following a declaration.

A judge member expressed strong support for the proposed Rule overall. This member suggested a change to the committee note's discussion concerning Rule 62(d)(1). Rule 62(d)(1) states that when "conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access" which should be "contemporaneous if feasible." The Rule text focuses on the timing of the access. The proposed committee note, at page 167, lines 312-15, instead focused on the form of access, stating with respect to videoconference proceedings that an audio feed could be provided to the public "if access to the video transmission is not feasible." This language in the note indicated a preference—for video instead of audio access—that was not grounded in the text of the proposed rule. Instead, the rule states that contemporaneous access—whether audio or video—is preferable to asynchronous transmission such as a transcript released after the proceeding. And the committee note's suggestion that video access should be provided to the public if "feasible" seemed to raise an undue barrier for courts—such as this member's court—that (due to bandwidth and other concerns) had been providing the public with audio-only access to video proceedings. It could be hard to make a finding that public video access was not "feasible"—would that require considering whether switching to a different electronic platform would permit public video access? The member suggested deleting this sentence from the committee note. Professor Beale explained that this was just one example and the Advisory Committee was not wedded to it. Judge Kethledge agreed that this example could be misunderstood. He thought there would not be much harm in striking that sentence from the committee note. Judge Bates also agreed, noting that his court had also been providing the public with audio-only access to video proceedings.

A second judge member suggested that, even if the Note's language about "feasibility" should be deleted, it could be useful for the Note to discuss the possibility of using audio to provide the public with "reasonable alternative access." The first judge endorsed the Rule's feasibility language concerning the timing of access: public access should be contemporaneous if that is feasible. A third judge member warned that requiring a feasibility analysis could suggest that courts should engage in "heroics" to try to provide contemporaneous video access to the public. An emergency rule will only apply in unusual circumstances. It is not helpful for the rules to require judges operating under such circumstances to devote extensive attention to information technology issues. The idea is to protect the rights of the defendant while acknowledging the rights of the public and to reconcile those in a timely fashion. This judge urged the deletion of any words that could introduce new points of dispute.

Professor Struve wondered whether a way to keep the thought about audio transmission as an option would be to insert a reference to it around line 300, as an example of a reasonable form

of access. She suggested a sentence reading: "Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding." The judge who first raised this issue agreed that this would be a better place for this example, as did Judge Bates. This would allow the deletion of the sentence at lines 312–15 that had been critiqued.

Discussion then moved to subdivision (e), which addresses the use of videoconferencing and teleconferencing after the declaration of a rules emergency. A judge member asked, in light of the decision to strike the reference to subparagraph (2)(A) from paragraph (e)(3), whether it would make sense to repeat in paragraph (e)(3) the requirements laid out in subparagraph (2)(B), the remaining cross-referenced provision. Judge Bates noted that the cross-reference only referred back ten lines or so and would thus be easy enough to follow. Professor Kimble noted that, when possible, it is better to avoid unnecessary cross-references, but that it always depends on how much language would need to be repeated and on the distance from the original language. Professor Kimble thought that the cross-reference was reasonable here.

A judge member wanted to make Committee members aware of caselaw interpreting Rule 43(c)(1)(B)'s provision that a noncapital defendant who has pleaded guilty "waives the right to be present … when the defendant is voluntarily absent during sentencing." In 2012—before the pandemic or the CARES Act—the Second Circuit had addressed the circumstances under which, pursuant to Criminal Rule 43(c)(1)(B), a defendant could consent to the substitution of video participation for presence in person. *See United States v. Salim*, 690 F.3d 115 (2d Cir. 2012). The Second Circuit had said that consent for purposes of Rule 43(c)(1)(B) can be made through counsel, though it must be knowing and voluntary. *Salim*'s requirements, this member stated, are nowhere near as stringent as those in proposed Rule 62(e)(3). The judge wondered whether the Second Circuit would adhere to *Salim*, in the non-emergency context, if Rule 62 were to be adopted. But the member did not think that this was a reason not to proceed with the rule as drafted.

Another judge member thanked the Advisory Committee for the proposed rule, which this member characterized as excellent. This judge had a question about subparagraph (e)(3)(B), which (as set out in the agenda book) provided that a felony plea or sentencing proceeding could not be conducted by videoconference unless "the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing." The phrase "requests in writing" had replaced "consents in writing" in an earlier draft. The committee note explained that this change was intended to provide an additional safeguard, and suggested that a judge might want to hold a colloquy with the defendant to confirm actual consent. The judge wanted to know whether the Advisory Committee intended that the court must make a finding that there is consent, as opposed to simply treating the written request as necessarily demonstrating consent. A written request is not the same as actual consent because it is always possible that a defendant could be confused or feel pressured. This judge did not think that subparagraph (e)(3)(B) was sufficiently clear about requiring a finding that would guarantee actual consent. Subparagraph (e)(2)(C), by comparison, suggested the need for a finding in a much clearer way. The judge suggested referencing the "requirements in (2)(B) and (C)" on line 101 as one possible way of clarifying the need for a finding.

Professor King asked whether the insertion of the words "and consents" after "in writing" in (e)(3)(B) on line 111 would suffice to clarify the point. The judge member responded that such

a change would ensure that there is a writing in the record that evinces consent; but that change by itself would not make clear that the judge should verify that the *defendant* (as distinct from the defendant's lawyer) was actually consenting. The member asked whether consultation was required on the record for a consent to videoconferencing at other types of proceedings under paragraph (e)(2). Professor King responded that Rule 62(e)(2)(C) does not require a finding on the record (with respect to that Rule's requirement that the defendant consents after consulting with counsel). Judge Bates noted that he had been considering a similar suggestion to Professor King's, that lines 110-11 might require that a defendant "consent by requesting in writing." But he was not sure whether that addressed the concern. The committee note might have to be changed as well.

Another judge member asked how subparagraph (e)(2)(C)—requiring that a defendant "consents after consulting with counsel"—would work for defendants who had refused counsel and were proceeding pro se. Judge Bates noted that consultation with counsel is required under both (e)(2) and (e)(3). Professor Beale responded that the Advisory Committee had not discussed this question, but that she assumed that consultation requirements would not apply for a defendant who had waived the right to counsel. Proposed Rule 62(d)(2) provides that "the court may sign for" a pro se defendant "if the defendant consents on the record," but no specific cross-reference to that provision appears in the (e)(2) and (e)(3) consultation provisions. The judge noted that "an adequate opportunity to consult"—used in (e)(2)(B)—might be a better formulation for (e)(2)(C) than "consulting."

A practitioner member noted that there were different consultation or consent requirements in the different subsections of (e) and wondered how much protection would be lost if (e)(2)(C) just said "the defendant consents." This might resolve the pro se defendant issue. In (e)(3)(B) the word "consent" could be added somewhere. And (e)(4)(C) simply requires that "the defendant consents." This would level out the articulation in all three provisions. Professor Beale stated that this was one possible way to resolve the issue. As an alternative, she expressed support for revising (e)(2)(C) to say "after the opportunity to consult." A defendant who has waived representation clearly has had an opportunity to consult with counsel.

The judge who had raised the concern about the writing and consent issue in the first place suggested a solution that involved substituting "consent in writing" for "request in writing." Professor King then explained that the Advisory Committee had intended to create an added protection by requiring a request from the defendant, rather than just consent. The idea has to come from the defendant, not from any outside pressure. To maintain the Advisory Committee's policy choice, "consent in writing" would need to be in addition to a written request, not a substitute for it.

As to the suggestion that the phrase "after consulting with counsel" be deleted from (e)(2)(C), Professor King pointed out that the videoconferencing and teleconferencing proceedings authorized by the CARES Act can only take place with the defendant's consent "after consultation with counsel." So Congress made a policy choice to require that consultation with counsel precede the consent. The Advisory Committee carried forward that policy choice. But inserting a reference to the "opportunity" to consult, Professor King suggested, would not be inconsistent with the Advisory Committee's intent.

Judge Kethledge noted that it was a judgment call whether to require the court to determine that the defendant actually has consulted with counsel with respect to consent to videoconferencing, or whether to require the court to find merely that the defendant generally had an opportunity to consult with counsel before and during the proceeding (leaving it to district judges in particular proceedings to determine how searching the inquiry should be with respect to consultation on the specific issue of consent to videoconferencing). Judge Kethledge acknowledged that the practitioner member's drafting suggestion would make the provisions under (e)(2)(C), (e)(3)(B), and (e)(4)(C) more uniform, but—Judge Kethledge suggested—spelling out a requirement concerning opportunity to consult with counsel seems worthwhile given the gravity of consenting to videoconferencing.

An appellate judge member followed up on Professor King's point that "request" was a higher requirement than consent. This member expressed support for requiring a request from the defendant; such a request is more likely to trigger a finding of waiver in the event that the defendant later tries (on appeal) to challenge the district court's use of videoconferencing.

Professor Capra reminded the members that at this stage the Standing Committee was only going to be voting on whether to send the rule out for public comment. He cautioned against too much drafting on the floor at this stage. These issues could always be kept in mind going forward.

An academic member expressed support for requiring only an opportunity to consult, and not actual consultation, with counsel; avoiding a requirement of actual consultation eliminates the risk that a defendant might later deny that the consultation occurred. A judge member stated that, if the rule refers to an "opportunity to consult," it should use the "adequate opportunity" language used in other provisions—lest someone draw an inference from the fact that different formulations are used in different places. This judge member pointed out, approvingly, that it was a policy choice by the Advisory Committee that subparagraph (e)(4)(C) not include the "opportunity" or "consultation" language. Subparagraph (e)(4)(C) omits those requirements because the idea is to allow the defendant to consent quickly and easily to continuing a proceeding if a participant loses video connection when a proceeding is already underway.

The judge who raised the writing and consent issue suggested revising paragraph (e)(3)(B) (at lines 109-13) to require that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." This would emphasize that a request is more than consent, while also ensuring that the defendant is actually consenting. Professor Beale and Judge Kethledge endorsed this suggestion because this was what the Advisory Committee had in mind. A judge member expressed concern that defendant signatures had been difficult to obtain during the pandemic, but Professor Beale noted that paragraph (d)(2) provides ways to comply with defendant-signature requirements when emergency conditions limit a defendant's ability to sign.

Judge Bates confirmed that Judge Kethledge and the reporters agreed with the change to line 111 (which they did), and said that the Standing Committee would proceed with considering the rule with that change. The rule being voted on would include the following changes:

- bracketed changes indicated in the agenda book at pages 161, 170, and 174-75

- changes to paragraph (e)(3) and committee note discussion of subdivision (c) that had been suggested by Judge Bates after publication of the agenda book but prior to today's meeting
- changes to subparagraph (e)(3)(B)
- changes to committee note discussion of paragraph (d)(1)

No change to lines 94-95 was made at this time. The reporters would note the potential issue for pro se defendants and the Advisory Committee would give it further consideration following the public comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Criminal Rule 62 for public comment with the above-summarized changes.**

The Civil Rules Advisory Committee presented its proposed rule next. Judge Robert Dow introduced it, thanking the subcommittee chairs and the reporters, and noting his appreciation for the input provided by the members of the Standing Committee at the January meeting. Both the Advisory Committee and its CARES Act Subcommittee agreed that the Civil Rules had performed very well during the pandemic and that civil proceedings had generally moved forward, with the exception that trials are backed up. Judge Dow said that the Advisory Committee was looking forward to receiving public comment and that it was still open to proceeding down any of three very different paths with regard to the emergency rule. One possibility was to proceed with the emergency rule (proposed Civil Rule 87) as currently drafted. Another possibility was to directly amend Civil Rules 4 (on service) and 6 (on time limits for postjudgment motions). Finally, given that the Civil Rules had proven adaptable, the Advisory Committee had not ruled out recommending against a civil emergency rule and leaving the Civil Rules unaltered.

Professor Cooper introduced the discussion of proposed Civil Rule 87. Rule 87 contains six emergency rules, five of which concern service of the summons and complaint. Rule 87(c)(1) (addressing alternate modes of service during an emergency) provides for service through "a method that is reasonably calculated to give notice." The Rule states that "[t]he court may order" such service in order to make clear that litigants need to obtain a court order rather than taking it on themselves to use the alternate mode of service and seek permission later. Proposed Rule 87(c)(1) builds in a "soft landing" provision, because the Advisory Committee concluded that each of the emergency Civil Rules should have its own "soft landing" provision. Rule 87(c)(1) provides that if the emergency declaration ends before service has been completed, the authorized method may still be used to complete service unless the court orders otherwise.

Rule 87(c)(2) softens Civil Rule 6(b)(2)'s ordinarily-impermeable barrier to extensions of time for motions under Civil Rules 50(b) and (d), 52(b), 59, and 60(b). Rule 87(c)(2) has been carefully integrated with the provisions of Appellate Rule 4(a)(4)(A) (concerning motions that re-start civil appeal time). The Appellate Rules Committee has worked in tandem with the Civil Rules Committee, and is proposing an amendment to Appellate Rule 4(a)(4)(A)(vi) that will mesh with proposed Civil Rule 87(c)(2). Rule 87(c)(2)(C) sets out a "soft landing" provision that addresses the timeliness of motions and appeals filed after an emergency declaration ends; it provides that

"[a]n act authorized by an order under" Rule 87(c)(2) "may be completed under the order after the emergency declaration ends."

The main remaining point of discontinuity with the other three proposed emergency rules was the fact—discussed earlier by Professor Capra—that proposed Rule 87(b)(1)(B) required the Judicial Conference to "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." This differs from proposed Criminal Rule 62(b)(1)(B), which directs that the emergency declaration "state any restrictions on the authority" granted in subsequent portions of Criminal Rule 62. The Criminal Rule's formulation would not work for Civil Rule 87(b)(1)(B), because it would not make sense to ask the Judicial Conference to cabin the district court's discretion with respect to methods of service, or to invite the Judicial Conference to alter the intricate structure set out in Civil Rule 87(c)(2). Instead, the Judicial Conference should consider which of the emergency Civil Rules to adopt. Professor Cooper concluded by reminding the Standing Committee members of Professor Capra's suggestion that it might be appropriate to allow disuniformity to remain for now in order to get public comment on the disuniformity itself.

Professor Marcus underscored the idea that Civil Rule 87 is dealing with very different issues than Criminal Rule 62. Rule 87(c)(1) authorizes a court to order additional manners of service in a given case. Trying to do something more global that did not require a court order had not been viewed as a good idea by the subcommittee.

A practitioner member supported publication of the rule. Given the design of each of the proposed emergency rules, this member acknowledged, achieving perfect uniformity is difficult. However, this member suggested that in a system where, for the first time, emergency rules are being introduced and the Judicial Conference is being tasked with declaring rules emergencies, there was something to say for establishing a consistent default rule along the lines set out in the proposed Bankruptcy and Criminal emergency rules—namely, that triggering the emergency triggers all the emergency rules. This would mean less work for the Judicial Conference, which would be able to activate all the emergency rules by declaring the emergency. But this could be discussed further following publication. Professor Cooper said that Civil Rule 87(b)(1)(B) envisioned substantially the same approach—namely, that all emergency provisions would be adopted in the emergency declaration unless the Judicial Conference affirmatively excepted one or more of them. But the member pointed out that Rule 87(b)(1)(B) requires explicit adoption of the emergency rules; what would happen if the Judicial Conference simply declared an emergency and said nothing else? Professor Capra agreed that if there is nothing in the declaration except the declaration itself, then nothing would happen under Rule 87. Professor Cooper suggested that the issue could be resolved if paragraph (b)(1) were revised to read: "[t]he declaration: (A) must designate the court or courts affected; (B) adopts all the emergency rules . . . unless it excepts one or more of them; and (C) must be limited to a stated period of no more than 90 days." Professor Capra suggested that it was unnecessary to resolve now, but also that it would be preferable to copy the language used in the other sets of rules.

A judge member agreed that more uniformity would be better but that it did not have to be addressed today. This member then asked two questions. First, why did the rule, in paragraph (c)(1), say that a "court may order service" through an alternative method instead of saying that a "court may authorize service?" Would it not be better to allow a party to change its mind and

decide that a standard method of service would be fine after all? A court order might lock a party into the alternative service method. Professor Marcus explained that the Advisory Committee used "order" rather than "authorization" because an "order" guarantees that the judge approves service by an identifiable means (a court order). The member asked whether the "order" would require that service must be by the alternative means, but Professor Marcus thought that surely the order would only add an additional means rather than ruling out standard methods. The member suggested revising (c)(1), at line 27, to say "[t]he court may by order authorize." Professor Cooper and Judge Dow approved of this change.

The member's second question also related to paragraph (c)(1). The member appreciated the point, in the proposed committee note, that courts should hesitate before modifying or rescinding an order issued under paragraph (c)(1) for fear that a party may already be in the process of serving its adversary. The member had previously thought it might be advisable to require good cause for modifying the order. After consideration, the member no longer thought a good cause standard was necessary, but the member wondered if it would be better if paragraph (c)(1), at page 125 lines 35-36, required that the court give the plaintiff notice and an opportunity to be heard before modifying or rescinding the order. Professor Cooper was neutral on this suggestion. Judge Dow did not see any downside to requiring notice and opportunity to be heard and thought that this was what most judges would do anyway. Professor Hartnett suggested omitting the word "plaintiff" because plaintiffs are not the only ones who serve summonses and complaints. Accordingly, lines 35-36 were revised to read "unless the court, after notice and an opportunity to be heard, modifies or rescinds the order."

A third change agreed upon was to delete (for style reasons) "authorized by the order" from line 33.

A judge member thought that the proposed rule addressed most of the Civil Rules that are integrated with Appellate Rule 4, which governs the time to file a notice of appeal. This judge noted, however, that proposed Civil Rule 87 did not seem to address Rules 54 and 58, each of which is also integrated with the Appellate Rules through Rule 59. (The member was referring to Civil Rule 58(e), which provides that "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.") Professor Struve responded that the Advisory Committee was attempting to account for the Rule 6(b)(2) provision stating that courts cannot extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The proposed rule targeted those particular constraints. The judge member acknowledged that explanation, but argued that Rule 58(e) contains its own bar on extensions that could not be avoided if a litigant wanted to preserve the option of waiting to appeal. Professor Struve responded that the deadline in Rule 58(e) ("a timely motion … under Rule 54(d)(2)") was extendable under Rule 6(b)(1); Judge Bates and Professor Cooper agreed with this view. The member responded that he read Rule 58(e) to incorporate the time deadline in Civil Rule 59, not the Civil Rule 59 deadline as it might be extended under the emergency rule. After some further discussion, Professor Struve suggested that this issue be noted for further discussion following public comment. Judge Bates agreed that this suggestion could be discussed further during the comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Civil Rule 87 for public comment** with the three modifications (to Rule 87(c)(1)) described above.

Judge Dennis Dow introduced the proposed emergency Bankruptcy Rule, new Rule 9038. He thanked Professor Gibson for her excellent work in spearheading the drafting of the proposed rule and Professor Capra for his leadership and coordination of the project. Changes since January largely resulted from guidance the Standing Committee had provided at its January meeting. Rules 9038(a) and (b) generally track the approach taken in the other emergency rules, while Rule 9038(c) addresses issues specific to the Bankruptcy Rules. Professor Gibson noted one point of disuniformity—the use of "bankruptcy court" instead of "court" throughout the proposed rule. Bankruptcy Rule 9001 defines "court" as the judicial officer presiding over a given case, so while the Advisory Committee thought the risk of confusion was low, the decision was made to use "bankruptcy court" when referring to the institution rather than the individual. The only substantive change since January was to revise paragraph (c)(1) to allow a chief bankruptcy judge to alter deadlines on a division-wide basis as opposed to district-wide when a rules emergency is in effect. The thinking was that if an emergency only affected part of a district, then deadlines could be extended in only that area. The emergency rule was largely an expansion of Rule 9006(b) (which addresses extensions). When the bankruptcy emergency subcommittee surveyed the Bankruptcy Rules, they determined that Rule 9006(b) was arguably insufficient in some emergency situations because it did not allow extensions of all rules deadlines (for example, the deadline for holding meetings of creditors). The proposed emergency rule would allow greater flexibility. The Advisory Committee agreed to make its rule uniform with the other proposed emergency rules in providing that only the Judicial Conference would be authorized to declare a rules emergency.

Judge Bates had a question about Rule 9038(c). In subsection (c)(1) a chief bankruptcy judge is allowed to toll or extend time in a district or division and in (c)(2) a presiding judge can extend or toll time in a particular proceeding. Judge Bates's question concerned (c)(4)'s provision on "Further Extensions or Shortenings." He asked if that provision was intended to allow presiding judges to further modify deadlines regardless of who had modified them in the first place. Professor Gibson and Judge Dow said yes.

A judge member noted that the rule did not permit chief judges to adjust the deadline extensions authorized by their own prior orders. Professor Gibson agreed that chief judges could not do this, except in individual cases over which they are presiding. The idea was that the chief judge's extensions would be general. This member also asked what it meant to say that further extensions or shortenings could occur "only for good cause after notice and a hearing and only on the judge's own motion or on motion of a party in interest or the United States trustee." Would it be enough to refer simply to notice and an opportunity to be heard, rather than a hearing? And why spell out whose motion could trigger the adjustment? Professor Gibson and Judge Dow explained that under the Bankruptcy Code, "notice and a hearing" is a defined term and that it required only an opportunity to be heard. There would be no need to hold a hearing if one was not requested. The point of mentioning whose motion could trigger the adjustment was to establish that the court could adjust the deadlines *sua sponte*. Judge Dow said that without this language he did not think it would be clear that judges could initiate the process on their own. Judge Bates asked whether

this language was necessary. In the district courts, judges can always initiate these kinds of processes on their own. Professor Gibson thought there were some situations where parties had to file motions. Judge Dow explained that the language was there for clarity and to prevent litigants from arguing that a court lacked the power to act sua sponte. Professor Hartnett asked about the significance of saying that "only" these persons could move. Who else could possibly move other than the persons listed? Professor Gibson and Judge Dow agreed that words "and only" could probably be cut.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Bankruptcy Rule 9038 for public comment** with the sole modification of the words "and only" on line 63 being deleted.

Judge Bybee and Professor Hartnett introduced the Advisory Committee on Appellate Rules' proposed amendments to Appellate Rules 2 and 4. Judge Bybee thanked everyone for their input and expressed that the Advisory Committee was satisfied with the proposed amendments. Professor Hartnett explained that the Advisory Committee had made significant changes to proposed Appellate Rule 2 since January in order to achieve greater uniformity and to respond to the Standing Committee's suggestions. The power to declare an emergency now rested only with the Judicial Conference, and sunset and early termination provisions had been added. The Advisory Committee had retained its suggestion that the Appellate Rules include a broad suspension power. The proposed appellate emergency rule would be added to existing Appellate Rule 2, which authorizes the suspension of almost any rule in a given case.

Professor Hartnett explained that the proposed amendment to Rule 4 that accompanied the proposed emergency rule was not quite an emergency rule itself, but rather was a general amendment to Rule 4. The idea was to amend Rule 4 so that it would work appropriately if Emergency Civil Rule 6(b)(2) ever came into effect; but the proposed amendment would make no change at all to the functioning of Appellate Rule 4 in non-emergency situations. Under Appellate Rule 4(a)(4)(A), certain postjudgment motions made shortly after entry of judgment re-set the time to take a civil appeal, such that the appeal time does not begin to run until entry of the order disposing of the last such remaining motion. For most types of motion listed in Rule 4(a)(4)(A), the motion has such re-setting effect if the motion is filed "within the time allowed by" the Civil Rules. If Emergency Civil Rule 6(b)(2) were to come into effect and a court (under that Rule) extended the deadline for making such a postjudgment motion, that motion (when filed within the extended deadline) would be filed "within the time allowed by" the Civil Rules and thus would qualify for re-setting effect under Appellate Rule 4(a)(4)(A). But for Civil Rule 60(b) motions to have re-setting effect, Rule 4(a)(4)(A) sets an additional requirement: under Rule 4(a)(4)(A)(vi), a Rule 60 motion has re-setting effect only "if the motion is filed no later than 28 days after the judgment is entered." This text, left as is, would mean that in a situation where a court (under Emergency Civil Rule 6(b)(2)) extended the deadline for a Civil Rule 59 motion, the re-setting effect of a motion filed later than Day 28 after entry of judgment would depend on whether it was a Rule 59 or a Rule 60(b) motion. To avoid this discontinuity, the proposal amends Rule 4(a)(4)(A)(vi) to accord re-setting effect to a Civil Rule 60 motion filed "within the time allowed for filing a motion under Rule 59." That wording, Professor Hartnett pointed out, leaves Rule 4(a)(4)(A)(vi)'s effect unaltered in non-emergency situations, because under the ordinary Civil Rules the (non-extendable) deadline for a Rule 59 motion is 28 days.

Judge Bates solicited comments on the proposed amendments to Appellate Rules 2 and 4. No comments were offered.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed amendments to Appellate Rules 2 and 4 for public comment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on April 30, 2021. The Advisory Committee presented three action items; in addition, it listed in the agenda book six information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 818.

Action Items

Publication of Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements). Judge Schiltz introduced this first action item: a proposed amendment to Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the other side may require admission of a completing portion of the statement in order to correct the misimpression. The proposed amendment is intended to resolve two issues with the rule.

First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. Suppose, for example, that a prosecutor introduces only part of a defendant's confession and the defendant wants to introduce a completing portion of the confession. The question becomes whether the prosecutor can object on grounds that the defendant is trying to introduce hearsay. Courts of appeals have taken three approaches to this question. Some exclude the completing portion altogether on grounds that it is hearsay, basically allowing the prosecution to mislead the jury. Some courts will admit the completing portion but will provide a limiting instruction that the completing portion can be used only for context and not for truth. This may confuse jurors. Other courts will allow a completing portion in with no instruction. The Advisory Committee unanimously agreed that Rule 106 should be amended to provide that the completing portion must be admissible over a hearsay objection. In other words, the judge cannot exclude the completing portion on hearsay grounds, but may still exclude it for some other reason (Rule 403 grounds, for example) or may give a limiting instruction.

The second issue is that the current rule applies to written and recorded statements but not to unrecorded oral statements. This means that, unlike any other rule of evidence, the rule of completeness is dealt with by a combination of the Federal Rules of Evidence and the common law, with the common law governing in the area of unrecorded oral statements. Completeness issues often arise at trial. Judges and parties often have to address these issues on the fly, in situations where they may not have time to thoroughly research the common law. There are circuit splits in this area as well. Some circuits allow the completion of an unrecorded oral statement and

others do not. The Advisory Committee unanimously supported an amendment that would extend Rule 106 to all statements so that it fully supersedes the common law. The DOJ initially opposed amending Rule 106 but thanks to the hard work of Ms. Shapiro and Professor Capra, the Advisory Committee was able to propose language for the amendments and committee note that garnered the DOJ's support.

A practitioner member complimented the proposal. A judge member, likewise, expressed support for the proposal; this member asked about the inclusion of case citations in the committee notes. This member pointed out that another advisory committee, explaining its decision not to adopt a suggested change to a committee note, had stated that "as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended." Professor Capra responded that the Standing Committee has never taken a position on case citations in committee notes. For a time there were certain members on the Standing Committee who believed that cases should never be cited in committee notes. The Evidence Rules Committee takes the view that case citations are permissible in committee notes, provided that they are employed judiciously. Here, the citations are useful because they note arguments, made by courts, that provide support for the rule.

Professor Coquillette said that case citations can be problematic when a case citation is used to justify a rule amendment. If the case in question is later overturned, one cannot at that point amend the committee note. If, however, the case is cited to illustrate how the rule works, there is less reason to think there is a problem. Professor Capra thought there was no risk in citing a case as a basis for a rule—if a case's reasoning is adopted by the rule and that case's holding becomes the new rule, then that case will not be overturned. Professor Coquillette decried this as circular reasoning, but Professor Capra disagreed. Professor Capra gave examples of prior committee notes to the Evidence Rules that cited cases. Judge Schiltz suggested that there was a difference between a note explaining that a rule amendment resolves a circuit split and a note explaining that a rule amendment was adopted because a case required the amendment. He thought the cases here were being used to illustrate the different approaches courts are taking as of the time of the amendment's adoption; such citations, he suggested, will not become outdated based on later events. Professor Capra agreed.

Professor Struve noted a diversity of opinion and past practice. She thought it was a good question but that since the rule was only going out for comment, it could be considered later rather than trying to fine-tune every citation at this meeting. Professor Capra stated that if there was going to be a policy never to include case citations in notes he would be willing to follow such a policy going forward, but he said such a policy should not be created without more careful consideration and should not be applied to this rule retroactively. Professor Beale noted that the Advisory Committee on Criminal Rules has not taken the position that case citations are never appropriate. Such citations, she suggested, can be employed judiciously and can provide relevant background about the history of a rule amendment. Multiple participants noted that this topic could be discussed among the reporters and at the Committee's January 2022 meeting.

Judge Bates observed that the committee note (on page 829 of the agenda book) states that the amendment to Rule 106 "brings all rule of completeness questions under one rule." He asked whether that was technically accurate, given Rule 410(b)(1) (which provides that "[t]he court may

admit a statement described in Rule 410(a)(3) or (4) . . . in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together"). Professor Capra responded that Judge Bates's question was a good one and the Committee would consider that question going forward.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 106.**

Publication of Proposed Amendment to Rule 615 (Excluding Witnesses). Judge Schiltz introduced the proposed amendment to Rule 615, a "deceptively simple" rule providing, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typically brief orders that courts issue under Rule 615 simply physically exclude witnesses from the courtroom or whether they also prevent witnesses from learning about what happens in the courtroom during periods when they have been excluded. Some circuits hold that a Rule 615 order automatically bars parties from telling excluded witnesses what happened in the courtroom and automatically bars excluded witnesses from learning the same information on their own, even when the judge's order does not go into this detail. Other circuits view Rule 615 as strictly limited to excluding witnesses from being present in a courtroom, requiring that any further restrictions must be spelled out in the order. The Advisory Committee unanimously voted to amend the rule to explicitly authorize judges to enter further orders to prevent witnesses from learning about what happens in the courtroom while they are excluded. But, under the amended Rule, any such additional restrictions will have to be spelled out in the order; they will not be deemed implicit in an order that mentions no such restrictions. Judge Schiltz pointed out that, in response to a Standing Committee member's comment in January, the committee note had been revised (as shown on page 834 of the agenda book) to include the observation that a Rule 615 order excluding witnesses from the courtroom "includes exclusion of witnesses from a virtual trial."

Judge Schiltz then explained another issue resolved by the proposed amendment. Rule 615 says that a court cannot exclude parties from a courtroom, so a natural person who is a party cannot be excluded from a courtroom. If one of the parties is an entity, that party can have an officer or employee in the courtroom. But some courts allow entities to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. The Advisory Committee considered this difference in treatment to be unfair. The proposed amendment would make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. Like any party, though, if an entity-party can make a showing that additional representatives are necessary, then the judge has the discretion to allow more.

Judge Bates noted a typo in the proposed committee note (on page 835 of the agenda book, the word "one" was missing from "only <u>one</u> witness-agent is exempt at any one time"). A judge member expressed support for the amendment but asked a broader historical question about why the default was not for witnesses to be excluded from the courtroom unless they fall into one of the categories set out in current Rule 615. Why should exclusion require an order? Professor Capra thought this would be less practical as a default rule. Requiring an order helps ensure notice to participants, and violating a court order can trigger a finding of contempt. Judge Schiltz noted that

there is a background default rule of open courtrooms, and a departure from that should require an order.

A practitioner member asked about rephrasing part of the committee note at the bottom of page 834 to be more specific. The committee note observes that the Rule does not "bar[] a court from prohibiting counsel from disclosing trial testimony to a sequestered witness," but then goes on to say that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions . . . and is best addressed by the court on a case-by-case basis." The member suggested that this passage seemed to spot issues without giving much guidance. Judge Schiltz explained that this is a nuanced issue that would be very difficult to treat in more detail. Professor Capra observed that the Advisory Committee had debated whether to mention the issue at all. The member expressed support for mentioning the issue in the committee note. The member pointed out that the language of proposed Rule 615(b)(1) suggests that a court can issue an order flatly prohibiting disclosure of trial testimony to excluded witnesses, full stop. So that raises the question of how that would apply to lawyers doing witness preparation, particularly in a criminal case. Professor Capra noted that the Advisory Committee would be open to considering revisions to the note language (so long as those revisions did not go into undue detail on the issue). Professor Coquillette expressed approval for the approach taken by the proposed committee note. This issue, he said, implicates difficult questions of professional responsibility (such as the scope of the duty of zealous representation)—questions that are regulated by state rules and state-court decisions. Going into any further detail would take the committee note's drafters into a real thicket.

An academic member asked what the standard would be for the issuance of an additional order (under proposed Rule 615(b)) preventing disclosure to or access by excluded witnesses. Professor Capra said there was no standard provided because the issue was highly discretionary. He saw it as similar to Rule 502(d), which provides no limitations on a court's discretion. Again, the rule could not be detailed enough to account explicitly for every situation that might come up. The member also asked why paragraph (a)(4), stating that a court cannot exclude "a person authorized by statute to be present," was necessary. The member expressed the view that the rules cannot authorize something inconsistent with a statute. Professor Capra explained that this provision had been added to the Rule in 1998 to account for legislation that limited the grounds on which a victim could be excluded from a criminal trial. Originally the 1998 proposal had been drafted to refer to that particular legislation, but (as a result of discussion in the Standing Committee) the provision as ultimately adopted refers generically to any statutory authorization to be present. The inclusion of this provision avoids the issue of supersession of a prior statute by a subsequent rule amendment (*see* 28 U.S.C. § 2072(b)).

Professor Bartell asked whether orders under Rule 615(b) require a party's request. Professor Capra noted that, like orders under Rule 615(a), an order under Rule 615(b) could be issued upon request or *sua sponte*. A judge member suggested that, after public comment, it may be worth making this explicit in (b) as it is in (a). Professor Capra did not think it made sense to try to make the language of Rules 615(a) and (b) parallel on this point. Orders under Rule 615(a), he pointed out, "must" be issued upon request whereas orders under Rule 615(b) are discretionary. Another judge member complimented the Advisory Committee's work and noted that the amendment addresses an issue that comes up all the time. Another judge member asked why 615(b) referenced additional orders and whether there was a reason that all Rule 615 issues could not be

addressed in a single order. Professor Capra and Judge Schiltz agreed there was no intent to require separate orders, and undertook to clarify the language after the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 615** (with the committee-note typo on page 835 corrected).

Publication of Proposed Amendment to Rule 702 (Testimony by Expert Witnesses). Rule 702 addresses the admission of expert testimony. Judge Schiltz described it as an important and controversial rule. Over the past four years, the Advisory Committee has thoroughly considered Rule 702. Ultimately, the Committee decided to amend it to address two issues.

The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702 such testimony must help the jury, must be based on sufficient facts, must be the product of a reliable method, and must represent a reliable application of that method to adequate facts. It is clear that a judge should not admit expert testimony without first finding by a preponderance of the evidence that each of these requirements of Rule 702 are met. The problem is that many judges have not been correctly applying Rule 702. They have treated the 702 requirements as if they go to weight rather than admissibility, and some have explicitly said that this is what they are doing even though it is not consistent with the text of Rule 702. For example, instead of asking whether an expert's opinion <u>is</u> based on sufficient data, some courts have asked whether the opinion <u>could be found by a reasonable juror to be</u> based on sufficient data. This is an entirely different question and sets a lower and incorrect standard.

The main reason for the confusion in the caselaw is that discerning the correct standard takes some digging. One starts with *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 592 (1993), which directs that "the trial judge must determine at the outset, pursuant to Rule 104(a)," whether Rule 702's requirements are met. Rule 104(a) merely says that it's the judge who decides whether evidence is admissible; that Rule doesn't say what standard of proof the judge should apply. For the latter, one must turn to *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), which directs that judges—in making admissibility determinations—should apply a preponderance-of-the-evidence standard. A lot of judges and litigants have had trouble connecting those dots. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that all the requirements of Rule 702 are met. This will not change the law at all but will clarify the Rule so that it is not misapplied so often.

The second issue to be addressed was the problem of overstatement—especially with respect to forensic expert testimony in criminal cases. That is, experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. All members of the Advisory Committee agreed that this was a problem, but they were sharply divided over whether an amendment was necessary to address it. The criminal defense bar felt strongly that the problem should be addressed by adding a new subsection to the rule explicitly prohibiting this kind of overstatement. The DOJ and some other committee members felt strongly that there should not be such an amendment; they argued that the problem with overstatement was poor lawyering. These members argued that Rule 702 already

provides the defense attorney with the grounds for objecting to, and the court with the basis for excluding, overstatements. Ultimately, an approach proposed by a judge member of the Standing Committee garnered support from all members of the Advisory Committee. That approach entails making a modest change to existing subsection (d) that is designed to help focus judges and parties on whether the opinion being expressed by an expert is overstated.

A judge member praised the proposed amendments to Rule 702 as beneficial and thoughtful. No other members had any comments on this proposal.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 702.**

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on April 8, 2021. The Advisory Committee presented twelve action items (two of which were presented together); in addition, it listed in the agenda book four information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 252.

Action Items

Final Approval of Restyled Rules Parts I and II. Professor Bartell introduced these restyled rules, Part I, or the 1000 series of Bankruptcy Rules, and Part II, the 2000 series of the Rules. The Advisory Committee had received extensive and very helpful comments on these revisions from the National Bankruptcy Conference. The Advisory Committee's responses to those comments are catalogued in the agenda book. The style consultants worked alongside the reporters and the subcommittee leading this project. Although the Advisory Committee was submitting these first two parts of the restyled rules for final approval, they asked that the Standing Committee not transmit them to the Judicial Conference at this time but instead wait until all the restyled Bankruptcy Rules have gone through the public comment process and can be submitted as a group. In addition, the Restyled Rules Parts I and II will need to be updated to account for amendments that have been made to those rules since the restyling process began, and the style consultants plan to conduct a final "top-to-bottom review" of all the Restyled Rules after the final comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the restyled Parts I and II for approval by the Judicial Conference** but not to transmit them to the Judicial Conference immediately.

Final Approval of Proposed Amendments Implementing the Small Business Reorganization Act of 2019 (SBRA or Act). Professor Gibson explained that after the SBRA was passed, the Advisory Committee promulgated interim rules to deal with several changes made to the Bankruptcy Code by the SBRA. The interim rules took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. The interim rules were published for comment last summer, along with the SBRA form amendments, as proposed final rules. There were no

comments. The Advisory Committee recommended final approval of the SBRA amendments and new Rule.

Professor Gibson noted that one of the affected Rules, Rule 1020, had also been amended on an interim basis to reflect certain statutory definitions that applied under the CARES Act. However, the version of Rule 1020 being submitted for final approval is the pre–CARES Act version. This is appropriate, Professor Gibson explained, because the relevant CARES Act statutory definitions are on track to expire by the time the SBRA amendments go into effect (the Advisory Committee will monitor for any extension of the sunset date for the relevant CARES Act provisions). Professor Struve complimented the members of the Advisory Committee, its reporters, and Judge Dow for their excellent work on these rules and on many others, often on short notice, over the past year.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the SBRA Rules—amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, and 3019, and new Rule 3017.2—for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3002(c)(6) (Filing Proof of Claim or Interest). Judge Dow explained that the proposed amendment to Rule 3002(c)(6) clarified and made uniform for domestic and international creditors the standard for extensions of time to file proofs of claim. No comments had been received on the proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 3002(c)(6) for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Judge Dow explained that this rule concerned filing and transmittal of papers to the United States trustee. The proposed amendments would permit transmittal to the United States trustee by filing with the court's electronic-filing system, and would eliminate the verification requirement for the proof of transmittal required for papers transmitted other than electronically. The United States trustee had been consulted during the drafting of the proposed amendment and consented to it. The only public comment on the proposal concerned some typographical issues, which had been corrected.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 5005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on officers or agents by use of their titles rather than their names. No public comments were submitted on the proposed amendment. Before giving final approval to the proposed amendment, the Advisory Committee had deleted a comma from the proposed rule text and, in the committee note, changed the word "Agent" to "Agent for Receiving Service of Process."

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 7004 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 8023 (Voluntary Dismissal). The proposed amendments would conform Rule 8023 to pending amendments to Appellate Rule 42(b). The amendments clarify that a court order is required for any action other than a simple voluntary dismissal of an appeal. No public comments were submitted on the proposed amendments, and the Advisory Committee had approved them as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 8023 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Official Form 122B (Chapter 11 Statement of Current Monthly Income). Judge Dow explained that this Form (which is used by a debtor in an individual Chapter 11 proceeding to provide information for the calculation of current monthly income) instructed that "an individual . . . filing for bankruptcy under Chapter 11" must fill out the form. The issue was that individuals filing under subchapter V of Chapter 11 do not need to make the calculation that Form 122B facilitates. The amendment therefore added "(other than under subchapter V)" to the end of the above-quoted instruction. No comments were submitted and the Advisory Committee approved the amendment as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Official Form 122B for approval by the Judicial Conference.**

Publication of Restyled Rules Parts III (3000 series), IV (4000 series), V (5000 series), and VI (6000 series). Professor Bartell expressed great satisfaction with the productive process of restyling the rules. These four parts are ready to go out for public comment. Unlike the procedure with Parts I and II, these proposed restyled rules would be accompanied by committee notes. The publication package would also include the committee note to Rule 1001 (which explains the restyling process and its goals). The Advisory Committee anticipates that the remaining three parts will be ready for public comment a year from now.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the restyled versions of Parts III, IV, V, and VI of the Bankruptcy Rules.**

Publication of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim). Judge Dow introduced the proposed amendments to Rule 3002.1, which would substantially revise the existing rule. The rule addresses notices concerning claims

secured by a debtor's principal residence (such as notices of payment changes for mortgages), charges and expenses incurred in the course of the bankruptcy proceeding with respect to such claims, and the status of efforts to cure arrearages. The proposed amendments were suggested by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy.

Professor Gibson explained that this is an important rule intended to deal with the situation of debtors filing Chapter 13 cases in order to save their homes. Often, these debtors would continue to make their monthly payments under the plan but then find out at the end of their bankruptcy case that they were behind on their mortgage either because they had not gotten accurate information about changes in the payment amount or because fees or other charges had been assessed without their knowledge. The purpose of the rule was to ensure that the trustee and debtor have the information they need to cure arrearages and stay up to date on the mortgage over the life of the plan.

Stylistic changes were made throughout the rule, and there were notable substantive changes. The amendments make two important changes in Rule 3002.1(b) (which deals with notices of changes in payment amount). New Rule 3002.1(b)(2) provides that if the notice of a mortgage payment increase is late, then the increase does not take effect until the debtor has at least 21 days' notice. New Rule 3002.1(b)(3) addresses home equity lines of credit. Dealing with notice of payment changes for HELOCs poses challenges because the payments may change by small amounts relatively frequently. New Rule 3002.1(b)(3) requires an annual notice of any over- or underpayment on a HELOC during the prior year (and an additional notice if the HELOC payment amount changes by more than $10 in a given month). Rule 3002.1(e) currently gives the debtor up to a year (after notice of postpetition fees and charges) in which to object. The amendment to Rule 3002.1(e) would authorize the court to shorten that one-year period (as might be appropriate toward the end of a Chapter 13 case). Proposed new Rule 3002.1(f) provides for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The existing procedure used at the end of the case would be replaced with a motion-based procedure, under new Rule 3002.1(g), that would result in a binding order from the court (under new Rule 3002.1(h)) on the mortgage claim's status. Five new Official Bankruptcy Forms have been developed for use by the debtor, trustee, and mortgage claim creditor in complying with the provisions of the rule.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 3002.1, and new Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, 410C13-10R.**

Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). This is the document filed by an individual to start a bankruptcy proceeding. Judge Dow explained that Official Form 101 requires the debtor to provide certain information, including, for the purpose of identification, names under which the debtor has done business in the past eight years. Judge Dow said that in answering that question, some debtors also reported the names of separate businesses such as corporations or LLCs in which they had some financial interest. The proposed amendment clarifies that legal entities separate from the debtor should not be listed.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Official Form 101.**

Publication of Proposed Amendments to Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)). Judge Dow explained that the 309 forms are a series of forms used in different cases and by different kinds of debtors and entities; the forms provide notice of the filing of a bankruptcy case and of certain deadlines in the case. Two versions of the form, 309E1 and 309E2, are used in chapter 11 cases filed by individuals. The Advisory Committee received a suggestion from two bankruptcy judges noting that these two forms did not clearly distinguish the deadlines for objecting to the debtor's discharge and for objecting to the dischargeability of a particular claim. The proposed amendments reorganized the two forms' graphical structure as well as some of the language addressing the different deadlines.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendments to Official Forms 309E1 and 309E2.**

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on April 23, 2021. The Advisory Committee presented two action items. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 642.

Action Items

Final Approval of Proposed Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g). Judge Dow introduced these new supplemental rules. The Advisory Committee received some public comments but not many. Two witnesses testified at a public hearing in January. The Advisory Committee was nearly unanimous in supporting these proposed rules. One member (the DOJ) opposed the proposed rules, but conceded that the rules were fair, reasonable, and balanced. Another member abstained (having been absent for the relevant discussion). All other members were strongly in favor. Judge Sara Lioi had done great work in chairing the subcommittee that prepared the proposed rules.

One obvious concern that has been raised about these rules has been that rules promulgated under the Rules Enabling Act process are ordinarily trans-substantive, whereas these rules address a particular subject area. A related concern was that any departure from trans-substantivity would make it harder to oppose promulgating specialized rules for other types of cases.

Judge Dow expressed that he had personally been on the fence about the creation of these rules for some time but had come to support them for a few reasons. First, Social-Security review actions are atypical because they are essentially appeals based on an administrative record. Second,

there are a great many of these cases. Third, magistrate judges viewed the proposed rules very favorably, and—at least in Judge Dow's district—magistrate judges handle most of these cases. District judges in districts where there has been a high volume of Social Security Review Actions also supported the rules. Fourth, the proposed supplemental rules would be helpful to pro se litigants. They had been clearly written and were as streamlined as they could possibly be. Finally, some districts have good local rules in this area, but many do not, and those districts without such rules would benefit from a fair, balanced, and comprehensible set of rules.

Professor Cooper summarized the changes that had been made in response to public comment. Supplemental Rule 2(b)(1)(A) now requires the complaint to include not the last four digits of the Social Security number but instead "any identifying designation provided by the Commissioner with the final decision"; a conforming change was made to the committee note. Supplemental Rule 6's language was clarified. The committee note now observes that the rules' scope encompasses instances where multiple people will share in an award from a claim based on one person's wage record.

Professor Cooper highlighted an issue concerning the drafting of Rule 3. That Rule dispenses with Civil Rule 4's provisions for service of summons and the complaint. Instead, the Rule mandates transmittal of a notice of electronic filing to the U.S. Attorney's Office for the relevant district and "to the appropriate office within the Social Security Administrations' Office of General Counsel." The quoted language was crafted by the Social Security Administration. It will be applied by the district clerk, who will know which office is the "appropriate office."

Professor Cooper observed that this project was originally proposed by the Administrative Conference of the United States and was supported by the Social Security Administration. The supplemental rules as now presented for final approval are greatly pared down compared with prior drafts. They are designed to serve public, not private, interests. As to the concern that private interests might in future invoke this example as support for the adoption of further substance-specific rules—Professor Cooper conceded that this was not a phantom concern. But, he suggested, the rulemaking process could withstand any incremental weakening of the trans-substantivity norm that might result from the adoption of these rules.

Professor Coquillette complimented the Advisory Committee on its work on these rules, which he saw as the rare appropriate exception to the general principle of trans-substantivity in the rules. He suggested that departure from that principle was justified here for three reasons: (1) the rules are set out as a separate set of supplemental rules; (2) the rules address matters of significant public interest and will assist pro se litigants; and (3) the rules were crafted with significant input from the Social Security Administration. Judge Bates also expressed support for the proposed new rules. He had chaired the Advisory Committee throughout much of the process. Judge Bates suggested that the committee note, on page 686 at lines 93-94, be updated to reflect the change in the proposed text of Supplemental Rule 6 (from "after the court disposes of all motions" to "after entry of an order disposing of the last remaining motion"). Professor Cooper endorsed the change.

A judge member expressed some concern that the supplemental rules might limit judges' ability to handle matters on a case-by-case basis. This judge thought that magistrate judges in particular liked being able to handle pro se cases, for example, in somewhat different ways. The

judge recognized, however, that constraining the discretion of judges and increasing consistency were, in many ways, the goals of the new supplemental rules. The judge thought the benefits did probably outweigh the costs. The judge then raised a few additional points, addressed below. The discussion has been reorganized here for clarity.

First, the judge asked whether the committee note language at page 685 lines 60-61 ("Notice to the Commissioner is sent to the appropriate regional office") should mirror the language in Supplemental Rule 3 itself (referencing notice being sent "to the appropriate office within the Social Security Administration's Office of General Counsel"). Judge Bates asked if deleting the word "regional" would be enough, and the judge indicated that this would be an improvement. It was agreed upon.

Additionally, the judge pointed out, electronic notice often raises troublesome technical issues (to what email is the notice sent? Can it be opened more than once?). The judge expressed the expectation that such issues would be resolved by the technical system designer and thus need not concern the Standing Committee.

Concerning Supplemental Rule 2(b)(1)(A), the judge was worried that no one would know what "any identifying designation provided by the Commissioner" referred to. He acknowledged that this formulation was preferable to requiring inclusion of parts of social security numbers. But it would be better to say specifically what the new identifier would be—maybe through a technical amendment in the near future—than to risk confusing litigants, particularly pro se litigants. Professor Struve thought that the idea of this language was to remain flexible and accommodating to the extent that practices change. She asked whether it would make sense to say something like "including any designation identified by the Commissioner in the final decision as a Rule 2(b)(1)(A) identifier." This would put the onus on the Commissioner to highlight the identifier, which would help pro se litigants. Professor Cooper pointed out that the Appeals Council, not the Commissioner, would be putting out the final decision. This was why the language used was "provided by the Commissioner." Later, Judge Dow expressed that he could not think of a better way of phrasing this and that the current language was the best of the options considered throughout the process. Judge Dow pointed out that if the rule was approved, the Commission would know that this was their opportunity to work out an identifying designation. Everyone knew that this was a problem that needed to be solved. Judge Dow wondered whether the language in that subparagraph could be developed along with the Commission and whether there could be flexibility to change the phrasing going forward. Judge Bates thought it would be difficult to keep the language flexible after the Standing Committee gave final approval and after the proposed rules were sent on to the Judicial Conference, Supreme Court, and Congress.

Finally, the same judge member pointed out that since the statute provides for venue not only in the judicial district in which the plaintiff resides, but also the judicial district where the plaintiff has a principal place of business, it seems odd that subparagraph 2(b)(1)(B) only asks about residence. Professor Cooper wanted to take time to confirm this venue point and to make sure it had not intentionally been left unmentioned for a particular reason. Professor Cooper proposed taking the rule as it was for now with the understanding that if a principal place of business was indeed relevant for the kinds of individual claims encompassed by the supplemental rules then it would be added to subparagraph 2(b)(1)(B). Professor Marcus added that

subparagraph 2(b)(1)(B) was only about what the complaint must state. That would not control venue so long as a statutory permission for venue existed elsewhere.

Another judge member raised a stylistic point regarding subparagraph 2(b)(1)(A), and suggested that the gerund "identifying" in line 8 sounded somewhat awkward. This judge also thought that subparagraph (A) was listing several things that a complaint must state and wondered whether it might be broken up into a few separate shorter subparagraphs. The judge had thought the rules committees were trying to move in the direction of breaking up lists into separate subheadings in this way. After some discussion it was decided that paragraph (b)(1) would read:

(1) The complaint must:
  (A) state that the action is brought under § 405(g);
  (B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;
  (C) state the name and the county of residence of the person for whom benefits are claimed;
  (D) name the person on whose wage record benefits are claimed; and
  (E) state the type of benefits claimed.

The judge who raised this point liked this suggestion and thought it helpfully provided a checklist for *pro se* litigants. A style consultant approved of this adjustment. Judge Dow agreed.

Judge Bates reviewed the changes that had been agreed upon. Supplemental Rule (2)(b)(1) would be reorganized as set out immediately above. Three changes would be made to the committee note: adjustments on page 685 at lines 51-52 to account for the revisions to subdivision (2)(b)(1); the deletion of the word "regional" on page 685 at line 61; and the change on page 686 at lines 93-94 identified by Judge Bates.

Upon motion, seconded by a member, and on a voice vote: **The Committee, with one member abstaining,[†] decided to recommend the proposed new Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) for approval by the Judicial Conference.**

Proposed Amendment to Rule 12(a)(4)(A) concerning time to file responsive pleadings. The proposed amendment would extend from fourteen days to sixty the presumptive time to serve a responsive pleading after a court decides or postpones a disposition on a Rule 12 motion in cases brought against a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Judge Dow explained that the DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to consult between local U.S. Attorney offices and main Justice or the Solicitor General.

Two major concerns had been raised at the Advisory Committee's April meeting. First, some thought the amendment might be overbroad and should be limited only to cases involving immunity defenses. Second, there was concern over whether the time period was too long. As

[†] Ms. Shapiro explained that the DOJ was abstaining for the reasons it had previously expressed.

Judge Dow saw it there were three types of cases. In some, it would be prejudicial to the plaintiff to extend the deadline because expedition is important. In others, the DOJ genuinely needs more time to decide whether to appeal. And sometimes the timing of the answer does not matter because discovery or settlement is proceeding regardless. Judge Dow said that he was persuaded during discussion that there are a lot more cases in the second category than in the first. If the default remained at fourteen days, there would be many motions by the government seeking extensions whereas if the default were sixty there would only be a few motions by plaintiffs seeking to expedite. Judge Dow noted that there had been a motion in the Advisory Committee meeting to limit the extended response time to cases in which there was an immunity defense, but that motion had failed by a vote of 9 to 6. The Advisory Committee decided by a vote of 10 to 5 to give final approval to the proposed amendment as published.

Professor Cooper explained that the proposal's substance was the same as that in the DOJ's initial proposal. He agreed that the minutes of the discussion accurately reflect the extensive discussion at the Advisory Committee meeting. There was some discussion of whether a number between fourteen and sixty might be appropriate. Professor Cooper noted that in the type of case addressed by Civil Rule 12(a)(3) and by the proposed amendment (i.e., a case in which a U.S. officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf), Appellate Rule 4(a)(1)(B)(iv) provides all parties with 60 days to take a civil appeal. There is some logic, he suggested, to according the same number of days for responding to a pleading as for the alternative of taking an appeal.

A judge member was sympathetic to Judge Dow's view that a sixty-day default rule would promote efficiency, but this member wondered whether thirty days might be a better choice. A frequent criticism of our system, this member noted, is that litigation gets delayed. Professor Cooper stated that, while the issue of the number of days had come up at the Advisory Committee's meeting, it had not been discussed extensively. The government often moves for an extension under the current rule and often receives it. Professor Cooper recalled that a number of the judges participating in the Advisory Committee's discussion thought the 60-day period made sense. Judge Bates thought the judge member's suggestion was valuable. He said it was important, however, not to increase the likelihood that the government would file protective notices of appeal. He wanted to make sure the DOJ had time to actually decide representational issues and appeal issues.

Another judge member thought that the gap between sixty days for the government and fourteen for everyone else was too much. It would look grossly unfair to give the government more than four times as much time. (By comparison, the 60-day appeal time for cases involving the government was double the usual appeal time.) The government gets only forty-five days to move for rehearing and that is a more significant decision. Given that the number of days was not substantially discussed at the advisory committee level, this member asked what justification the government had given for needing 60 days. The member suggested that 30 days might be more appropriate, and noted that the government had been managing under the current rule by making motions when necessary.

This judge later noted that the government typically got extra time because of the Solicitor General process and that many states also have solicitors general. Professor Cooper noted that states had previously suggested that their solicitors general needed extra time, but those arguments

had been countered by concerns over delay, and questions about how to draw the line between state governments and other organizations with cumbersome processes. A practitioner member expressed uncertainty as to whether states' litigation processes are as centralized as the federal government's.

Still another judge member suggested that forty days might be more appropriate. Other parties, after the disposition or postponement of disposition of a motion, get fourteen days to answer, which is two-thirds of the twenty-one-day limit initially set for them by Civil Rule 12(a)(1)(A)(i). Forty days is two-thirds of the sixty-day limit initially set for the government by Civil Rules 12(a)(2) and (3). Keeping the ratio the same would be fair. Judge Dow noted that the Advisory Committee had focused on the immunities issue and might not have given enough thought to the number of days. The first judge member who had spoken on this issue thought that moving things along was a good idea across the board.

Judge Bybee asked how this integrated with the Westfall Act. If the government has already made its decision under the Westfall Act (whether the employee's actions were within the scope of employment), why would the government need extra time at this stage? Judge Bates responded that though the official-capacity decision would already have been made, the government would still need time to determine how to respond to the judicial determination on immunity. Judge Dow agreed that the government had reported that its need for time at this stage usually concerned whether to appeal a decision on immunity.

Another judge member raised concerns about the committee note. Even though the rule is not limited to situations where an immunity defense is raised, the committee note gives the impression of privileging not just the government as such but the official immunity defense in particular. This member suggested that the proposed rule really looked like preferential treatment that had not been fully vetted and may not have been warranted.

Ms. Shapiro spoke next. She had not gotten a definitive response from the DOJ during this conversation. She believed that the sixty-day period had been suggested because that is the time period for the United States to answer a complaint or take a civil appeal. The government has a unique bureaucracy, and careful deliberation, consultation, and decision-making can take time. With that said, the DOJ would prefer forty or forty-five days to no extension of the period.

Judge Bates noted that any number higher than fourteen would constitute special treatment for the United States. He was reluctant to see the Standing Committee vote on a number without the Advisory Committee having given the issue full consideration. Judge Dow said he would be happy for the proposal to be remanded to the Advisory Committee and to obtain more information from the DOJ on the question of length. By consensus, the matter was returned to the Advisory Committee for further consideration.

Judge Dow added that proposed amendments to Civil Rules 15 and 72 had been approved for publication at the January meeting of the Standing Committee but that they had been held back from public comment until another more significant amendment or set of amendments was moving forward. Judge Bates agreed that now was the time to send them out for public comment alongside proposed new Civil Rule 87, the proposed emergency rule.

Information Items

Professor Marcus updated the Committee on two items. The agenda materials noted that the Discovery Subcommittee was considering possible rule amendments concerning privilege logs. With the help of the Rules Committee Support Office, an invitation for comments on this topic had been posted. Second, the Multidistrict Litigation Subcommittee was interested in a collection of issues regarding settlement review, appointment of leadership counsel, and common benefit funds. Yesterday, a thorough order on common benefit funds had been entered in the Roundup MDL, which Professor Marcus anticipated might raise the profile of this issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met via videoconference on May 11, 2021. The Advisory Committee presented one action item. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 747.

Action Item

Final Approval of Proposed Amendment to Rule 16 (Discovery and Inspection). Judge Kethledge introduced this proposed amendment, which clarifies the scope and timing of the parties' obligations to disclose expert testimony that they plan to use at trial. He explained that Criminal Rule 16 is a rule regularly on the Advisory Committee's agenda. The proposed amendment here reflected a delicate compromise supported by both the DOJ and the defense bar. Judge Kethledge thanked both groups and in particular singled out the DOJ representatives, Mr. Wroblewski, Mr. Goldsmith, and Ms. Shapiro, who had worked in such good faith on this amendment.

The Advisory Committee received six public comments. All were supportive of the concept of the proposal and all made suggestions directed at points that the Advisory Committee had carefully considered before publication. In the end, it was not persuaded by the suggestions, and some of the suggestions would upset the delicate compromise that had been worked out.

Since the proposed amendment was last presented to the Standing Committee, the Advisory Committee had made some clarifying changes. Professor King summarized these changes and they are explained in more detail at pages 753-54 of the agenda book. Professor Beale called the Standing Committee's attention to an additional administrative error on page 769 of the agenda book. The sentence spanning lines 219–21 ("The term 'publications' does not include internal government documents.") had not been accepted by the Advisory Committee. It therefore should not have appeared in the agenda book.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 16 for approval by the Judicial Conference**, with the sole change of the removal of the committee-note sentence identified by Professor Beale.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on April 7, 2021. The Advisory Committee presented three action items and one information item, and listed five additional information items in the agenda book. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 180.

Action Items

Final Approval of Proposed Amendment to Rule 25 (Filing and Service) concerning the Railroad Retirement Act. Judge Bybee presented a proposed amendment to Rule 25, which he described as a minor amendment that would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 25 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Bybee noted that this proposed amendment had last been before the Committee in June 2020. Rule 42 deals with voluntary dismissals of appeals. At its June 2020 meeting, the Committee queried how the proposed amendment[‡] might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 42 for approval by the Judicial Conference.**

Publication of Proposed Consolidation of Rule 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Bybee introduced this final action item. The proposal, on which the Advisory Committee had been working for some time, entailed comprehensive revision of two related rules. The Advisory Committee understood that there had been some confusion

[‡] The proposed amendment clarifies the language of Rule 42, including by restoring the pre-restyling requirement that the court of appeals "must" dismiss an appeal if all parties agree to the dismissal.

among practitioners in the courts of appeals as to how and when to seek panel rehearing and rehearing en banc. Procedures for these different types of rehearing were laid out in two different rules. The Advisory Committee was proposing to consolidate the practices into a single rule. This would involve abrogating Rule 35, currently the en banc rule, and folding it into a new Rule 40 addressing both petitions for rehearing and petitions for rehearing en banc. This would improve clarity and would particularly help pro se litigants. It would also clarify that rehearing en banc is not the preferred way of proceeding. This consolidation would not involve major substantive changes, with the exception that new Rule 40(d)(1) would clarify the deadline to petition for rehearing after a panel amends its decision. A new Rule 40(f) would also make clear that a petition for rehearing en banc does not limit the authority of the original three-judge panel to amend or order additional briefing. Conforming changes in other Appellate Rules were proposed alongside this change.

A practitioner member expressed support for the idea of combining Rules 35 and 40, and predicted that this would make the rules much more user-friendly. This member had two questions about the proposal. The first question was about an apparent inconsistency between two provisions carried over from the existing rules. In subparagraph (b)(2)(A), on page 217, the new rule stated that petitions for rehearing en banc must (as one of two alternative statements) state that the full court's consideration is "necessary to secure and maintain uniformity of the court's decisions." Subdivision (c), however, on page 218, said that the court ordinarily would not order rehearing en banc unless (as one of two alternatives) en banc consideration was "necessary to secure or maintain uniformity of the court's decisions." The member recognized that the difference in wording had been carried over from the existing rules, but suggested that, for the sake of consistency, both provisions should use the word "or." Judge Bates agreed and had been prepared to say the same thing.

The practitioner member's second question related to the existing history (i.e., prior committee notes) concerning Rule 35. When a rule is abrogated, the former rule's history is no longer readily available. Here, Rule 35 would be transferred rather than abrogated. The historical evolution of Rule 35 would remain relevant to the new Rule 40. Professor Hartnett noted that the committee notes for now-abrogated Civil Rule 84 are all readily available on the internet (at https://www.law.cornell.edu/rules/frcp/rule_84). Professor Capra recalled that, in 1997, Evidence Rules 803(24) and 804(b)(5) had been folded into Evidence Rule 807. He pointed out that, if you pull up Rule 804, it says that Rule 804(b)(5) was "[t]ransferred to Rule 807." Professor Capra stated that, in all the publications he was aware of, the legislative history of Rule 804(b)(5) is still there. Using a word like "transferred" might cue publishers that the former rule still existed and mattered. Later, another judge member looked at a Thomson-Reuters publication on hand in chambers and noted that it did include prior history even for transferred or abrogated rules. This member agreed that "transferred" would be a better term than "abrogated." Noting that the 1997 committee note to Evidence Rule 804(b)(5) explains why that provision was transferred to Rule 807, this member suggested that similar note language would be helpful to explain why Rule 35's contents were transferred to Rule 40. Professor Coquillette later stated that the Moore's Federal Practice treatise keeps the rules history in place, and Professor Marcus said that the Wright & Miller treatise does so as well.

Judge Bates asked whether the new, combined Rule 40 could not be titled simply "Petitions for Panel or En Banc Review" rather than (as in the current proposal) "Petition for Panel Rehearing; En Banc Determination." Professor Struve noted that the rule also covered initial hearings en banc. Judge Bates suggested "Petitions for Panel or En Banc Rehearing or for Initial Hearing En Banc."

A judge member who had worked with the subcommittee that developed this proposal liked the idea of saying "transferred" rather than "abrogated." This judge had two other comments. First, this judge thought it would be better to change "or" to "and" on page 218 (subdivision (c)(1)) to accord with the "and" on page 217 (subdivision (b)(2)(A)); the "and" in (b)(2)(A), this member noted, was carried forward from current Rule 35(b)(1)(A). Second, the title of the proposed new rule had been discussed extensively at many subcommittee meetings. The reason for the current title was that a litigant could still file a petition for only panel rehearing. The title the subcommittee settled on was intended to emphasize that these are different and separate types of petitions.

Professor Bartell pointed out that the text of proposed Rule 40 omitted existing Rule 35(a)'s authorization for a court of appeals on its own initiative to order initial hearing en banc. Judge Bybee and the judge member who had worked on the subcommittee both agreed that the Advisory Committee had not intended to take that out of the rule. The judge member suggested that a potential fix might include inserting the words "hear[] or" before "rehear[]" at appropriate places in proposed Rule 40(c).

Another judge member, weighing in on the "and" versus "or" discussion (concerning subdivisions (b)(2)(A) and (c)(1)) favored using "or" in both places because securing and maintaining are not the same thing. This member also asked whether paragraph (c)(1) ought to reference conflict with a decision of the Supreme Court as a basis on which the court might grant rehearing en banc since subparagraph (b)(2)(A) identifies this as one reason why a party might appropriately seek rehearing en banc. Professor Hartnett noted that the committee was trying to combine rules without changing much substance, and the same issue existed with respect to the current rule. He surmised that the current rule may have been drafted this way on the theory that it is very easy for a party who lost in the Court of Appeals to say that the decision is inconsistent with a Supreme Court decision. Judge Bates agreed it was strange for the rule to reference inconsistency with the Supreme Court in one place and not the other.

The same judge member also asked about the provision of subdivision (g) stating that a "petition [for initial hearing en banc] must be filed no later than the date when the appellee's brief is due." The judge understood that this might have been a carryover from the existing rule, and expressed uncertainty as to whether the scope of the current project extended to considering a change to this feature. Nonetheless, this member suggested, this due date seemed to fall very late in the process. Professor Hartnett agreed that this was a carryover from the existing rule.

Another judge member thought that although the Advisory Committee had not been focusing on the "legacy" rule language so much as on how to combine the rules, this was nonetheless a good opportunity to clean up the language of the rules. This judge pointed to a syntactical ambiguity in subparagraph (b)(2)(A). As a matter of syntax, it is not clear whether the statement that "the full court's consideration is therefore necessary to secure and maintain

uniformity of the court's decisions" must be included *both* in petitions identifying an intra-circuit conflict *and* in petitions identifying a conflict with a Supreme Court decision. Logically that statement should be required only where the petition relies on an intra-circuit conflict. Moreover, when the petition relies on an intra-circuit conflict, the clause about securing and maintaining uniformity is redundant because if there is an intra-circuit conflict then rehearing is always necessary to secure and maintain uniformity. It might be worth considering deleting or revising the clause about securing and maintaining uniformity.

Judge Bates asked whether the number of comments that had been put forward suggested that the proposed amendments ought to go back to the committee. Judge Bybee and Professor Hartnett noted that the Advisory Committee had specifically tried to consolidate the two rules without otherwise altering their content. Given the feedback from members of the Standing Committee that some of that existing content should be reconsidered, the Advisory Committee would welcome the opportunity to reconsider the proposal with that new goal in mind. Judge Bates observed that the Advisory Committee, in doing so, need not feel obliged to overhaul the entirety of the rules' substance, but also should not feel constrained to retain existing features that seem undesirable. By consensus, the proposal was remanded to the Advisory Committee.

Information Item

Amicus Disclosures. Judge Bybee invited input from the Standing Committee on the amicus-disclosure issue described in the agenda book beginning at page 193 (noting the introduction of proposed legislation that would institute a registration and disclosure system for amici curiae). A subcommittee of the Advisory Committee had been formed and would welcome any input from the Standing Committee on the issue. Judge Bates encouraged members of the Standing Committee with thoughts to reach out to Judge Bybee or Professor Hartnett.

OTHER COMMITTEE BUSINESS

Julie Wilson delivered a legislative report. The chart in the agenda book at page 864 summarized most of the relevant information, but there had been a few developments since the book was published. First, the Sunshine in the Courtroom Act of 2021 had been scheduled for markup later in the week. It would permit broadcasting of any court proceeding. This would conflict with Criminal Rule 53 and its prohibition on broadcasting and photographing criminal proceedings. The Director of the Administrative Office expressed opposition to the bill in her capacity as Secretary to the Judicial Conference. Second, the Juneteenth National Independence Day Act was enacted late last week. Technical amendments to time-counting rules would be required to account for this new federal holiday. Third, a prior version of the Justice in Forensic Algorithms Act of 2021, which was included on the chart, would have directly amended the Criminal Rules and would have added two new Evidence Rules. The latest version of the Act had dropped those provisions. However, if passed, Evidence Rule 702 would be affected. Professor Capra was aware of the Act and the Rules Committee Staff will continue to monitor.

Bridget Healy summarized the Standing Committee's strategic planning initiatives. Tab 8B in the agenda book contains a brief summary of the Judicial Conference's Strategic Plan for the Federal Judiciary, a list of the Standing Committee's initiatives, and a status report on each

initiative. A new initiative concerning the emergency rules had been added. Committee members were asked for any comments regarding the strategic initiatives and to submit any suggestions for long-range planning issues.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their patience and attention. The Committee will next meet on January 4, 2022. Judge Bates expressed the hope that the meeting would take place in person in Miami, Florida.

TAB 1D

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 6-7

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and .... pp. 9-13

   b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 13-14

3. Approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 18-21

4. Approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 23-25

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 22, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

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

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Acting Chief Counsel, Rules Committee Staff; Bridget Healy and Scott Myers, Rules Committee Staff

Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC).

Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco.

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also discussed the advisory committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). Additionally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic and discussed an action item regarding judiciary strategic planning.

EMERGENCY RULES[1]

Section 15002(b)(6) of the CARES Act directs the Judicial Conference and the Supreme Court to consider rule amendments that address emergency measures that may be taken by the courts when the President declares a national emergency. The advisory committees immediately began to review their respective rules last spring in response to this directive and sought input from the bench, bar, and public organizations to help evaluate the need for rules to address emergency conditions. At its January 2021 meeting, the Standing Committee reviewed draft rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response

[1] The proposed rules and forms amendments approved for publication, including the proposed emergency rules, will be published no later than August 15, 2021 and available on the Proposed Amendments Published for Public Comment page on uscourts.gov.

to that directive. The Evidence Rules Committee concluded that there is no need for an emergency evidence rule.

In their initial review, the advisory committees concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to developing emergency rules that are uniform to the extent reasonably practicable given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. At its January 2021 meeting, the Standing Committee encouraged the advisory committees to continue seeking uniformity and made a number of suggestions to further that end. Since that meeting, the advisory committees have made progress toward this goal in a number of important respects including: (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

The advisory committees' proposals initially diverged significantly on the question of who could declare a rules emergency. Each rule gave authority to the Judicial Conference to do so, but some of the draft emergency rules also allowed certain courts and judges to make the declaration. In light of feedback received from the Committee at its January meeting, all of the

proposed rules now provide the Judicial Conference with the sole authority to declare a rules emergency.

The basic definition of what constitutes a "rules emergency" is now uniform across all four emergency rules. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."

Proposed new Criminal Rule 62 (Criminal Rules Emergency) additionally requires that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The other advisory committees saw no reason to impose this extra requirement in their own emergency rules given the strict standards set forth in the basic definition. The Committee approved divergence in this instance given the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

The proposed bankruptcy, civil, and criminal emergency rules all allow the Judicial Conference to activate some or all of a predetermined set of emergency rules when a rules emergency has been declared. But the language of proposed new Civil Rule 87 (Civil Rules Emergency) differs from the other two. Proposed new Rule 87 states that the declaration of emergency must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed bankruptcy and criminal emergency rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question. The Civil Rules Committee feared that authorizing the placement of "restrictions on" the emergency rule variations listed in Rule 87(c) could cause problems by suggesting that one of those emergency rules could be adopted subject to restrictions that might alter the functioning of that particular emergency rule. The Civil Rules Committee designed Rule 87 to authorize the Judicial Conference to adopt fewer than all of the emergency rules listed

in Rule 87(c), but not to authorize the Judicial Conference to place additional "restrictions on" the functioning of any specific emergency rule that it adopts. Emergency Rule 6(b)(2), in particular, is intricately crafted and must be adopted, or not, in toto. After discussion, the Committee supported publishing the rules with modestly divergent language on this point.

Each of the proposed emergency rules limits the term of the emergency declaration to 90 days. If the emergency is longer than 90 days, another declaration can be issued. Each rule also provides for termination of an emergency declaration when the rules emergency conditions no longer exist. Initially, there was disagreement about whether the rules should provide that the Judicial Conference "must" or "may" enter the termination order. This matter was discussed at the Committee's January meeting and referred back to the advisory committees. After further review, the advisory committees all agreed that the termination order should be discretionary.

While the four emergency rules are largely uniform with respect to the definition of a rules emergency, the declaration of the rules emergency, and the standard length of and procedure for early termination of a declaration, they exhibit some variations that flow from the particularities of a given rules set. For example, the Appellate Rules Committee concluded that existing Appellate Rule 2 (Suspension of Rules) already provides sufficient flexibility in a particular case to address emergency situations. Its proposed emergency rule – a new subdivision (b) to Rule 2 – expands that flexibility and allows a court of appeals to suspend most provisions of the Appellate Rules for all cases in all or part of a circuit when the Judicial Conference has declared a rules emergency. Proposed new Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) is primarily designed to allow for the extension of rules-based deadlines that cannot normally be extended. Proposed new Civil Rule 87 focuses on methods for service of process and deadlines for postjudgment motions. Proposed new Criminal Rule 62 would allow for specified departures from the existing rules with respect to public access to the courts,

methods of obtaining and verifying the defendant's signature or consent, the number of alternate jurors a court may impanel, and the uses of videoconferencing or teleconferencing in certain situations.

After making modest changes to the text and note of proposed Criminal Rule 62 and to the text of proposed Bankruptcy Rule 9038 and Civil Rule 87, the Standing Committee unanimously approved all of the proposed emergency rules for publication for public comment in August 2021. This schedule would put the emergency rules on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Rules 25 and 42.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(a)(5) concerning privacy protection was published for public comment in August 2020. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Rule 42 (Voluntary Dismissal)

The proposed amendment to Rule 42 was published for public comment in August 2019. At its June 2020 meeting, the Standing Committee queried how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Standing Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. These local rules take a variety of approaches such as requiring a personally signed statement from the defendant or a statement from counsel about the defendant's knowledge and consent. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 25 and 42 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that a proposed amendment to Rule 2 be published for public comment in August 2021. The Advisory Committee also recommended for publication a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to be published with the emergency rules proposals. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 4(a)(4)(A) provides that a motion listed in the rule and filed "within the time allowed by" the Civil Rules re-sets the time to appeal a judgment in a civil case; specifically, it

re-sets the appeal time to run "from the entry of the order disposing of the last such remaining motion." The Civil Rules set a 28-day deadline for filing most of the motions listed in Rule 4(a)(4)(A), *see* Civil Rules 50(b), 52(b), and 59, but the deadline for a Civil Rule 60(b) motion varies depending on the motion's grounds. *See* Civil Rule 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). For this reason, Appellate Rule 4(a)(4)(A)(vi) does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those filed no later than 28 days after entry of judgment – a limit that matches the 28-day time period applicable to most of the other post-judgment motions listed in Appellate Rule 4(a)(4)(A).

Civil Rule 6(b)(2) prohibits extensions of the deadlines for motions "under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Proposed Emergency Civil Rule 6(b)(2) would lift this prohibition, creating the possibility that (during an emergency) a district court might extend the 28-day deadline for, inter alia, motions under Civil Rule 59. In that event, a Rule 59 motion could have re-setting effect even if filed more than 28 days after the entry of judgment – but if Appellate Rule 4(a)(4)(A) were to retain its current wording, a Rule 60(b) motion would have re-setting effect only if filed within 28 days after entry of judgment. Such a disjuncture would be undesirable, both because it could require courts to discern what is a Rule 59 motion and what is instead a Rule 60(b) motion, and because parties might be uncertain as to how the court would later categorize such a motion. To avoid this disjuncture and retain Rule 4(a)(4)(A)'s currently parallel treatment of both types of re-setting motions, the proposed amendment would revise Rule 4(a)(4)(A)(vi) by replacing the phrase "no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59." The proposed amendment would not make any change to the operation of Rule 4 in non-emergency situations.

Information Items

The Advisory Committee met by videoconference on April 7, 2021. In addition to the matters discussed above, agenda items included: (1) two suggestions related to Rule 29 (Brief of an Amicus Curiae), including study of potential standards for when an amicus brief triggers disqualification and a review of the disclosure requirements for organizations that file amicus briefs; (2) a suggestion regarding the criteria for granting in forma pauperis status and the disclosures directed by Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis); (3) a suggestion to revise Rule 4(a)(2)'s treatment of premature notices of appeal; and (4) the continued review of whether the time-counting rules' presumptive deadline for electronic filings should be moved earlier than midnight.

The Advisory Committee will reconsider proposed amendments it had approved for publication that would abrogate Rule 35 (En Banc Determination) and amend Rule 40 (Petition for Panel Rehearing) so as to consolidate in one amended Rule 40 all the provisions governing en banc hearing and rehearing and panel rehearing. The Advisory Committee, in crafting that proposal, had sought to accomplish this consolidation without altering the current substance of Rule 35. Discussion in the Standing Committee brought to light questions about how to implement the proposed consolidation as well as suggestions that additional aspects of current Rule 35 be scrutinized. Accordingly, the Standing Committee re-committed the proposal to the Advisory Committee for further consideration.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended the following for final approval: (1) Restyled Parts I and II of the Bankruptcy Rules; (2) proposed amendments to 12 rules, and a proposed new rule, in response to the Small Business Reorganization Act of 2019

(SBRA), Pub. L. 116-54, 133 Stat. 1079 (Aug. 26, 2019), (Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, and new Rule 3017.2); (3) proposed amendments to four additional rules (Rules 3002(c)(6), 5005, 7004, and 8023); and (4) a proposed amendment to Official Form 122B in response to the SBRA. The proposed amendments were published for public comment in August 2020. As to all of these proposed amendments other than the Restyled Parts I and II of the Bankruptcy Rules, the Advisory Committee sought transmission to the Judicial Conference; the Restyled Rules, as noted below, will be held for later transmission.

Restyled Rules Parts I and II

Parts I and II of the Restyled Rules (the 1000 and 2000 series) received extensive comments. Many of the comments addressed specific word choices, and changes responding to those comments were incorporated into the versions that the Advisory Committee recommended for final approval. The Advisory Committee rejected other suggestions. For example, the National Bankruptcy Conference (NBC) objected to capitalizing of the words "Title," "Chapter," and "Subchapter" because those terms are not capitalized in the Bankruptcy Code. The Advisory Committee concluded that this change was purely stylistic and deferred to the Standing Committee's style consultants in retaining capitalization of those terms. The NBC also suggested that the Restyled Rules add a "specific rule of interpretation" or be accompanied by "a declarative statement in the Supreme Court order adopting the new rules" that would assert that the restyling process was not intended to make substantive changes, and that the Restyled Rules must be interpreted consistently with the current rules. The Advisory Committee disagreed with this suggestion and noted that none of the four prior restyling projects (Appellate, Civil, Criminal, and Evidence) included such a statement in the text of a rule or promulgating order. As was done in the prior restyling projects, the Advisory Committee has included a general committee note describing the restyling process. The note also emphasizes that restyling is not

intended to make substantive changes to the rules. Moreover, the committee note after each individual rule includes that following statement: "The language of Rule [ ] has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The Advisory Committee recommended that the Standing Committee approve the 1000 and 2000 series of Restyled Rules as submitted, but that it wait until the remainder of the Restyled Rules have been approved after publication in 2021 and 2022 before sending any of the rules to the Judicial Conference. The Advisory Committee anticipates a final review of the full set of Restyled Rules in 2023, after the upcoming publication periods end, to ensure that stylistic conventions are consistent throughout the full set, and to incorporate any non-styling changes that have been made to the rules while the restyling process has been ongoing. The Standing Committee agreed with this approach and approved the 1000 and 2000 series, subject to reconsideration once the Advisory Committee is ready to recommend approval and submission of the full set of Restyled Rules to the Judicial Conference in 2023.

The SBRA-related Rule Amendments

The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA-related form amendments.

The following rules were published for public comment:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits);
- Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors);
- Rule 2009 (Trustees for Estates When Joint Administration Ordered);

- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting);
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status);
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13);
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case);
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case or in a Case Under Subchapter V of Chapter 11);
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement);
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case); and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

No comments were submitted on these SBRA-related rule amendments, and the Advisory Committee approved the rules as published.

Rules 3002(c)(6), 5005, 7004, and 8023

Rule 3002(c)(6) (Filing Proof of Claim or Interest). The rule currently requires a court to apply different standards to a creditor request to extend the deadline to file a claim depending on whether the creditor's address is foreign or domestic. The proposed amendment would create a uniform standard. Regardless of whether a creditor's address is foreign or domestic, the court could grant an extension if it finds that the notice was insufficient under the circumstances to give that creditor a reasonable time to file a proof of claim. There were no comments, and the Advisory Committee approved the proposed amendment as published.

Rule 5005 (Filing and Transmittal of Papers). The proposed amendment would allow papers required to be transmitted to the United States trustee to be sent by filing with the court's electronic filing system, and would dispense with the requirement of proof of transmittal when the transmittal is made by that means. The amendment would also eliminate the requirement for

verification of the statement that provides proof of transmittal for papers transmitted other than through the court's electronic-filing system. The only comment submitted noted an error in the redlining of the published version, but it recognized that the committee note clarified the intended language. With that error corrected, the Advisory Committee approved the proposed amendment.

Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rules 7004(b)(3) or (h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. Although no comments were submitted, the Advisory Committee deleted a comma from the text of the proposed amendment and modified the committee note slightly by changing the word "Agent" to "Agent for Receiving Service of Process." The Advisory Committee approved the proposed amendment as revised.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to the pending proposed amendment to Appellate Rule 42(b) (discussed earlier in this report). The amendment would clarify, inter alia, that a court order is required for any action other than a simple voluntary dismissal of an appeal. No comments were submitted, and the Advisory Committee approved the proposed amendment as published.

SBRA-related Amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income)

When the SBRA went into effect on February 19, 2020, the Advisory Committee issued nine Official Bankruptcy Forms addressing the statutory changes. Unlike the SBRA-related rule amendments, the SBRA-related form amendments were issued by the Advisory Committee under its delegated authority to make conforming and technical amendments to the Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. Although the SBRA-related form amendments were

already final, they were published for comment along with the proposed rule amendments in order to ensure that the public had a thorough opportunity to review them. There were no comments and the Advisory Committee took no further action with respect to them.

In addition to the previously approved SBRA-related form amendments, a proposed amendment to Official Form 122B was published in order to correct an instruction embedded in the form. The instruction currently explains that the form is to be used by individuals filing for bankruptcy under Chapter 11. The form is not applicable under new subchapter V of chapter 11, however, so the instruction was modified as follows (new text emphasized): "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 *(other than under subchapter V)*." There were no comments and the Advisory Committee approved the form as published.

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

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Official Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to the Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules); Rule 3002.1; Official Form 101; Official Forms 309E1 and 309E2; and new Official Forms 410C13-1N,

410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R with a recommendation that they be published for public comment in August 2021. In addition, as discussed in the emergency rules section of this report, the Advisory Committee recommended approval for publication of proposed new Rule 9038 (Bankruptcy Rules Emergency). The Standing Committee unanimously approved the Advisory Committee's recommendations. The August 2021 publication package will also include proposed amendments to Rules 3011 and 8003, and Official Form 417A, which the Standing Committee approved for publication in January 2021 and which are discussed in the Standing Committee's March 2021 report.

Restyled Rules Parts III, IV, V, and VI

The Advisory Committee sought approval for publication of Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules). This is the second group of Restyled Rules recommended for publication. The first group of Restyled Rules, as noted above, received approval by the Standing Committee after publication and comment; and the Advisory Committee expects to present the final group of Restyled Rules for publication next year.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

The proposed amendment is intended to encourage a greater degree of compliance with the rule's provisions for determining the status of a mortgage claim at the end of a chapter 13 case. Notably, the existing notice procedure used at the end of the case would be replaced with a motion-based procedure that would result in a binding order from the court on the mortgage claim's status. The amended rule would also provide for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition

defaults that may have occurred. The amended rule includes proposed stylistic changes throughout.

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

Changes are made to lines 2 and 4 of the form to clarify that the requirement to report "other names you have used in the last 8 years … [including] *doing business as* names" is meant to elicit only names the debtor has personally used in doing business and not the names of separate entities such as an LLC or corporation in which the debtor may have a financial interest.

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

The proposed amendments to line 7 of Official Form 309E1 and line 8 of Official Form 309E2 clarify the distinction between the deadline for objecting to discharge and the deadline for seeking to have a debt excepted from discharge.

New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim)

The proposed amendment to Rule 3002.1 discussed above calls for the use of five new Official Forms. Subdivisions (f) and (g) of the amended rule would require the notices, motions, and responses that a chapter 13 trustee and a holder of a mortgage claim must file to conform to the appropriate Official Forms.

The first form – Official Form 410C13-1N – would be used by a trustee to provide the notice required by Rule 3002.1(f)(1). This notice is filed midway through a chapter 13 case (18-24 months after the petition was filed), and it requires the trustee to report on the status of

payments to cure any prepetition arrearages and, if the trustee makes the ongoing postpetition mortgage payments, the amount and date of the next payment.

Within 21 days after service of the trustee's notice, the holder of the mortgage claim must file a response using the second form – Official Form 410C13-1R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any prepetition arrearage, and it must also provide information about the status of ongoing postpetition mortgage payments.

The proposed third and fourth forms – Official Forms 410C13-10C and 410C13-10NC – would implement Rule 3002.1(g)(1). One is used if the trustee made the ongoing postpetition mortgage payments from the debtor's plan payment (as a conduit), and the other is used if those payments were made by the debtor directly to the holder of the mortgage claim (nonconduit). This motion is filed at the end of a chapter 13 case when the debtor has completed all plan payments, and it seeks a court order determining the status of the mortgage claim.

As required by Rule 3002.1(g)(2), the holder of the mortgage claim must respond to the trustee's motion within 28 days after service, using the final proposed form – Official Form 410C13-10R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any arrearages and the payment of any postpetition fees, expenses, and charges. It must also provide information about the status of ongoing postpetition mortgage payments.

Information Items

The Advisory Committee met by videoconference on April 8, 2021. In addition to the recommendations discussed above, the meeting covered a number of other matters, including a suggestion by 45 law professors to streamline turnover procedures in light of *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021).

In its January 2021 decision in *City of Chicago v. Fulton*, the Supreme Court held that a creditor who continues to hold estate property acquired prior to a bankruptcy filing does not violate the automatic stay under § 362(a)(3). *City of Chicago*, 141 S. Ct. at 592. In so ruling, the Court found that a contrary reading of § 362(a)(3) would render superfluous § 542(a)'s provisions for the turnover of estate property. *Id.* at 591. In a concurring opinion, Justice Sotomayor noted that current procedures for turnover proceedings "can be quite slow" because they must be pursued by an adversary proceeding. She stated, however, that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id.* at 595.

Acting on Justice Sotomayor's suggestion, 45 law professors submitted a suggestion that would allow turnover proceedings to be initiated by motion rather than adversary proceeding, and the National Bankruptcy Conference has submitted a suggestion supportive of the law professors' position. A subcommittee of the Advisory Committee has begun consideration of the suggestions and is gathering information about local rules and procedures that already allow for turnover of certain estate property by motion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The rules were published for public comment in August 2020.

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the

Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

The proposed supplemental rules are the result of four years of extensive study by the Advisory Committee, which included gathering additional data and information from the various stakeholders (claimant and government representatives, district judges, and magistrate judges) as well as feedback from the Standing Committee. As part of the process of developing possible rules, the Advisory Committee had to answer two overarching questions: first, whether rulemaking was the right approach (as opposed to model local rules or best practices); and, second, whether the benefits of having a set of supplemental rules specific to § 405(g) cases outweighed the departure from the usual presumption against promulgating rules applicable to only a particular type of case (i.e., the presumption of trans-substantivity). Ultimately, the Advisory Committee and the Standing Committee determined that the best way to address the lack of uniformity in § 405(g) cases is through rulemaking. While concerns about departing from the presumption of trans-substantivity are valid, those concerns are outweighed by the benefit of achieving national uniformity in these cases.

The proposed supplemental rules are narrow in scope, provide for simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of treating the actions as appeals to be decided on the briefs and the administrative record. Supplemental Rule 2 provides for commencing the action by filing a complaint, lists the elements that must be stated in the complaint, and permits the plaintiff to add a short and plain

statement of the grounds for relief. Supplemental Rule 3 directs the court to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate office of the Social Security Administration and to the U.S. Attorney for the district. Under Supplemental Rule 4, the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c).

Supplemental Rule 5 provides for decision on the parties' briefs, which must support assertions of fact by citations to particular parts of the record. Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for the plaintiff's reply brief.

The public comment period elicited a modest number of comments and two witnesses at a single public hearing. There is almost universal agreement that the proposed supplemental rules establish an effective and uniform procedure, and there is widespread support from district judges and the Federal Magistrate Judges Association. However, the DOJ opposed the supplemental rules primarily on trans-substantivity grounds, favoring instead the adoption of a model local rule.

The Advisory Committee made two changes to the rules in response to comments. First, as published, the rules required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. Because the Social Security Administration is in the process of implementing the practice of assigning a unique alphanumeric identification, the rule was changed to require the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." (The committee note was subsequently augmented to observe that "[i]n current practice, this designation is called the Beneficiary Notice Control Number.") Second, language was added to Supplemental Rule 6 to make it clear that the 30 days for the plaintiff's brief run

from entry of an order disposing of the last remaining motion filed under Civil Rule 12 if that is later than 30 days from the filing of the answer. At its meeting, the Standing Committee made minor changes to Supplemental Rule 2(b)(1) – the paragraph setting out the contents of the complaint – in an effort to make that paragraph easier to read; it also made minor changes to the committee note.

With the exception of the DOJ, which abstained from voting, the Standing Committee unanimously approved the Advisory Committee's recommendation that the new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 87 (Civil Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation. The August 2021 publication package will also include proposed amendments to Civil Rules 15 and 72 that were previously approved for publication in January 2021 (as set out in the Standing Committee's March 2021 report).

Information Items

The Advisory Committee met by videoconference on April 23, 2021. In addition to the action items discussed above, the Advisory Committee considered reports on the work of the Subcommittee on Multidistrict Litigation, including a March 2021 conference on issues regarding leadership counsel and judicial supervision of settlement, as well as the work of the

newly reactivated Discovery Subcommittee. The Advisory Committee also determined to keep on its study agenda suggestions to develop uniform *in forma pauperis* standards and procedures, and to amend Rule 9(b) (Pleading Special Matters – Fraud or Mistake; Conditions of Mind).

The Advisory Committee will reconsider a proposed amendment to Rule 12(a)(4)(A), the rule that governs the effect of a motion on the time to file responsive pleadings, following discussion and feedback provided at the Standing Committee meeting. The proposed amendment would have extended from 14 days to 60 days the presumptive time for the United States to serve a responsive pleading after a court denies or postpones a disposition on a Rule 12 motion "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to provide for consultation between local U.S. Attorney offices and the DOJ or the Solicitor General. The Advisory Committee determined that extending the time to 60 days would be consistent with other time periods applicable to the United States (e.g., Rule 12(a)(3), which provides a 60-day time to answer in such cases, and Appellate Rule 4(a)(1)(B)(iv), which sets civil appeal time at 60 days).

The proposed amendment has not been without controversy. It was published for public comment in August 2020 and, of the three comments received, two expressed concern that the proposed amendment was imbalanced and would cause unwarranted delay; that plaintiffs in these actions often are involved in situations that call for significant police reforms; that the amendment would exacerbate existing problems with the qualified immunity doctrine; and that the proposal was overbroad in that it would accord the lengthened period in actions in which there is no immunity defense. Discussion at the Advisory Committee's April 2021 meeting focused on two major concerns. First, some thought the amendment might be overbroad and

should be limited only to immunity defenses; however, a motion to add this limitation failed. Second, there was concern over whether the 60-day time period was too long. Ultimately, however, the Advisory Committee approved the proposed amendment by a divided vote.

At its meeting, members of the Standing Committee expressed similar concerns about the 60-day time period being too long, especially given that the time period for other litigants is 14 days. After much discussion, the Standing Committee asked the Advisory Committee to obtain more information on factors that would justify lengthening the period and consider further the amount of time that those factors would justify.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval a proposed amendment to Rule 16 (Discovery and Inspection). The proposal was published for public comment in August 2020.

The proposed amendment to Rule 16, the principal rule that governs discovery in criminal cases, would clarify the scope and timing of expert discovery. The Advisory Committee developed its proposal in response to three suggestions (two from district judges) that pretrial disclosure of expert testimony in criminal cases under Rule 16 should more closely parallel Civil Rule 26.

With the aid of an extensive briefing presented by the DOJ to the Advisory Committee at its fall 2018 meeting and a May 2019 miniconference that brought together experienced defense attorneys, prosecutors, and DOJ representatives, the Advisory Committee concluded that the two core problems of greatest concern to practitioners are the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The proposed amendment addresses both problems by clarifying the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Importantly, the proposed new provisions are reciprocal. Like the existing provisions, the amended paragraphs – (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) – generally mirror one another.

The proposed amendment limits the disclosure obligation to testimony the party will use in the party's case-in-chief and (as to the government) testimony the government will use to rebut testimony timely disclosed by the defense under (b)(1)(C). The amendment deletes the current Rule's reference to "a written summary of" testimony and instead requires "a complete statement of" the witness's opinions. Regarding timing, the proposed amendment does not set a specific deadline but instead specifies that the court, by order or local rule, must set a deadline for each party's disclosure "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence.

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes to the text and the committee note. The provisions regarding timing elicited the most feedback, with several commenters advocating that the rule should set default deadlines (though these commenters did not agree on what those default deadlines should be). The Advisory Committee considered these suggestions but remained convinced that the rule should permit courts and judges to tailor disclosure deadlines based on local practice, varying caseloads from district to district, and the circumstances of specific cases. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. And under existing Rule 16.1, the parties "must confer and try to agree on a timetable

and procedures for pretrial disclosure"; any resulting recommendations by the parties will inform the court's choice of deadlines.

Commenters also focused on the scope of required disclosures, with one commenter suggesting the deletion of the word "complete" from the phrase "a complete statement of all opinions" and another commenter proposing expansion of the disclosure obligation (for instance, to include transcripts of prior testimony) as well as expansion of the stages in the criminal process at which disclosure would be required. The Advisory Committee declined to delete the word "complete," which is key in order to address the noted problem under the existing rule of insufficient disclosures. As to the proposed expansion of the amendment, such a change would require republication (slowing the amendment process) and might endanger the laboriously obtained consensus that has enabled the proposed amendment to proceed.

After fully considering and discussing the public comments, the Advisory Committee decided against making any of the suggested changes to the proposal. It did, however, make several non-substantive clarifying changes.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 16 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 62 (Criminal Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met by videoconference on May 11, 2021. The meeting focused on approval for publication of proposed new Rule 62 as well as final approval of the proposed amendments to Rule 16. Both of these items are discussed above. The Advisory Committee also received a report from the Rule 6 Subcommittee and considered suggestions for new amendments to a number of rules, including Rules 11 and 16.

Rule 11 (Pleas)

The Advisory Committee has received a proposal to amend Rule 11 to allow a negotiated plea of not guilty by reason of insanity. Title 18 U.S.C. § 4242(b), enacted as part of the Insanity Defense Reform Act of 1984, provides a procedure by which a defendant may be found not guilty by reason of insanity; however, neither the plea nor the plea agreement provisions of Rule 11 expressly provide for pleas of not guilty by reason of insanity. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere," and Rule 11(c)(1) provides a procedure for plea agreements "[i]f the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense." Initial research by the Rules Committee Staff found a number of instances in which a jury trial was avoided because both parties agreed on the appropriateness of a verdict of not guilty by reason of insanity. The procedure used in those instances was to hold a bench trial at which all the facts were stipulated in advance. This meets the statutory requirement of a verdict and does not use the Rule 11 plea procedure. The Advisory Committee determined to retain the suggestion on its study agenda in order to conduct further research on the use of the stipulated trial alternative.

Rule 16 (Discovery and Inspection)

The Advisory Committee considered two new suggestions to amend Rule 16 to require that judges inform prosecutors of their *Brady* obligations. Although the recently enacted Due

Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, the suggestions urge the Advisory Committee to develop a national standard. The Advisory Committee determined that it would not be appropriate to propose a national rule at this time, but placed the suggestions on its study agenda to follow the developments in the various circuits and districts, and to consider further whether the Advisory Committee has the authority to depart from the dispersion of decision making Congress specified in the Act.

Rule 6 (The Grand Jury)

In May 2020, the Advisory Committee formed a subcommittee to consider suggestions to amend Rule 6(e)'s provisions on grand jury secrecy. The formation of the subcommittee was prompted by two suggestions proposing the addition of an exception to the grand jury secrecy provisions to include materials of historical or public interest. Two additional suggestions have been submitted in light of recent appellate decisions holding that district courts lack inherent authority to disclose material not explicitly included in the exceptions listed in Rule 6(e)(2)(b). *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020); *see also Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (cert. granted July 2, 2020; case remanded with instructions to vacate the order below on mootness grounds, July 2, 2021) (presenting the question regarding the exclusivity of the Rule 6(e) exceptions). Additionally, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). 140 S. Ct. at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically

enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

The two most recent suggestions submitted in reaction to this line of cases include one from the DOJ suggesting an amendment to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances. In the past, courts had issued such orders based on their inherent authority over grand jury proceedings; however, some district courts have stopped issuing delayed disclosure orders in light of *McKeever*. Second, two district judges have suggested an amendment that would explicitly permit courts to issue redacted judicial opinions when there is potential for disclosure of matters occurring before the grand jury.

In April, the subcommittee held a day-long virtual miniconference to gather more information about the proposals to amend Rule 6 to add exceptions to the secrecy provisions. The subcommittee obtained a wide range of views from academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration.

The Advisory Committee has also referred to the subcommittee a proposal to amend Rule 6 to expressly authorize forepersons to grant individual grand jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts.

The Rule 6 Subcommittee plans to present its recommendations to the Advisory Committee at its fall meeting.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 106, 615, and 702 with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

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

The proposed amendment to Rule 106 would fix two problems with Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the opponent may require admission of a completing portion of the statement in order to correct the misimpression. The rule prevents juries from being misled by the selective introduction of portions of a written or recorded statement. The proposed amendment is intended to resolve two issues. First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. The proposed amendment clarifies that the completing portion is admissible over a hearsay objection. (The use to which the completing portion may be put – that is, whether it is admitted for its truth or only to prove that the completing portion of the statement was made – will be within the court's discretion.) Second, the current rule applies to written and recorded statements but not unrecorded oral statements leading many courts to allow for completion of such statements under another rule of evidence or under the common law. This is particularly problematic because Rule 106 issues often arise at trial when there may not be time for the court or the parties to stop and thoroughly research other evidence rules or the relevant common law. The proposed amendment would revise Rule 106 so that it would apply to all written or oral statements and would fully supersede the common law.

Rule 615 (Excluding Witnesses)

The proposed amendment to Rule 615 addresses two difficulties with the current rule. First, it addresses the scope of a Rule 615 exclusion order. Rule 615 currently provides, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typical simple and brief orders that courts issue under Rule 615 operate only to physically exclude witnesses from the courtroom, or whether they also prevent witnesses from learning about what happens in the courtroom while they are excluded. The proposed amendment would explicitly authorize judges to enter orders that go beyond a standard Rule 615 order to prevent witnesses from learning about what happens in the courtroom while they are excluded. This will clarify that any additional restrictions are not implicit in a standard Rule 615 order. The committee note observes that the rule, as amended, would apply to virtual trials as well as live ones.

Second, the proposed amendment clarifies the scope of the rule's exemption from exclusion for entity representatives. Under Rule 615, a court cannot exclude parties from a courtroom, and if one of the parties is an entity, that party can have an officer or employee in the courtroom. Some courts allow an entity-party to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. In the interests of fairness, the Advisory Committee proposes to amend the rule to make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. As with any party, an entity-party can seek an additional exemption from exclusion by arguing that one or more additional representatives are "essential to presenting the party's claim or defense" under current Rule 615(c) (which would become Rule 615(a)(3)).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendment to Rule 702 concerns the admission of expert testimony. Over the past several years the Advisory Committee has thoroughly considered Rule 702 and has determined that it should be amended to address two issues. The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702, such testimony must be based on sufficient facts or data and must be the product of reliable principles and methods, and the expert must have "reliably applied the principles and methods to the facts of the case." A proper reading of the rule is that a judge should not admit expert testimony unless the judge first finds by a preponderance of the evidence that each of these requirements is met. The problem is that many judges have not been correctly applying Rule 702 and there is a lot of confusing or misleading language in court decisions, including appellate decisions. Many courts have treated these Rule 702 requirements as if they go merely to the testimony's weight rather than to its admissibility. For example, instead of asking whether an expert's opinion *is* based on sufficient data, some courts have asked whether *a reasonable jury could find* that the opinion is based on sufficient data. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that the expert is relying on sufficient facts or data, and employing a reliable methodology that is reliably applied. The amendment would not change the law but would clarify the rule so that it is not misapplied.

The second issue addressed by the proposed amendment to Rule 702 is that of overstatement – experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. There had been significant disagreement among members of the Advisory Committee on this issue. The criminal defense bar felt strongly that the problem should be addressed by adding a new

subsection that explicitly prohibits this kind of overstatement. The DOJ opposed such an addition, pointing to its own internal processes aimed at preventing overstatement by its forensic experts and arguing that the problem with overstatement is caused by poor lawyering (i.e., failure to make available objections) rather than poor rules. The Advisory Committee reached a compromise position, which entails changing Rule 702(d)'s current requirement that "the expert has reliably applied the principles and methods to the facts of the case" to require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The committee note explains that this change to Rule 702(d) is designed to help focus judges and parties on whether the conclusions being expressed by an expert are overstated.

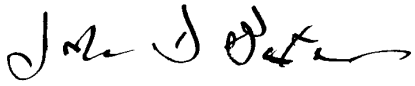
Information Items

The Advisory Committee met by videoconference on April 30, 2021. Discussion items included a possible new rule to set safeguards concerning juror questioning of witnesses and possible amendments to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) regarding the use of illustrative aids at trial; Rule 1006 (Summaries to Prove Content) to provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006; Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay) regarding admissibility of statements offered against a successor-in-interest; and Rules 407 (Subsequent Remedial Measures), 613 (Witness's Prior Statement), 804 (Hearsay Exceptions; Declarant Unavailable), and 806 (Attacking and Supporting the Declarant) to address circuit splits. The Advisory Committee discussed, and decided not to pursue, possible amendments to Rule 611(a) (to address how courts have been using that rule) and to Article X of the Evidence Rules (to address the best evidence rule's application to recordings in a foreign language).

OTHER ITEMS

An additional action item before the Standing Committee was a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard, that the Committee refresh and report on its consideration of strategic initiatives. The Committee was also invited to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs. No members of the Committee suggested any changes to the proposed status report concerning the Committee's ongoing initiatives. Those initiatives include: (1) Evaluating the Rules Governing Disclosure Obligations in Criminal Cases; (2) Evaluating the Impact of Technological Advances; (3) Bankruptcy Rules Restyling; and (4) Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation. The proposed status report also includes the addition of one new initiative – the emergency rules project described above – which is linked to Strategy 5.1: Harness the Potential of Technology to Identify and Meet the Needs of Judiciary Users and the Public for Information, Service, and Access to the Courts. The Standing Committee did not identify any topics for discussion at future long-range planning meetings. This was communicated to Chief Judge Howard by letter dated July 13, 2021.

Respectfully submitted,



John D. Bates, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
William K. Kelley	

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)

Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpt)

Appendix C – Federal Rules of Civil Procedure (proposed new supplemental rules and supporting report excerpt)

Appendix D – Federal Rules of Criminal Procedure (proposed amendment and supporting report excerpt)

TAB 1E1

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2021)

REA History:

- Transmitted to Supreme Court (Oct 2020)
- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	The proposed amendment would conform the rule to the proposed amended Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Proposed conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subdivision (c) replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142.	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	AP 26.1, BK 8012
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Revised October 19, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sep 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	

Revised October 19, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sep 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subsection (a)(4)(A)(vi).	CV 87 (Emergency CV 6(b)(2))
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK Restyled Rules (Parts III-VI)	The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022.	
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2021.	
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the twenty-second day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d).	

TAB 1E2

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

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary (authored by CRS):** This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
PROTECT Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Co-sponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Adminstrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	• 3/3/2021: Introduced in Senate; referred to Judiciary Committee

Sunshine in the Courtroom Act of 2021	**S.818** *Sponsor:* Grassley (R-IA) *Co-sponsors*: Blumenthal (D-CT) Cornyn (R-TX) Durbin (D-IL) Klobuchar (D-MN) Leahy (D-VT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines. This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."	• 3/18/21: Introduced in Senate; referred to Judiciary Committee • 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 6/25/21: Ordered to be reported without amendment favorably by Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Co-sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)		**Senate Bill Text (HR text not available):** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."	• 3/18/21: Introduced in Senate and House; referred to Judiciary Committees • 5/3/21: Letter received from Sen. Grassley and Rep. Issa • 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates

Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Co-sponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** A bill "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes." Section 2 of the bill contains the following two subdivisions that implicate Rules: "(b) PROTECTION OF TRADE SECRETS.— (1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts. (2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, as such rules would function in the absence of an evidentiary privilege." "(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software."	• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology
Juneteenth National Independence Day Act	**S. 475**	AP 26; BK 9006; CV 6; CR 45	Established Juneteenth National Independence Day (June 19) as a legal public holiday	• 6/17/21: Became Public Law No: 117-17.

Bankruptcy Venue Reform Act of 2021	H.R. 4193 *Sponsor*: Lofgren (D-CA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 **Summary:** Modifies venue requirements relating to Bankruptcy proceedings.	• 6/28/21 Introduced in House, Referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	S. 2497 *Sponsor*: Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195 **Summary:** Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate. • Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate.	• 7/28/21 Introduced in Senate, Referred to Judiciary Committee

TAB 2

TAB 2A

FORDHAM

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Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Amendment to Rule 106
Date: October 1, 2021

At its last meeting, the Committee unanimously approved for release for public comment a proposed amendment to Rule 106, the rule of completeness. That proposal was unanimously approved by the Standing Committee. The public comment period runs until mid-February.

The amendment makes two changes to the rule: 1) it allows completing statements to be admissible over a hearsay objection; and 2) it covers oral unrecorded statements. The end result, if the amendment is eventually approved, is that Rule 106 will replace the common-law rule of completeness --- something made necessary when the Supreme Court unfortunately referred to the existing rule as being a partial codification of the common-law.

Notably, the amendment does not change the basic requirement of the rule: that completion is allowed only if the proponent has offered statement that is a misrepresentation or half-truth, and the statement offered for completion will rectify the misimpression.

At the next meeting, the Committee will determine whether to make any changes to the proposal in light of public comment, and ultimately whether to recommend the amendment to the Standing Committee for final approval.

At this meeting, the Committee has traditionally considered any public comments that have already been received at the time of the meeting. (Most comments are received after February 1). To date, there has only been one comment on the rule worth noting --- not a formal posted comment, but one proposed by a law professor at a discussion about the amendment. This memo sets forth the amendment, and then discusses the proposed change. It will also discuss a conversation that took place at the Spring Standing Committee meeting, and what it might mean for the Committee Note.

The Proposed Amendment and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

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

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

Committee Note

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir.1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said. In this example the prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the

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

proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

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

The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey,* 2017 WL 5126163, at *7 (D. Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). A party seeking completion with an oral statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

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

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

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

Comment Suggesting a Change to the Text of the Amendment

The amendment currently replaces "writing or recorded statement" with "written or oral statement." At some point in the Committee's deliberations, Judge Schroeder raised as a suggestion that "written or oral" could be dropped out, and the rule could simply refer to a "statement." That is, leaving it as "statement" would implicitly include an oral unrecorded statement. While there was never a vote on this specific proposal, it was dropped because the Committee determined that it would be a useful emphasis to add "written or oral" --- to make clear in text that the rule was now covering all oral statements, including those that are unrecorded. In defense of that position, it can generally be said that subtlety in rulemaking raises the risk that users will not pick up on the change.

But a comment from a law professor indicates that the "written or oral" language, while emphatic, is possibly underinclusive. The professor noted that a "statement" may be made by nonverbal conduct --- the easy examples being nodding one's head instead of saying "yes", and lifting up three fingers instead of saying "three." Adding "written or oral" would mean that statements made by assertive conduct would not be covered by the rule.

There are two responses to this concern about assertive conduct. First, you would have to think long and hard about a situation in which conduct that is a statement would be needed to complete a misleading presentation. There are not, so far as I know, any reported cases on the subject. Second, the rule that currently exists does not cover conduct that is a statement. It covers only written or recorded statements.

All that said, there is merit to the suggestion that conduct that is a statement should be covered by the rule. There is no evidentiary difference between "three" and three fingers --- so it would appear to be inconsistent to allow the oral statement to complete and not the conduct. And while the problem of completion by assertive conduct will rarely arise, you never know. And at any rate, even a theoretical possibility should be treated consistently. Finally, the fact that conduct is not covered by the current rule is surely not dispositive, because a major reason for the amendment is to expand its coverage beyond written and recorded statements.

If the Committee decides to drop "written or oral" and go forward with "statement" there will be a need to modify the Committee Note. Here is the paragraph on oral unrecorded statements as it currently exists, with a proposed change to adjust to the deletion of "written or oral":

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

The first sentence would be inaccurate unless the above change is made. But there is a question about whether statements through conduct need to be specifically referred to in the Note. The point of the amendment is to cover unrecorded oral statements. Any discussion about the unlikely use of statements by conduct could tend to confuse and could muddle the important message that is being given in the above paragraph. Adding the bracketed words in the last sentence might be a good compromise, i.e., referring to the applicability of the rule to statements by conduct, but not making a big deal about a matter that is unlikely to arise.

If the Committee believes it necessary to do more, another option would be to delete the bracketed language and add the following sentence to the end of the Rule:

> "A statement may also be made through conduct, such as nodding the head, and if such a statement fits the requirements of completion, it would be admissible under this amendment."

At this meeting, the Committee may wish to take a straw vote on deleting "written or oral" in the rule text, with accompanying changes to the Note. The issue can then be resolved with finality, along with any other changes, at the Spring 2022 meeting.

Discussion of Use of Cases in the Committee Note

At the Standing Committee meeting, a Committee member made the observation that the Committee Note to Rule 106 contained a number of case citations. That Committee member had innocently waded into a dispute that has gone on between the former Reporter to the Standing Committee, Dan Coquillette, and myself for the last 15 years. It's a question that the Standing Committee has never formally discussed or voted upon: is it good practice to include case citation in Committee Notes?

The basic argument against including case citations is that cases can be overruled, and Committee Notes cannot be changed. So there is a risk of a Committee Note being like a historic relic more than a helpful Note. There is some precedent that would support the argument: the original Advisory Committee issued a Note (more of a comment) on the relationship between the hearsay rule and the right to confrontation. The case law discussed there has, of course, been eclipsed by *Crawford* and its progeny. The Note is no longer helpful. (Though there is a response to this example --- it really wasn't a Committee Note. It did not attempt to explain the application of a particular rule.)

The argument in favor of case citations is that, when used properly, they can serve several important purposes: 1. If the amendment is derived from case law, then the cases cited are an indication that the rule is founded in something other than the heads of Advisory Committee members; 2. They can operate as legislative history, and a thorough discussion in a case could provide helpful analysis and resources that would not be found in the Committee Note itself; 3. People learn by way of illustration (says the law professor), and what better illustration than an actual case that has discussed the matter treated by the amendment?

While there is some precedent involving overruled case law, it is probably fair to state that there is much more precedent indicating that the use of case law (and treatises, for that matter) in Committee Notes has been extremely useful to the Bench and bar. For example, the Committee Notes from the original Advisory Committee are replete with citations to case law and treatises. Many of these citations have been relied on to determine the meaning of the rule. To take just one example, the citation to the *Houston Oxygen* case in the Committee Note to Rules 803(1) and (2) shows a lot about how the hearsay exception for present sense impressions was intended to apply. And the citation to Wigmore in the Committee Note to Rule 615 says a lot about how important sequestration is and how aggressively Rule 615 should be applied.

For precedent on Committee Notes to amendments, the best example is the Committee Note to the 2000 amendment to Rule 702. That note contains copious citations to case law, treatises, and law review articles. A recent check indicates that the Rule 702 Committee Note has been cited more than any other Evidence Committee Note, including the original Committee Notes. (I have found 1855 citations to the Note, and I think that is undercounting as courts cite id in different ways.) The note continues to be frequently cited today, 21 years later. Indeed, one of the major reasons for even proposing an amendment to Rule 702 was that a Committee Note could

be written to help courts and parties figure out *Daubert* and its progeny. The Committee determined that a Committee Note with that goal would have to cite case law and treatises.

All this is just to bring to the Committee the dispute about Committee Notes that has yet to be formally discussed by the Standing Committee. The Standing Committee unanimously approved for public the proposed Rule 106, and of course, its Committee Note and case citations. Perhaps the question to think about is whether the use of case law in the Rule 106 Committee Note is judicious on the one hand or excessive and unnecessary on the other. So what follows is an explanation of the citations, in the order they arise.

The first citation is in the first paragraph:

> Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir.1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said. In this example the prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

Explanation: *Sutton* is the leading circuit court case supporting the Committee's position. It is really the only case that has spent a lot of time on why the rule of completeness cannot operate properly if a hearsay objection is sustained. Having worked on this awhile, it is fair to say that *Sutton* is part of the legislative history of the amendment. Most importantly, it runs absolutely no risk of being overruled, because the amendment essentially codifies the analysis and result in *Sutton.*

The next citation is in the paragraph about oral statements:

> The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey,* 2017 WL 5126163, at *7 (D. Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). A party seeking completion with an oral statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

Explanation: It was the *Bailey* case that started the Committee's work on Rule 1006, back in 2017. The example used throughout the Committee's discussions --- the defendant's statement that he bought the gun, but sold it before the crime --- is from *Bailey.* Judge Grimm includes an extensive discussion of all the reasons for amending the rule, especially with respect to unrecorded oral statements. He does a very thorough and scholarly job that supplements the arguments in the Committee Note. So if the reader goes back to the case, they will be even more convinced that the amendment is necessary, helpful, and well-supported. And, of course, *Bailey* will be codified by the amendment, so it won't be overruled.

The next use of a citation is in the short discussion about the timing element in the rule:

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

Explanation: The goal of the paragraph is to emphasize that courts have flexibility in the timing of completion. At one time, there was "flexible timing" language in the text of the amendment, and the Committee opted to have a more stripped-down amendment, but to refer to timing flexibility in the Note. It would seem to help to cite an illustration of flexible timing, that readers can go to, because the note is intentionally spare and general.

The next citation is to Beech Aircraft:

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

Explanation: Not sure whether one is needed. You can't meaningfully discuss the goal of displacing the common law without discussing the starting point, the reason why the whole enterprise is necessary. The Note needs to say that the Court's statement, while correct at the time, is incorrect after the amendment.

The final citation is in the last paragraph of the Note.

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

Explanation: The last sentence, the example, was added just before the last meeting. The example is essentially the facts of *Williams. Williams* was written by the former chair, Judge Livingston, who spent many hours (and many, many discussions with the Reporter) on Rule 106. It was a Committee member who suggested the use of the example from *Williams*; and it is an excellent example about what the amendment does not do. Perhaps reasonable minds can differ on whether the citation is necessary. But the citation is helpful for those who want a fact situation that is more detailed, and thus more instructive about how the rule is to apply, than the summary provided in the Note. And the chances of the case being overruled are infinitesimal, because nothing in the amendment changes its result, and it is hard to think of a time in which the rule might be amended to allow a defendant to complete with protestations of innocence whenever they end up confessing.

TAB 2B

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 615
Date: October 1, 2021

At the last meeting, the Committee unanimously approved, for release for public comment, amendments to Rule 615, the rule governing sequestration of witnesses. The Standing Committee unanimously voted to release the proposed amendment for public comment. The proposed amendment and Committee Note provide as follows:

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

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

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

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

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

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

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

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

(2) prohibit excluded witnesses from accessing trial testimony.

Committee Note

Rule 615 has been amended for two purposes. Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial—and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) ("The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript."). On the other hand, a rule extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the rule itself was limited to exclusion of witnesses from the courtroom.

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

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

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

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

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

Thus far, no comments have been received on the amendment. But at the Standing Committee meeting, three questions were asked that might be usefully addressed at this meeting. No action will be taken on the amendment until the next meeting. What follows are the three points that were raised at the Standing Committee.

1. Order in Writing?

The major goal of the amendment is to specify that the basic Rule 615 order is limited to excluding witnesses from the courtroom, but the trial court can order extra protections to limit the risk that witnesses will get access to trial testimony while outside the courtroom. A question raised at the Standing Committee was whether the rule should require the order that extends outside the courtroom to be in writing.

The existing rule does not require the exclusion order to be in writing, and nothing in the amendment changes that. It appears, at least from the case law and discussions with some judges, that in many courts the exclusion order is not in writing. Nothing in the case law indicates a problem with oral orders entered on the record, so it would seem that there is not a strong justification for adding a writing requirement for the exclusion order. The question then is whether there is a distinction between the order of exclusion and the order that extends outside the courtroom that would justify imposing a writing requirement on the latter.

The argument could be that the exclusion order need not be in writing because it is so straightforward --- "keep all witnesses out of the courtroom until they testify." The order extending outside the courtroom is obviously more complex. It might involve instructions to witnesses not

to access the internet, or not to share their testimony with other witnesses who haven't yet testified. It might include instructions to lawyers on the line between proper witness preparation and being little more than a conduit of trial testimony to prospective witnesses. Generally speaking, the more complicated and nuanced the order, the greater the need for it to be in writing.

One major reservation about requiring the order to be in writing is that it would be a unique provision in the Federal Rules of Evidence. There are a few other references to court orders, but none of them require the order to be in writing. For example, Rule 502(d) orders are not required by that rule to be in writing. A Rule 502(d) order is every bit as complicated as one that would be entered under the amended Rule 615, and if there is no writing requirement in the former rule, it is hard to see why the requirement needs to be in Rule 615. Rule 615 does not seem to be the one place in the Evidence Rules where it is important to specify that a court order needs to be in writing.

It is of course for the Committee to determine whether a writing requirement should be added to Rule 615(d). The addition would be easy to make to the text: "the court may also, by written order:" If the change is made then something would need to be added to the Committee Note to explain why there is a writing requirement for the order extending outside the courtroom, but not for the exclusion order itself. The challenge of making a convincing argument for that distinction in a Committee Note is probably a reason for not adding a writing requirement to the rule.

2. Should the Rule Set Forth Criteria for an Order Extending Outside the Courtroom?

Another question raised in the Standing Committee discussion is whether the rule should set forth criteria for issuing an order that extends outside the courtroom. There is a strong argument that the Committee should not go down the path of setting criteria for such an order. The risks of access to trial testimony are bound to differ among cases, and both the number and type of witnesses who present risks are likely to be a case by case proposition. Any list of criteria risks underinclusion, and also risks a rigidity that seems misplaced in determining what is to be done about access to trial testimony.

It bears noting that when the Committee drafted Rule 502, it specifically considered whether to include a list of criteria for entering a Rule 502(d) order. The Committee voted unanimously to reject such a list, concluding that any list would risk being underinclusive and would hamper the judge in determining the need for, and the terms of, a Rule 502(d) order. There would appear to be no reason to add a list of criteria in Rule 615(b), given that a similar list was rejected in Rule 502.

If the Committee does believe that a list of criteria should be added to the amendment, such a list, and a corresponding passage in the Committee Note, will be drafted for the next meeting. If criteria are going to be listed, then the following paragraph of the Committee Note will have to be deleted:

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

3. Does the Amendment Allow the Order of Exclusion and the Order Extending Beyond the Courtroom to be Combined?

A Standing Committee member asked whether the amendment would allow the judge to combine the traditional exclusion order with the order extending outside the courtroom --- or does the amendment require two separate orders?

On the merits, there is absolutely no reason for the rule to require two separate orders. Why shouldn't the judge be allowed to treat both problems of access to trial testimony in the same order? What the question raised was whether the amendment was clear enough on the permissibility of a combined order.

The amendment provides as follows:

> **(b) Additional Orders to Prevent Disclosing and Accessing Testimony.** An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:
>
> (1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and
>
> (2) prohibit excluded witnesses from accessing trial testimony.

Nothing in the above indicates that the court must issue a *separate* order from the one that is issued under Rule 615(a). The phrase "may also, by order" can certainly be read as "may also, by adding to the original order." To the extent there is any ambiguity, it is a challenge to clarify the text without adding a little clunkiness to the rule. Probably the cleanest solution would be the following:

"But the court may also, either in the order issued under (a) or in a separate order:"

Another possibility is to add any necessary clarification to the following paragraph in the Committee Note:

> An order under subdivision (a) operates only to exclude witnesses from the courtroom. This includes exclusion of witnesses from a virtual trial. Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit parties subject to the order from disclosing trial testimony to excluded witnesses,

as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the rule's policy of preventing tailoring of testimony. Under the amendment, an order under subdivision (b) can either be separate from or combined with an order under subdivision (a), at the court's discretion.

A good argument can be made that the amendment as it is adequately explains that the court can combine or separate Rule 615 orders. But to the extent there is any ambiguity, it probably doesn't hurt to add a sentence to the Committee Note like the one above. And it would not do much violence to the current text to make the textual change like the one above.

TAB 2C

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra and Liesa L. Richter
Re: Possible Amendment to Rule 702
Date: October 1, 2021

At its last meeting, the Advisory Committee unanimously approved amendments to Rule 702, for release for public comment. These amendments were also unanimously approved by the Standing Committee, along with several laudatory comments from members of that Committee.

The public comment period ends in mid-February. As of this writing, the Committee has received only one public comment that is worth Committee discussion. That public comment was submitted by Lawyers for Civil Justice (LCJ), an organization that provided several comments during the Committee's consideration of an amendment to Rule 702.

This memo analyzes that public comment, for the Committee to consider at this meeting. At the next meeting, there will likely be many more public comments for the Committee to process, all with the goal of proposing adoption of an amended Rule 702.

The text and Committee Note of the proposal that has been released for public comment begin on the next page:

Rule 702. Testimony by Expert Witnesses

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

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

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

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

(d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Committee Note

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

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

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

Of course, some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the

sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

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

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

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

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

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

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

LCJ Comments

1. Adding "the court" back into the text.

The draft amendment that was considered by the Committee at the last meeting provided that expert testimony would be admissible if the court finds that the proponent has demonstrated by a preponderance of the evidence that: . . .

At the meeting, it was proposed that the reference to a court finding should be deleted because it suggested that a court would always have to make a finding. The proposal issued for public comment provides that expert testimony would be admissible if the proponent has demonstrated by a preponderance of the evidence that: . . .

LCJ recommends that the reference to "the court" be returned to the rule. LCJ reasons that that the whole point of the amendment is to emphasize that it is the court and not the jury that must make the finding of reliability. As it now is, a reluctant court might reason that the rule leaves it up to the jury to find by a preponderance of the evidence that the testimony is reliable --- in other words, the rule could be read to codify the Rule 104(b) standard.

Reporter's Comment: LCJ's suggestion to reinsert a reference to the court has much to commend it. LCJ is right that a court so inclined could reason that the rule leaves the preponderance decision to the jury. The rule as it is now is not explicit and definitive on the point. Given the fact that the reason the rule is being amended is that some courts did not construe the 2000 amendment properly, it makes eminent sense to make it as explicit as possible.

It is true that the *Note* makes clear that the preponderance decision is for the court. But given the judicial reluctance to follow the rule, it is hardly ideal for the answer to be left to the Note.

The concern about courts having to make findings can be answered in three ways: 1) courts are in fact going to have to make findings, as they always have, in exercising their gatekeeping function; 2) such findings are required only when a proper objection is made --- so nothing in the rule (or any other evidence rule) would require findings in the absence of an objection; and 3) if there is still a residual concern about courts having to make formal findings, that concern can be ameliorated by not using the word "findings." Language such as "the court determines" should do the trick.

In sum, the Committee may want to consider a change to the amendment as issued for public comment, to bring back the emphasis that it is the court that must determine that the proponent has satisfied the admissibility requirements by a preponderance of the evidence. If that friendly amendment is approved, the rule would look like this:

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

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

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

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

(d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

2. Re-inserting the language about court misapplication in the Note.

The Committee Note that was drafted for the last meeting criticized some courts for misapplying Rule 702. The Note stated in no uncertain terms that holdings that the reliability requirements were jury questions were now being rejected by the amendment. Here are the excerpts from the draft that call out the offending courts:

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

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

After discussion at the last meeting, the Committee determined that the language in the note was unduly harsh, and that it would do no good to call out the wayward courts and say in a note that they are wrong. So the language in the Note was altered, as follows:

First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence. *See* Rule 104(a). Of course, the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States,* 483 U.S. 171 (1987). But ~~unfortunately~~ many courts have held that the critical questions

of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a) ~~and are rejected by this amendment~~.

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

LCJ believes that the language of the draft should be reinserted, and that the Committee should not "make compromises for the sake of optics." LCJ believes especially that it is necessary to state that decisions holding the reliability requirements to be jury questions are "rejected by this amendment" --- because they are. LCJ is concerned that if the Note does not contain strict language, the courts that have refused to follow the 2000 amendment will also refuse to follow the 2023 amendment.

Reporter's Comment:

Deletion of the term "unfortunately" does not blunt the impact of the message in the note. "Unfortunately" is more of an editorial comment than a statement about what the Rule is about. So there is not a great case for re-inserting it.

Deletion of the phrase "and are rejected by this amendment" should be reconsidered, because it is in fact a correct description of what the amendment does. And arguably it is useful to be a bit forceful in a Committee Note to an amendment that is designed to get courts to follow the rule that had not been followed in some courts. It seems less an insult than a statement of what the amendment is intended to do. It is not an ad hominem attack on the wayward courts.

Deleting the statement that the courts have "ignored" the rule seems appropriate. The alternative --- "failed to apply correctly" --- gets the point across without accusing the courts of disrespecting the rule. "Ignored" implies a mindset that is difficult to divine from a written opinion or even from a set of written opinions. Therefore it is probably appropriate to stick with "failed to apply correctly."

3. Citing three cases as being wrongly decided in the Committee Note.

LCJ contends that most of the decisions that incorrectly leave reliability issues to the jury are relying on one or more of three cases: *Loudermill v. Dow Chemical Co.,* 863 F.2d 566 (8th Cir. 1988); *Viterbo v. Dow Chemical Co.,* 826 F.2d 420 (5th Cir. 1987); and *Smith v. Ford Motor Co.,* 215 F.3d 713 (7th Cir. 2000). ALJ recommends that the Committee Note actually cite these cases as being wrong and rejected by the amendment.

Reporter's Comment: There does not seem much benefit, and there is some risk, in calling out these three cases. The benefit of singling out three cases is especially minimized if the language about rejecting *all* the cases declaring that the reliability requirements are jury questions is restored to the Note. If all the cases are rejected, it actually seems odd to then specify that these three cases are especially rejected.

The risk in citing these cases is, if the attack is on the result reached by the respective courts of appeals, then the Committee is essentially at risk of being incorrect. It is true that all three courts include language stating that questions of sufficiency of data and reliability of application are generally jury questions. But *Loudermill* is a case in which the court simply held that the trial judge did not abuse discretion in admitting the plaintiff's expert. Can the Committee really be confident that the trial court abused its wide discretion in allowing the expert to testify? In *Viterbo* the trial court *excluded* the plaintiff's expert and the court of appeals found no abuse of discretion in that ruling. It's hard to see that LCJ can complain about the result in that case. And as to *Smith,* the court of appeals did find that the trial judge abused discretion in excluding the plaintiff's expert, but the trial court's reasoning was actually wrong --- it excluded the expert on reliability grounds solely because the expert's methodology was not peer reviewed. So again, it is hard to say categorically that the result reached in *Smith* needs to be called out as wrong. Incorrect language is fairly easy to determine, but an incorrect result at the appellate level is not.

So these cases cannot just be rejected out of hand. They could, of course, be criticized for wayward and incorrect statements about the proper standard of proof for the reliability requirements of Rule 702. But it is hard to see why. As the Committee Note clearly states, there are a lot of courts that have made incorrect statements of law; and all those statements are incorrect. Again, if the Note is amended to say not only that the statements are incorrect but are rejected, it really seems excessive to single out the language in these three cases.

LCJ states that some Committee Notes have called out specific cases as being wrong. But the example given --- citing the Second Circuit's *Residential Funding* cases in the Civil Rules' discovery amendments of a few years ago --- is not apt. The question there was whether negligent destruction was sufficient to support a discovery violation. The courts were in dispute. *Residential Funding* held that negligence was sufficient. The amendment clarified that negligence was not sufficient. *Residential Funding* was not called out as being *wrong* or for making *incorrect statements of law.*

In sum, it would appear that adding the three cases called out by LCJ is not necessary, and raises a risk that the reader may think that the Committee is disagreeing with the results reached in those cases, when that could not be so.

TAB 3

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible changes to Rule 407
Date: October 1, 2021

At its last meeting, the Committee voted to review two possible changes to Rule 407, the rule providing protection to defendants from evidence of subsequent remedial measures. The rule currently provides as follows:

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

* * *

There are disputes in the circuits about at least two issues of application of Rule 407:

1. Whether the rule applies to every change that would have made the plaintiff's injury less likely to occur, or whether the change must have been in response to the injury.

2. Whether the rule should apply in cases involving breach of contract actions.

This memo is in five parts. Part One discusses the rationales for the protection provided by Rule 407. Part Two deals with the circuit split involving whether the measure must have been in response to the plaintiff's injury. Part Three discusses the dispute over the applicability of Rule 407 in contract cases. Part Four discusses two issues that are not circuit splits but may be possible candidates for "add-on" changes, if the rule is going to be amended on other grounds. Part Five provides drafting alternatives and possible Committee Notes.

It should be noted that a Rule 407 amendment is not an action item for this meeting. But hopefully a straw vote can be taken to determine whether the Committee wants to proceed with an amendment --- in which event a proposed amendment and Committee Note would be presented as an action item for the Spring, 2022 meeting.

I. The Rationales for Rule 407 Protection

The principal argument made in favor of the rule is based in social policy: that without the rule, improvements would not be made after an injury or harm, for fear that such measures could be used as an admission of fault, culpability, defective design, etc., on the part of the defendant. As Judge Posner has put it: "A major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs (or take other safety measures) after an accident that would exist if the accident victim could use those measures as evidence of the defendant's liability."[1] Thus, the rule is a response to the negative social consequences that would allegedly arise in the *absence* of an exclusionary rule.

There is a good argument that the social policy foundation for the rule is weak, and that application of the rule is really just a windfall for corporate defendants. First, the policy argument presumes that a person or organization would know that there is no exclusionary rule for subsequent remedial measures in the relevant jurisdiction, and would also know that in the absence of such a rule, a subsequent remedial measure would be evidence that could be used --- at a trial that has not yet begun. Second, even if the informed-defendant assumption is correct (for example, a corporation with counsel may be advised of the evidence rules), a defendant with that kind of knowledge of the rules of evidence would also know that the failure to correct a situation in which an injury occurred could be admissible *if another injury were to occur*—with far more serious consequences to the defendant. That is, in a world without Rule 407, if a remedial action is not undertaken, and *another* injury occurs, the well-informed defendant would know that there would be a strong case on notice, gross negligence or recklessness, and even the possibility of punitive damages. (And a defense to the lack of action that "there is no Rule 407 in this jurisdiction" is likely to fall on deaf ears). A properly counseled defendant would balance the relatively contained cost of remedying the condition (use of that evidence against the defendant in the case arising from the past injury) against the potentially dramatic cost of not remedying the condition (use of that evidence against the defendant in all cases arising from future injuries). Moreover, there is always an incentive to make a product or condition safer anyway --- the safer the product, the less likely

[1] *Flaminio v. Honda Motor Co.,* 733 F.2d 463, 467 (7th Cir. 1984).

the lawsuit. So a well-informed defendant, even in the absence of a rule such as Rule 407, would be very likely to take corrective measures anyway in order to avoid more serious liability for future injuries, and in order to avoid future litigation. Because the defendant would probably take corrective measures even in the absence of Rule 407, it follows that the social policy argument behind Rule 407 is flawed; at the very least it is overprotective.

Judge Posner disagrees with this analysis. He argues as follows:

> One might think it not only immoral but reckless for an injurer, having been alerted by the accident to the existence of danger, not to take steps to correct the danger. However, accidents are low-probability events. The probability of another accident may be much smaller than the probability that the victim of the accident that has already occurred will sue the injurer and, if permitted, will make devastating use at trial of any measures that the injurer may have taken since the accident to reduce the danger.[2]

But it seems more likely that most defendants, having become aware of a dangerous condition after an injury, would not be as easily persuaded as Judge Posner that a future injury is a low-probability event. More importantly, even if a future injury is considered unlikely, most defendants would probably conclude that the risk of substantially higher liability resulting from an uncorrected condition would be too great to bear, should the low-probability event ever come to pass. The defendant must factor in not only the likelihood of injury but the amount of liability should an injury occur. And if the defendant is aware of a dangerous condition but does nothing to correct it, the amount of liability for future injuries is bound to be high. In any case, the absence of a rule is likely to be a deterrent only in those cases in which a future injury is highly improbable --- meaning that a broad rule protecting against evidence of all subsequent remedial measures is overkill, and a windfall to many corporate defendants.

Despite the weakness of the social policy argument, both the Advisory Committee Note and the subsequent cases rely on social policy as the principal rationale for the rule. But the weakness of the social policy rationale should mean that the rule is to be applied narrowly. A broad application results in the exclusion of relevant and reliable evidence for no good reason.

A separate rationale for the rule is that subsequent remedial measures may be of limited relevance in assessing the defendant's liability.[3] This relevance-based rationale is explained in the Advisory Committee Note as follows:

> The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was

[2] Id.

[3] *See, e.g., Grenada Steel Indus. v. Alabama Oxygen Co.,* 695 F.2d 883, 887 (5th Cir. 1983) (in a product liability case, the court reasoned that "evidence of subsequent repair or change has little relevance to whether the product in question was defective at some previous time").

foolish before."

The Advisory Committee, though, was not completely convinced about the relevance rationale. It states that the public policy rationale is "more impressive" and concedes that "under a liberal theory of relevancy this ground would not support exclusion as the inference [of fault] is still a possible one." (And Rule 401 definitely provides "a liberal theory of relevancy.") Probably the most that can be said is that in some cases, the probative value of a subsequent remedial measure might be substantially outweighed by the risk of a jury being confused and over-weighing the evidence. But that concern can be handled on a case-by-case basis under Rule 403. It probably does not justify the global solution of excluding all subsequent remedial measures on relevance grounds.

The merits of the social policy and relevance rationales are important in determining the proper result for the two circuit splits, to which we will now turn.

II. Does Rule 407 Apply When the Action is Subsequent to the Injury but is not in Response to the Injury?

A number of courts have considered and are split on whether the Rule 407 protection applies where a measure would have made an injury or harm less likely to occur, but the motivation for the change is unconnected to that injury or harm. Examples of the problem include the following factual scenarios:

1. In February, the defendant develops plans for a change; the plaintiff gets injured in March; the defendant effectuates its planned change in April.

2. The plaintiff is injured in 2010; the change is made in 2018.

3. The plaintiff is injured on January 1; the change is made later that day.

4. The plaintiff is injured rounding a curve on a private road. He alleges that the road was slippery. The defendant alleges that the cause of the injury was the plaintiff driving too fast around the curve. The plaintiff wants to admit the fact that the defendant put sand on the curve two days after the accident. The plaintiff argues that it is not a subsequent remedial measure under the defendant's own theory, because according to the defendant's own pleading there is no relationship between the measure and the asserted cause.

Admissibility in each of these examples depends on whether there needs to be a causal connection between the injury and the remedial measure. Let's now discuss the two views.

Causal Connection Not Required

Many courts say that a causal connection is not required, so in each of the examples above, Rule 407 would apply. The basic argument in these cases relies on the text of the existing rule. All the rule requires is that the measure was taken after the injury and would have made the injury less likely to occur. In each of the above circumstances, it is posited that the measure would have made the injury less likely to occur --- and that is that for many courts. Thus, under this literal interpretation, Rule 407 would preclude evidence of a change made years after the injury or two minutes after the injury, even though these measures are taken for purposes completely unrelated to an injury. *See, e.g., Chlopek v. Fed. Ins. Co.*, 499 F.3d 692, 700 (7th Cir. 2007) (concluding that the intent or motive behind a measure is irrelevant).[4]

While relying on the text of the Rule is unquestionably justified, the textual position is obviously overcome *if the language is changed.* So other than text, is there any justification for covering all post-injury measures under Rule 407, even if they are not in response to the plaintiff's injury? One argument in support that has been expressed is that if a causative connection is required, a defendant might have an incentive to delay a change until there is an injury --- then if the change is made, a causative connection can be argued.[5] There is a ready response to this argument --- beyond criticizing its assumption that corporations are so soul-less that they will wait until they injure someone so that they can rely on an evidence rule. It presumably is the case that the change is an improvement. Why would a corporation delay improving a product for extensive use, with presumably commercial benefit, until the old product hurts someone? This stated scenario hardly seems to be a reason to provide an evidentiary benefit to a corporation.

The other argument in favor of applying Rule 407 to all remedial measures after a plaintiff's injury, regardless of motive, is that it may be difficult to determine whether a causative connection exists. Requiring the court to find whether there is a causative connection between the injury and the change adds another factual inquiry to what arguably is an already complicated rule.

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[4] *See also Mills v. Beech Aircraft Corp., Inc.,* 886 F.2d 758, 763 (5th Cir. 1989) (to fall within Rule 407, safety measure need not be a response to the accident in issue so long as it is subsequent to the plaintiff's injury)*; Hill v. Novartis Pharms. Corp.*, 944 F. Supp. 2d 943, 960–61 (E.D. Cal. 2013) ("A manufacturer's motive for making the change is irrelevant" to analyzing applicability of Rule 407."); *Bush v. Michelin Tire Corp.,* 963 F. Supp. 1436, 1449 (W.D. Ky. 1996) ("The rule's language does not go to Defendant's intent in adopting the later measures. It simply asks whether the later measures could have prevented the earlier accident.").

It should be noted that there is also a split among the states on whether there must be a causal relationship between the plaintiff's injury and the subsequent measure. For cases finding that a causative connection is not required, *see Johnson v. State, Dep't of Transp.,* 233 P.3d 1133, 1134 (Ariz. 2010) ("Rule 407 requires the exclusion of evidence of subsequent measures to prove a party's negligence or culpable conduct, even when such measures are taken without specific knowledge of the accident in question"); *Martin v. Norfolk S. Ry. Co*., 271 S.W.3d 76, 87–88 (Tenn. 2008) (rejecting the argument that the measure "was not remedial because it was carried out in accordance with [defendant's] internal policies rather than with the intent of remedying the condition that allegedly led to [plaintiff's] death").

[5] *See* Mark G. Boyko & Ryan G. Vacca, *Who Knew? The Admissibility of Subsequent Remedial Measures When Defendants Are Without Knowledge of the Injuries*, 38 MCGEORGE L. REV. 653, 675–76 (2007) (arguing that a causal connection requirement incentivizes the defendant to make the remedial measure only after it learns of plaintiff's injury).

So, while the protection of all subsequent measures may not be supported by strong policy, it does have the virtue of ease of administration. Whether that virtue outweighs the loss of probative evidence of measures that are not within the social policy that justifies Rule 407 is a question for the Committee to consider.

Causal Connection Is Required

Other courts have concluded that Rule 407 is inapplicable when there is no causal connection, i.e. when the measure was not taken in response to the injury-causing event in the case. These courts have generally reasoned that the social policy of the rule is inapplicable when the change was not made in response to the injury. *See, e.g., In re Aircrash in Bali, Indonesia,* 871 F.2d 812, 816 (9th Cir. 1989) ("The purpose of Rule 407 is to ensure that prospective defendants will not forego safety improvements because they fear that these improvements will be used against them as evidence of their liability . . . Since the Thomas Report, a comprehensive report many months in the making, was dated only one day after the Bali crash, it is patently clear it was not a response to the crash. We find no basis for treating the Thomas Report as a subsequent remedial measure.").[6] A causative connection requirement limits the risk that the rule will operate as a windfall for corporate defendants.

Which is the Better View?

Essentially this conflict is based on the difference between the purpose of the rule and the language of the rule--- and if the language of the rule is altered, the position that causation is not required is substantially undermined. In the latest opinion on the subject, Judge Sargus emphasized the purpose of the rule, and noted the overbreadth of a rule that was not limited by a causative connection between the injury and the subsequent measure. Judge Sargus wrote as follows in *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation,* 2021 WL 486425 (S.D. Ohio):

> The better interpretation of Rule 407 is that there must be some sort of causal connection or nexus between the injury-causing event and the subsequent measure. Under the literal interpretation of the rule, there is no logical limit to the Rule's application; a measure taken ten years after the injury-causing event could be considered a subsequent remedial measure because it is actually subsequent and may have reduced the likelihood

[6] *See also Brazos River Auth. v. GE Ionics, Inc.,* 469 F.3d 416, 431–32 (5th Cir. 2006)("The admission of evidence of changes made merely to improve a product, as distinguished from remedial measures that make an injury or harm less likely to occur, is not barred by the rule."). For state cases in accord, *see, e.g., Van Gordon v. Portland Gen. Elec. Co.,* 693 P.2d 1285, 1288 (Or. 1985) (Rule 407 "does not require exclusion of the evidence because the motivation for the remedial measure was not the prevention of a recurrence of the [plaintiff's] accident."); *Ranches v. City & Cty. of Honolulu,* 168 P.3d 592, 597–98 (Haw. 2007) (measures that are taken after an event but that are predetermined before the event are not covered by Rule 407 because they are not intended to address the event); *Klutman v. Sioux Falls Storm,* 769 N.W.2d 440, 451–52 (S.D. 2009) (same).

that the harm would have occurred had the measure been in place earlier. This is nonsensical. . . .

The two policies or purposes behind Rule 407 also show that the Rule requires more than mere subsequence. The first policy is that subsequent remedial measures are "equally consistent with injury by mere accident [and] through contributory negligence," meaning evidence of such measures is poor proof of fault. . . .The first policy makes little sense applied to a measure that occurs years after an event that caused harm. Certainly, the measure may be still equally probative (or not probative) of an accident or negligence—but after enough time, the risk of admitting the evidence is less that the jury will conflate evidence of an innocent accident with evidence of negligence, but that the evidence of the later measure is simply irrelevant to proving any earlier negligence and is likely to distract the jury from the timeframe at issue. *This is the province of Rules 401, 402, and 403—not Rule 407.*

The second policy is that people should be encouraged to take steps to improve safety, which they would be deterred from doing if such acts would be counted against them in court. When a supposed remedial measure has no connection to the harm at issue in the case, it is difficult to imagine why any deterrence would result. If defendants do not view the measures taken as connected to a harm-causing event, then it is unlikely that they would be disincentivized from taking these actions in anticipation of litigation of the injury-causing event.

These are compelling arguments for adding language to require the subsequent remedial measure to be responsive to the plaintiff's injury. The only real counterargument is that it might sometimes be difficult to show that the defendant's actions were triggered by a specific plaintiff's injury --- especially where there are many cases in which multiple injuries have occurred. A rule that all subsequent measures are covered by Rule 407 has the virtue of simplicity.

But there several important responses to the argument that finding a causative relationship will result in difficult and costly factual determinations:

1) Rule 407 is a weakly founded rule in the first place, and so making it more difficult to trigger its protection is a good thing, not a bad thing; a rule based on weak social policy should not be extended to situations not originally contemplated --- rather, the rule should be narrowly applied.

2) Determining whether a measure is in response to an injury would involve a factual determination by the judge under Rule 104(a) (because a causative connection would be an admissibility requirement). But this factual determination would not seem any more difficult or time-consuming than other factual determinations made by the judge under Rule 104(a). Judges determine, for example, whether a declarant and defendant are members of the same conspiracy; whether a prior consistent statement was made before the witness's motive to falsify arose; whether a statement was sufficiently contemporaneous with an event to be admissible as a present sense impression; and, the Big Kahuna, whether an expert's opinion is based on sufficient facts or data and a reliable

methodology, reliably applied. Determining whether a subsequent measure was responsive to an injury does not at all seem more difficult or intricate than any of these other issues of fact.

3) The moving party --- the defendant --- will have all the evidence on a causative connection, so there probably will not be significant problems of discovery or access to information.

4) Finally, while there may be some difficult determinations, most of the cases that raise the issue are pretty obvious---the change was made the day after the injury, or resulted from a long-term process before the injury, or was many years after the injury. So the spectre of difficult and costly factual determinations seems overstated --- whatever costs remain must be balanced against the loss of probative evidence that occurs with an expansive application of Rule 407.

Defendants might argue that requiring a causative connection will render them completely open to evidence of subsequent remedial measures. But a rule that requires a causal connection is unlikely to open the flood gates against beleaguered corporations. That is because, if the change was really not related to the injury, there is a fair chance that it will be excluded under Rule 403 anyway. A change, for example, that was made for cosmetic or public relations purposes is not very probative of some recognition on the part of the defendant that the initial condition was unsafe or dangerous.[7] And if there is minimal probative value, it may in a fair number of cases be substantially outweighed by the risk that the jury will be confused about the import of the subsequent measure, and give it undue weight as a concession of liability.[8] Arguably it is a better result to have a case by case approach under Rule 403, as compared to a bright-line rule that over-excludes probative evidence.

One final argument in favor of a rule that requires the measure to be responsive to the injury: that rule is consistent with an existing line of case on a related question --- whether Rule 407 protects changes that are mandated by the government. When the subsequent remedial measure is taken in response to mandatory government regulations, the courts have uniformly held that Rule 407 does not exclude the measure.[9] Courts reason that when the government mandates

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[7] *See, e.g., Burke v. U-Haul Int'l, Inc.,* 2006 WL 3760317, at *3 (W.D. Ky.) (noting that if remedial measure was undertaken "for financial reasons," that fact would affect relevance).

[8] *See, e.g., Trull v. Volkswagen of Am., Inc.,* 187 F.3d 88, 96–97 (1st Cir. 1999) (evidence was not excluded on Rule 407 grounds --- because the change was made before the injury --- but there was no error in applying Rule 403 to exclude the evidence; the probative value of the change was weak in part because there was no evidence that the defendant made the change to remedy the defect alleged by the plaintiff).

This is not to say that all subsequent measures that are unconnected to the plaintiff's injury will be minimally relevant. For example, a defendant might be preparing a change in response to injuries that are similar to those subsequently suffered by the plaintiff. If the change occurs after the plaintiff's injury, there is no causative connection, but the change is pretty probative of the defendant's position regarding the original product or condition.

[9] 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5283 n.68 (updated April 2021). *See, e.g., Herndon v. Seven Bar Flying Serv., Inc.,* 716 F.2d 1322, 1331 (10th Cir. 1983)

the remedial measure, the safety policy rationale behind Rule 407 is not furthered --- because there is no causal connection between the injury and the subsequent measure.[10] The existence of the doctrine of involuntary subsequent remedial measures—which is an extratextual doctrine justified by Rule 407's policy aims—supports an argument that Rule 407 should be amended to add a causal connection requirement. Courts that apply Rule 407 to measures that are not in response to the plaintiff's injury are being inconsistent when they also find Rule 407 inapplicable to government-mandated changes.

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Drafting alternatives to resolve the circuit split on a causative connection requirement will be discussed in Part V.

III. Rule 407 --- Does the Rule Exclude Subsequent Changes in Contract Cases?

The courts are divided on whether changes in contract or policy language should be protected by Rule 407 as a subsequent remedial measure. To take an example, assume that an employee has signed a form contract, and claims that a certain clause supports his claim for overtime. The employer disagrees with that interpretation. In a breach of contract action, the employee wishes to introduce the fact that after he brought his lawsuit, the employer changed the language of the form contract to sharpen it, in a way that would have terminated the plaintiff's claimed interpretation. This is offered as proof that the employer recognized the strength of the plaintiff's interpretation. The Third, Fourth, and Seventh Circuits have held that Rule 407 does apply to altered contract or policy language in breach of contract cases.[11] These courts have viewed changes in advertised language on a website, policy language in a contract, and terms in insurance offerings as subsequent remedial measures excludable by FRE 407. By contrast, the Fifth and Eighth Circuits, and district courts from the First, Sixth, and Eleventh Circuits, have all refused to exclude this type of changed language in breach of contract or warranty cases, because such

("Where a superior authority requires a tortfeasor to make post-accident repairs, the policy of encouraging voluntary repairs which underlies Rule 407 has no force—a tortfeasor cannot be discouraged from voluntarily making repairs if he must make repairs in any case.")

[10] *See, e.g., O'Dell v. Hercules, Inc.,* 904 F.2d 1194, 1204 (8th Cir. 1990) ("An exception to Rule 407 is recognized for evidence of remedial action mandated by superior governmental authority or undertaken by a third party because the policy goal of encouraging remediation would not necessarily be furthered by exclusion of such evidence.").

[11] *See Reynolds v. Univ. of Pa*., 483 F. App'x 726, 733 (3d Cir. 2012) (finding no abuse of discretion in applying FRE 407 to evidence of changed website language in a breach of contract claim); *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 153–54 (4th Cir. 1995) (applying FRE 407 to exclude evidence that a payment limitation was discontinued in a case alleging breach of contract due to an unjustified application of the limitation); *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1045 (7th Cir. 2007) (applying Rule 407 to evidence of a changed insurance policy in a breach of contract claim).

financial injuries do not appear to be within the concern of Rule 407, which speaks in the tort-based terms of "negligence," "culpable conduct," and "injury or harm."[12]

Cases Holding That Rule 407 Applies in Contract Actions

Most of the courts applying Rule 407 to contract actions rely on the text of the rule. As one court puts it:

> Had the drafters of the Rule intended it to apply only to tortious conduct, they could have used the words "tortious conduct" in place of "culpable conduct." By choosing the broader of the two phrases, the drafters clearly demonstrated their intent not to confine the application of the Rule to tort cases. Because a breach of contract is culpable conduct, . . . I find that the plain language of Rule 407 indicates that it applies to breach of contract cases.[13]

Beyond this textual analysis --- which of course is mooted if the language is changed by amendment --- two policy arguments have been made for applying Rule 407 in contract cases. The first is that the social policy supporting Rule 407 (to remove a disincentive to making improvements) applies in the same way to contractual changes as it does to product and premises changes. Judge Posner put it as follows: "To use at a trial a revision in a contract to argue the meaning of the original version would violate Rule 407 of the Federal Rules of Evidence, the subsequent-repairs rule, by discouraging efforts to clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract."[14]

The other policy argument offered in support of applying Rule 407 to contractual changes is that the line between tort and contract is not a bright one. There is certainly some misconduct that would constitute both a breach of contract and a tort --- breach of warranty actions and wrongful discharge actions come to mind. So it makes some sense to have a unitary treatment in

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[12] *See Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 428 (5th Cir. 2006) ("a product can fail to perform as warranted without necessarily creating an "injury or harm" as contemplated by the rule 407. A "lemon" is not necessarily a safety hazard"); *NAZ, LLC v. Philips Healthcare*, 2019 WL 77233, at *16 (E.D. La.) ("Thus, as the Fifth Circuit observed in *Brazos*, the evidence at issue here does not go to the issue of negligence or culpability, but instead relates to whether the product sold worked as represented or warranted. Consequently, the words and the rationale of Rule 407 do not apply."); *R.W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266, 274 (8th Cir. 1985) (finding 407 inapplicable to a contract action); *Mowbray v. Waste Mgmt. Holdings, Inc.*, 45 F.Supp.2d 132, 141 (D. Mass. 1999) (finding Rule 407 to be inapplicable to breach of warranty cases because no proof of mental state is required); *Melendez v. Sinclair Cmty. Coll.*, No. 3:05 CV 338, 2007 WL 81846, at *8 (S.D. Ohio Jan. 8, 2007) ("The Court reads this language ['injury or harm' in Rule 407] as directed to a tort setting."); *Smith v. Miller Brewing Co. Health Benefits Program*, 860 F. Supp. 855, 857 n.1 (M.D. Ga. 1994) ("[W]hen the dispute concerns the terms of a contract, and there are changes in the language that make the intent of the drafter clearer, the court should consider that change in evaluating the disputed term.").

[13] *Reynolds v. Univ. of Pennsylvania*, 747 F. Supp. 2d 522, 535 (E.D. Pa. 2010), *aff'd*, 483 F. App'x 726 (3d Cir. 2012). *See also* Pastor v. State Farm Mutual Automobile Insurance Company, 487 F.3d 1042 (7th Cir. 2007) (applying Rule 407 to a contract case and describing breach of contract as "culpable conduct").

[14] *Pastor v. State Farm Mut. Auto. Ins. Co.,* 487 F.3d 1042, 1045 (7th Cir. 2007).

terms of Rule 407 protection. As one court put it: "the application of the Rule cannot depend on whether a plaintiff chooses, potentially years later, to bring a lawsuit sounding in tort or one sounding in contract."[15] A related argument is that applying Rule 407 to both contract and tort actions allows for more predictable use, and therefore is something that a defendant can place more reliance on when deciding whether to improve a product or condition. Thus, "[b]y applying Rule 407 uniformly to both tort and contract claims, individuals are incentivized to repair potentially injurious conditions regardless of what type of claim might arise therefrom."[16]

Cases Holding That Rule 407 Does not Apply to Contract Actions

Ironically, the courts holding that Rule 407 does not apply to contract actions *also* rely on the text of the Rule. The rule talks in terms of "culpable" conduct and "injury or harm" and these are tort-like terms. Thus, in *R.W. Murray, Co. v. Shatterproof Glass Corp*., 758 F.2d 266, 274 (8th Cir. 1985), the court observed that "Rule 407 is, by its terms, confined to cases involving negligence or other culpable conduct" and thus did not cover breach of contract, because the court concluded that culpability is not required for that claim. And in *Smith v. United HealthCare Servs., Inc*., 2003 WL 22047861, at *11 (D. Minn. Aug. 28, 2003), the court observed that "[t]he language of the rule requires 'injury or harm,' as well as a charge of product deficiency, negligence or culpable conduct, but makes no reference to economic loss."

Some courts rely on the Committee Note to conclude that the Rule does not contemplate covering contract actions. As the court in *Smith, supra,* put it, "the Advisory Committee Notes explain that the primary policy rationale for this rule is safety, emphasizing the focus on bodily harm tort claims."

Which is the Better View?

There is little doubt that applying Rule 407 to contract actions is an extension of the Rule. The text and Committee Note show a clear intent to cover tort actions only. And even the 1997 amendment (which specified product liability and breach of warranty actions to be covered by the Rule) was concerned with tort actions only. But the question for rulemakers seeking to solve a circuit split is not what the rule says now but whether it should be changed in order to rectify the split and adopt a workable, uniform rule.

One solution to a circuit split is to adopt the rule of the strong majority of the courts (so that the transaction costs of a rule change will be minimized). But in this instance, the courts are

[15] *Reynolds v. Univ. of Pennsylvania*, 747 F. Supp. 2d 522, 535 (E.D. Pa. 2010), *aff'd*, 483 F. App'x 726 (3d Cir. 2012).

[16] Id.

relatively evenly split. So really it comes down to 1) which is the better view as a matter of policy, and 2) which rule will be easier to apply.

In terms of policy: there is an argument that the policy of Rule 407 should apply to contractual changes. The policy of Rule 407 is to remove a disincentive to fix something for fear that the fix will be used against you at trial. In contract cases, the drafter of the contract arguably may be deterred from improving it for fear that the improvement will be used against the drafter at trial. But the counterargument is that the social policy behind Rule 407, even for tortious conduct, is weak. That is because defendants will probably fix things anyway --- even without the protection of the rule --- for fear that not fixing them will lead to future injuries and greater liability. So, why extend a weakly-founded rule to another set of cases? Surely there is reason to doubt that the rule will actually affect conduct in a breach of contract case. Moreover, it is one thing to exclude relevant evidence to promote safety; it is another to exclude relevant evidence to promote precision in contractual drafting.

There is also a distinction in the context of tort and contract claims as applied to Rule 407, that might counsel against applying the rule to contracts cases. In the tort case, the plaintiff is saying, "if you fixed it before, I wouldn't have lost my leg in the lawnmower." In the contract case, the plaintiff is saying, "if you fixed the contract, there wouldn't have been a breach of contract" but what he is also saying is that "if you fixed the contract, I wouldn't have the right I am claiming now." Which is weird.

In terms of ease of application: it would seem that a rule extending Rule 407 to contract cases would be the easier one. All the court would have to determine is whether the change would have made the injury less likely to occur. The contrary view, that the rule is limited to tort cases, can raise some difficulty if the cause of action raises both tort and contract issues, or when there are separate tort and contract claims arising from the same conduct. It would be odd to exclude the subsequent measure on the tort claim but not on the contract claim. And it would be odd if the plaintiff could plead its way around Rule 407 by characterizing the claim solely in contract terms. On the other hand, if the reported case law is any indication, the use of Rule 407 in tort/contract overlap cases is exceedingly rare.[17]

Another possibility, of course, is that the Committee does nothing and leaves the split unremedied. The justification for this position would be that the matter does not arise very frequently, and the arguments for one or the other option are pretty much in equipoise.

Drafting alternatives to resolve the circuit split on the applicability of Rule 407 to contract actions, assuming the Committee wishes to go forward with such an amendment, will be discussed in Part V.

[17] I am not saying that tort/contract overlap cases are rare. I am saying that the reported cases in which a subsequent measure is offered in a tort/contract overlap case can be counted on one hand.

IV. Add-on for Government-Mandated Changes and Non-Party Changes

As discussed above, the courts have uniformly found that Rule 407 does not apply to government-mandated changes --- because the social policy of not discouraging improvements is inapplicable if the government is requiring the change. Similarly, almost all courts have found that Rule 407 is inapplicable when the change is made by a non-party, not the defendant.[18] For example, assume a plaintiff is injured when using a machine that was bought by his employer. After the injury, the *employer* makes a change to the machine that would have made the injury less likely to occur. The plaintiff sues the *manufacturer* and the manufacturer seeks to exclude the change. As stated above, the vast majority of cases find Rule 407 inapplicable, but there is a district court case to the contrary --- on somewhat unusual facts, so this probably does not rise to the level of a circuit split.[19]

While the case law on government-mandated changes and third-party changes is essentially uniform, the fact is that neither of these lines of authority are consistent with the actual language of the rule. The rule provides protection for "measures … taken that would have made an earlier injury less likely to occur." There is no exception for measures mandated by the government. And there is no exception for measures taken by non-parties.[20] Case law has engrafted these two exceptions into the rule.

The disparity between the case law and the text of the Rule, while hardly ideal, would not in itself be a reason to amend the rule --- because the amendment would not change any result, so

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[18] *See, e.g.*, Wright & Miller, 23 Fed. Prac. & Proc. Evid. § 5283 (2d ed.) ("The vast majority of cases and commentators conclude that Rule 407 only excludes remedial measures taken by a party, usually the defendant.").

[19] *Pfeifer v. Hiland*, 2019 WL 1767567, at *6 (W.D. Ky. Apr. 22, 2019) (prison doctor sued for malpractice; recommendations of a prison review board were protected under Rule 407 because admitting the nonparty's measures would "potentially expose current and former employees to liability" [in other actions] which is "not within the spirit of the rule.").

For some of the many cases to the contrary, *see, e.g., Raymond v. Raymond Corp*., 938 F.2d 1518, 1524 (1st Cir. 1991) ("Rule 407 applies only to subsequent remedial measures taken voluntarily by the defendant. . . . Because the social policy which forms the primary basis of Rule 407 is not furthered, there is no rationale for excluding third party subsequent repairs under the Rule."); *Diehl v. Blaw-Kno*x, 360 F.3d 426, 430 (3d Cir. 2004) (The policy underlying Rule 407 "is not implicated where the evidence concerns remedial measures taken by an individual or entity that is not a party to the lawsuit. The admission of remedial measures by a non-party necessarily will not expose that non-party to liability, and therefore will not discourage the non-party from taking the remedial measures in the first place. It is noteworthy that each of the circuits to address this issue has concluded that Rule 407 does not apply to subsequent remedial measures taken by a non-party."); *TLT-Babcock, Inc. v. Emerson Elec. Co*., 33 F.3d 397, 400 (4th Cir. 1994) ("The courts of appeals, therefore, have held that evidence of subsequent repairs may be admitted where those repairs have been performed by someone other than the defendant. . . . We agree with the logic and conclusion of our sister circuits."); *Goehler v. Wal-Mart Stores, Inc.*, 229 F.3d 1142 (4th Cir. 2000) ("Not only was the soap dispenser not moved for safety reasons, it appears that it was not moved at Wal-Mart's direction. The district court's admission of evidence regarding the soap dispenser's movement did not violate Rule 407."); *Dixon v. Int'l Harvester Co*., 754 F.2d 573, 583 (5th Cir. 1985) ("Since these repairs were made by a non-defendant, Rule 407 does not bar the evidence.").

[20] *Diehl v. Blaw-Kno*x, 360 F.3d 426, 430 (3d Cir. 2004) (finding that "each of the circuits to address this issue has concluded that Rule 407 does not apply to subsequent remedial measures taken by a non-party" and deciding to follow the Sister Circuits; but noting that "[t]he able District Judge declined to follow these authorities, observing that the text of Rule 407 makes no exception for subsequent remedial measures taken by a non-party.")

the transactions costs of the amendment probably would not justify the limited benefit. But if the Rule is to be amended, it might well be a useful add-on to specifically provide exceptions for government-mandated and non-party changes.

There is significant precedent for add-ons to an amendment. The latest example is Rule 404(b), which became effective last December. The predominant purpose of the amendment was to require the government to provide notice of the specific purpose for offering bad act evidence, and to articulate how the bad act evidence was probative to that purpose without proceeding through a propensity inference. The add-on amendment was to change the restyled language ("crimes, wrongs, or other acts") back to the original phrase ("other crimes, wrongs, or acts"), to emphasize that the rule covered only acts other than those charged. No court had had a problem with the restyled phrase, but the Committee determined that the restoration would be useful as an add-on --- because, after all, you don't get many chances to amend a particular rule, so you might as well make it as good as you can if you are amending it.

The drafting alternatives in Part V will treat the possibility of add-ons for government-mandated and non-party changes. As we will see, if the amendment imposes a requirement that the injury was the cause for the change, the government-mandated add-on is actually addressed by that change. But if the amendment provides that the measure is admissible without regard to the motivation, then the government-mandate cases are undermined and there is no way to treat that doctrine, in text or committee note, with any consistency.

V. Drafting Alternatives

There are four drafting options: 1. Causative connection requirement; 2. No causative connection requirement; 3. Declaring the Rule 407 protection inapplicable to breach of contract actions; and 4. Extending the protection to breach of contract actions. Obviously these alternatives can be combined, as you see below.

The drafting proposals below try to address, where possible, the questions of government-mandated changes and non-party changes.

1. Causative Connection Requirement and Exclusion of Contract Cases

Rule 407. Subsequent Remedial Measures

When measures are taken by a party in response to an injury or harm that would have made ~~an earlier~~ that injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- ~~culpable~~ tortious conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Reporter's Comment on Change re Contract Cases:

Arguably the change "from culpable" to "tortious" is a little too subtle. That solution stems from court cases saying that the rule extends to contract actions because the drafters used the term "culpable" rather than "tortious." There are other solutions to consider. One possibility would be to add "personal" before "injury" --- measures "taken by defendant in response to a personal injury or harm." But not all tort injuries are personal injuries. Another, more specific solution, is to simply add a sentence providing that the Rule is not applicable to breach of contract claims. That could be a sentence added to the final sentence of the rule:

> But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures. And the court may also admit the evidence as proof of breach of contract.

Draft Committee Note

The rule has been amended in three respects. Most importantly, the rule now provides that its protection is limited to situations in which the subsequent measure is in response to the plaintiff's injury or harm. If there is no connection between the injury or harm and the improvement, then the policy supporting the rule is inapplicable. If, for example, the defendant has been planning a change, but the change is not effectuated until after the injury, the rule does not apply because the public policy of not discouraging improvements simply is not in play. Likewise, if the defendant is not even aware of the plaintiff's injury, the motivation to take a measure that would have made the injury less likely to occur will not be affected by Rule 407.

Of course, if the measure is not causally connected to the plaintiff's injury, the probative value of that change in proving negligence, product liability, etc., may be diminished, and the trial court may consider excluding the measure under Rule 403.

Under the amendment, a change made in response to a government mandate will not be protected by Rule 407. Virtually all courts have so held, but the language of the rule did not actually support those outcomes, because the text extended coverage to any act that would have made the injury or harm less likely to occur. As amended, a government-mandated change is not within the rule's protection, because that protection is granted only to changes made in response to the plaintiff's injury or harm.

Second, the amendment provides that the rule is not applicable in breach of contract actions. Some courts have extended the protection of Rule 407 to subsequent measures in breach of contract actions. But the social policy supporting the rule, while perhaps viable in tort actions, is strained in breach of contract actions. A case-by-case Rule 403 approach is preferable to a broad rule based on a social policy that has always been tied to tort actions, not contract actions.

Finally, the rule has been amended to clarify that its protection does not extend to changes made by non-parties. Almost all courts have held that Rule 407 does not exclude evidence of changes made by non-parties --- because the social policy of the rule is not in play, as the rule presumably has no effect on the conduct of a non-party. The existing case law is now supported by the text of the rule.

2. Causative Connection Requirement and Extension to Contract Cases

Rule 407. Subsequent Remedial Measures

When measures are taken by a party in response to an injury or harm that would have made ~~an earlier~~ that injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; ~~or~~
- a need for a warning or instruction; or
- a breach of contract.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Draft Committee Note

The rule has been amended in three respects. Most importantly, the rule now provides that its protection is limited to situations in which the subsequent measure is in response to the plaintiff's injury or harm. If there is no connection between the injury or harm and the improvement, then the policy supporting the rule is inapplicable. If, for example, the defendant has been planning a change, but the change is not effectuated until after the injury, the rule does not apply because the public policy of not discouraging improvements simply is not in play. Likewise, if the defendant is not even aware of the plaintiff's injury, the motivation to take a measure that would have made the injury less likely to occur will not be affected by Rule 407.

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Second, the amendment provides that the rule is applicable in breach of contract as well as tort actions. Some courts have refused to extend the protection of Rule 407 to subsequent measures in breach of contract actions, but the reasoning was that the language of the rule

could not fairly be read to extend to contract actions. Now it does. The rule is necessary to avoid "discouraging efforts to clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract." *Pastor v. State Farm Mut. Auto. Ins. Co.,* 487 F.3d 1042, 1045 (7th Cir. 2007). Moreover, some harms may be grounded in both tort and contract, so a unitary approach avoids difficulties in such cases.

Finally, the rule has been amended to clarify that its protection does not extend to changes made by non-parties. Almost all courts have held that Rule 407 does not exclude evidence of changes made by non-parties --- because the social policy of the rule is not in play, as the rule presumably has no effect on the conduct of a non-party. The existing case law is now supported by the text of the rule.

3. No Causative Connection Requirement and Exclusion of Contract Cases

Rule 407. Subsequent Remedial Measures

When measures are taken by a party that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures --- regardless of the defendant's motivation for taking the measures --- is not admissible to prove:

- negligence;
- ~~culpable~~ tortious conduct;[21]
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Draft Committee Note

The rule has been amended in three respects. Most importantly, the rule now provides that its protection extends to a subsequent remedial measure even if the measure was not taken in response to the plaintiff's injury or harm. The courts have been split on whether the rule applies when, for example, the defendant has been planning a change, but the change is not effectuated until after the injury. Under the amendment the rule does apply. The Committee determined that requiring a specific connection between the injury or harm and the remedial measure would require difficult factual determinations, and ultimately would undermine the social policy that animates the rule.

Second, the amendment provides that the rule is not applicable in breach of contract actions. Some courts have extended the protection of Rule 407 to subsequent measures in breach of contract actions. But the social policy supporting the rule, while viable in tort actions, is strained in breach of contract actions. A case-by-case Rule 403 approach is preferable to a broad rule based on a social policy that has always been tied to tort actions, not contract actions.

Finally, the rule has been amended to clarify that its protection does not extend to changes made by non-parties. Almost all courts have held that Rule 407 does not exclude evidence of changes made by non-parties --- because the social policy of the rule is not in play, as the rule presumably has no effect on the conduct of a non-party. The existing case law is now supported by the text of the rule.

[21] See the Reporter's Commentary to Draft Alternative 1 for a suggestion about more specific language to indicate that the rule does not apply to breach of contract actions.

Reporter's comment on Committee Note to Draft Alternative 3

The first two alternatives contained language in the Note regarding the inapplicability of the rule to government-mandated changes. But such language cannot be added to the note for an amendment that makes motivation for the change irrelevant. Indeed a fair reading of this Alternative would mean that government-mandated changes *are* protected by the amended rule. On balance, if this alternative were proposed, it would probably be best to say nothing at all about the case law on government-mandated changes. Just leave it lie ---unless the Committee thinks that the uniform caselaw is somehow misguided. (A note entry saying that there is no intent to change the result in such cases would be hard put to explain why this is so.)

Arguably the provision that the rule is inapplicable to non-party changes is also inconsistent with the amendment. The cases on non-party changes are based on the fact that the removal of a disincentive to make changes would have no effect on the non-party's conduct. But if the rule removes a motivation requirement, it will mean that the protection will apply even though it would have had no effect on the defendant's conduct. Perhaps the tension between the amendment and the non-party cases could be answered as follows: it is one thing to protect all of the defendant's changes, because it is often too hard to figure out what motivated them; but it is quite another to extend the protection to the defendant of actions done by another --- where there are obviously no factual questions about the defendant's motivations, because the defendant didn't do anything. Nonetheless, if motivation for a change becomes irrelevant, there is indeed a tension with the non-party cases --- and maybe the best thing to do would (was with government-mandated changes) just say nothing at all about them. If so, the drafting alternative can be easily adjusted to leave the law where it found it.

4. *No Causative Connection Requirement and Inclusion of Contract Cases*

Rule 407. Subsequent Remedial Measures

When measures are taken by a party that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures --- regardless of the defendant's motivation for taking the measures --- is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; ~~or~~
- a need for a warning or instruction;
- a breach of contract.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Draft Committee Note

The rule has been amended in three respects. Most importantly, the rule now provides that its protection extends to a subsequent remedial measure even if the measure was not taken in response to the plaintiff's injury or harm. The courts have been split on whether the rule applies when, for example, the defendant has been planning a change, but the change is not effectuated until after the injury. Under the amendment the rule does apply. The Committee determined that requiring a specific connection between the injury or harm and the remedial measure would require difficult factual determinations, and ultimately would undermine the social policy that animates the rule.

Second, the amendment provides that the rule is applicable in breach of contract as well as tort actions. Some courts have refused to extend the protection of Rule 407 to subsequent measures in breach of contract actions, but the reasoning was that the language of the rule could not fairly be read to extend to contract actions. Now it does. The rule is necessary to avoid "discouraging efforts to clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract." *Pastor v. State Farm Mut. Auto. Ins. Co.,* 487 F.3d 1042, 1045 (7th Cir. 2007). Moreover, some harms may be grounded in both tort and contract, so a unitary approach avoids difficulties in such cases.

Finally, the rule has been amended to clarify that its protection does not extend to changes made by non-parties. Almost all courts have held that Rule 407 does not exclude evidence of changes made by non-parties --- because the social policy of the rule is not in play, as the rule presumably has no effect on the conduct of a non-party. The existing case law is now supported by the text of the rule.

TAB 4

TAB 4A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Rule on Illustrative Aids and the Treatment of "Demonstrative Evidence"
Date: October 1, 2021

At its last meeting, the Committee voted to consider a possible amendment to Rule 611 that would set standards for offering illustrative aids, and thereby distinguish illustrative aids from demonstrative evidence. The problem of distinguishing between illustrative aids and demonstrative evidence is illustrated in *Baugh v. Cuprum S.A. de C.V.,* 730 F.3d 701, 703 (7th Cir. 2013) (Hamilton, J.). In *Baugh,* the trial court allowed an "exemplar" of the ladder involved in the accident at issue to be presented at trial, but only for the purpose of helping the defense expert to illustrate his testimony. Over objection, the trial court allowed the jury to inspect and walk on the ladder during deliberations. The Seventh Circuit found that while allowing the ladder to be used for illustrative purposes was within the court's discretion, it was error to allow it to be provided to the jury for use in its deliberations. The court drew a line between exhibits admitted into evidence to prove a fact, and presentations used only to illustrate a party's argument or a witness's testimony; it stated that the "general rule is that materials not admitted into evidence simply should not be sent to the jury for use in its deliberations."

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

> The term "demonstrative" has been used in different ways that can be confusing and may have contributed to the error in the district court. In its broadest and least helpful use, the term "demonstrative" is used to describe any physical evidence. *See, e.g., Finley v. Marathon Oil Co*., 75 F.3d 1225, 1231 (7th Cir.1996) (using "demonstrative evidence" as synonym for physical exhibits). . . .
>
> As Professors Wright and Miller lament, the term, "demonstrative" has grown "to engulf all the prior categories used to cover the use of objects as evidence.... As a result,

courts sometimes get hopelessly confused in their analysis." 22 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 5172 (2d ed.); see also 5 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 9:22 (3d ed.) (identifying at least three different uses and definitions of the term "demonstrative" evidence, ranging from all types of evidence, to evidence that leaves firsthand sensory impressions, to illustrative charts and summaries used to explain or interpret substantive evidence). The treatises struggle to put together a consistent definition from the multiple uses in court opinions and elsewhere. See 2 McCormick on Evidence § 212 n. 3 (Kenneth S. Broun ed., 7th ed.) (recognizing critique of its own use of "single term 'demonstrative evidence,' " noting that this approach "joins together types of evidence offered and admitted on distinctly different theories of relevance").

The *Baugh* court declined to "reconcile" all the definitions of "demonstrative" evidence but did delineate the distinction between exhibits that are admitted into evidence to prove a fact and illustrative aids that are introduced only to help the factfinder understand a witness's testimony or a party's argument.

The distinction addressed in this memo is between (substantive) demonstrative evidence – such as a product demonstration to prove causation or the lack of it --- and *illustrative aids* that help the factfinder to understand a witness's testimony or a party's presentation, e.g., closing argument, summation, etc. That is the line that will be followed in this memo, and in the discussion draft of an amendment set forth below. The goal of an amendment would be to provide a distinction in the rules between demonstrative evidence and illustrative aids, and to set forth standards for when illustrative aids can be used at trial. As such, the goal would be to track and improve on Maine Rule of Evidence 616, which provides extensive guidelines on the use of "illustrative aids."

This memo consists of four parts. Part One provides a short description of the case law on "demonstrative evidence" and illustrative aids; it includes a section on the confusion of some courts in distinguishing between summaries (covered by Rule 1006) and illustrative aids. Part Two sets forth Maine Rule 616 and provides some comment on it. Part Three provides a short discussion of the costs and benefits of an amendment along the lines of Maine Rule 616, and discusses where it might be placed. Part Four sets forth a possible amendment and Committee Note.

This memo should be read in conjunction with another memo in this book, prepared by Professor Richter, dealing with various issues arising under Rule 1006. An amendment that would add guidelines on illustrative aids would dovetail with an amendment to Rule 1006 that would emphasize that illustrative aids are not summaries covered by Rule 1006 --- because that rule applies to summaries of admissible evidence.

The draft amendment on illustrative aids is not an action item at this meeting. But if the Committee is in favor of it, then it will be presented as an action item at the next meeting, with whatever alterations the Committee suggests at this meeting.

I. Federal Case Law on "Demonstrative Evidence" and "Illustrative Aids"

As indicated by the court in *Baugh,* and by the authority it cites, there is no single definition for the term "demonstrative" evidence; and it is of course not optimal to have a term bandied about to cover a number of different evidentiary concepts --- everything from physical evidence in the case, to evidence offered circumstantially to prove how an event occurred, to information offered as an illustrative aid, i.e., a pedagogical device to assist the jury in understanding a witness's testimony or a party's presentation. The fluidity of the nomenclature can certainly lead to problems like that found in *Baugh,* where the trial court started out on the right path in allowing the ladder to be introduced to help illustrate the expert's testimony, but then switched tracks and treated it as "demonstrative" evidence of a fact.

A. General Description of the Case Law

What follows is a general description of the case law on "demonstrative evidence" and "illustrative aids":

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

[1] *See, e.g., United States v. Stewart-Carasquillo,* 997 F.3d 408 (1st Cir. 2021) (finding no error in excluding a proposed demonstration of a disputed event --- whether one person could pull large bales of drugs out of the ocean and into a boat --- because the purported demonstration differed from the actual circumstances in substantial ways).

[2] *See, e.g., Apple, Inc. v. Corellium, LLC,* 2021 WL 2712131 (S.D. Fla. 2021) (allowing the use of an illustrative aid, relying on Rule 611(a), and noting that the aid would be useful in explaining a difficult concept to the jury; court refers to it as a "demonstrative aid"); *United States v. Edwards*, 2021 US Dist LEXIS 45421 (N.D. Ill.) (firearm was properly used as an aid to illustrate "racking" of a gun; the government made clear that the gun was not the defendant's and was not used in any crime; court relies on Rule 611(a) and refers to the use of the gun as a "demonstrative aid"); *United States v. Kaley,* 760 F. App'x 667, 681–82 (11th Cir. 2019) (finding under Rule 611(a) and Rule 403 that the illustrative aid fairly represented the evidence); *United States v. Crinel*, 2017 WL 490635, at *11–12 & Att.2 (E.D.

line is that the aid cannot be misrepresentative, as that could lead the jury to confusion or to draw improper inferences.[3]

If the pedagogical aid is sufficiently helpful and not substantially misleading or otherwise prejudicial, it may be presented at trial, but, as the court held in *Baugh*, *it may not be given to the jury for use in deliberations.* Though if you ask individual judges, you will find that many believe they have the discretion to allow the jury to use pedagogical aids, powerpoints, etc. in their deliberations, over a party's objection. And as seen below, there is some dispute in the courts on this point.

The recent case of *Rodriguez v. Vil. of Port Chester*, 2021 US Dist LEXIS 79597 (S.D.N.Y.), provides a good example of a court's approach to illustrative aids. The defendants sought to preclude evidence of a medical illustration of the plaintiff's injuries. The plaintiff intended to use the illustration as an aid to "help the jury understand the anatomy of the ankle and exactly which bones were broken and how the injury affected the entirety of the ankle." The defendants argued that the illustration was inappropriate because it constituted the artist's "interpretive . . . spin to verbal descriptions of x-rays and CT scans." The court found this argument meritless and concluded as follows:

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

La. Feb. 7, 2017) (directing modification to pedagogical aid so that it is not misleading); *Johnson v. Blc Lexington Snf*, 2020 US Dist LEXIS 233263 (E.D. Ky.) (inflammatory and conclusory illustrative aid, sought to be used during opening and closing argument, relying on Rule 611(a) as requiring the court to "police the line between demonstration of evidence and demonization of an opposing party or witness"); *In re RFC*, 2020 US Dist LEXIS 23482 (D. Minn.) (chart offered as a pedagogical device was precluded, because it inaccurately summarized data in a database, and mischaracterized many transactions).

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

It could be argued that Rule 403 is not applicable to illustrations and pedagogical devices because they are not "evidence." But that is surely a hypertechnical view that gets you nowhere. Rule 611(a) is grounded in the presentation of "evidence" as well, and courts routinely rely on that rule to regulate the use of illustrative aids. So the conclusion from this view is that there is no rule that regulates the presentation of information offered to illustrate a point. If a party wants to bring a circus in to illustrate a breach of contract, the court is powerless to respond. That just cannot be, and as will be seen below, the courts have not at all considered themselves hamstrung in regulating information offered for pedagogical or illustrative purposes. At any rate, the proposed amendment places a balancing test geared specifically to illustrative aids, in the text of the rule.

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

The Court therefore declines to preclude use of this illustration . . . However, the Court reserves ruling on its admissibility until trial, as its propriety as an exhibit will depend on whether it . . . accurately reflects the testimony and opinion of the witness whose testimony it is meant to explain.[4]

3. There is another related type of evidence that raises the substantive/pedagogical line: summaries and charts. Here, the line is the same though there is an additional rule involved: Rule 1006 covers summaries if they are to be admitted substantively. The conditions for admission under Rule 1006, when the rule is properly applied, are: 1) the underlying information must be substantively admissible; 2) the evidence that is summarized must be too voluminous to be conveniently examined in court; 3) the originals or duplicates must be presented for examination and copying by the adversary.[5] Rule 1006 summaries of the evidence are distinct from illustrative aids, which are not offered into evidence to prove a fact.[6]

Summaries offered for illustrative purposes are permissible subject to Rule 611(a) and 403. That is to say they may be considered by the factfinder (but not as evidence) so long as they are consistent with the evidence and not misleading. *See, e.g., United States v. Wood*, 943 F.2d 1048 (9th Cir. 1991): In a complex tax fraud case, the trial court allowed

[4] For other examples of recent court treatment of illustrative aids, see, e.g., *United States v. Nelson*, 2021 US Dist LEXIS 71421 (N.D. Cal. Apr. 13, 2021) (the government's illustrative aid regarding cellphone company records would help the jury make sense of that evidence; but an express statement in one of the slides that two defendants were "traveling together" suggested a degree of concerted action that was not supported by the underlying data, and was struck pursuant to Rule 403); *King v. Skolness (In re King)*, 2020 Bankr LEXIS 2866 (Bankr. N.D. Ga.): The defendants sought to introduce a spreadsheet created by illustrating certain transactions implicating that the money paid by the defendants was directly spent by the plaintiff for his own purposes. The court found that the spreadsheet was not admissible as an illustrative aid because "it presents cherry picked information to present a conclusion about where the money included therein was spent" and so the spreadsheet was "an ineffective method for determining the truth of the evidence presented as well as highly prejudicial to the Plaintiff."

[5] Note the proviso, "when properly applied." In a separate memo in this agenda book, Professor Richter analyzes the many difficulties that courts have had in applying Rule 1006 --- most of which stem from the failure to mark the difference between summaries of admissible evidence under Rule 1006 and illustrative aids, which are not evidence.

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

a government witness to testify to his opinion of Wood's tax liability, as summarized by two charts, but prohibited the defendant's witness from using his own charts; Rule 1006 was not applicable, because the charts were pedagogical devices and not substantive evidence; the court found no error in allowing the use of the prosecution's chart but prohibiting the use of the defense's chart, because the prosecution's chart was supported by the proof, while the chart prepared by the defense witness was based on an incomplete analysis.[7]

But as stated in *Baugh,* when summaries are offered only for illustration, the general rule is that they should not be submitted to the jury during deliberations. *See, e.g., Pierce v. Ramsey Winch Co.,* 753 F.2d 416, 421 (5th Cir. 1985) (distinguishing between summaries that are admitted under Rule 1006 and "other visual aids that summarize or organize testimony or documents that have already been admitted in evidence"; concluding that summaries admitted under Rule 1006 should go to the jury room with other exhibits but the other visual aids should not be sent to the jury room without the consent of the parties).

B. Areas of Confusion or Disagreement

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

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

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

government witness, but had not been admitted into evidence. Over a defense objection, the district court sent these aids to the jury in response to the jury's request to have them, but also read a pattern jury instruction stating that "[the demonstrative aids] were offered to assist in the presentation and understanding of the evidence" and "[were] not evidence [themselves] and must not be considered as proof of any facts." The Sixth Circuit stated that "the law is unclear as to whether it is within a district court's discretion to provide a deliberating jury with demonstrative aids that have not been admitted into evidence." The court found it unnecessary to decide this point because any error was harmless given that the summaries sent to the jury merely reiterated evidence already admitted at trial.[8]

Beyond the case law, discussions with individual trial judges seem to show disagreement about whether illustrative aids can be sent to the jury over a party's objection. I've spoken to about 40 judges on this matter, and more than half said that they have on occasion submitted illustrative aids to the jury --- sometimes after a jury's request.

The second area of confusion regards the distinction between summaries of evidence under Rule 1006 and illustrative aids. Professor Richter states that "some district courts struggle with the basic distinctions between summaries admitted under Rules 611(a) and 1006 and the requirements that must be satisfied for the application of each rule." Professor Richter's memo, also in this agenda book, discusses the problems that the courts are having with Rule 1006 (especially, distinguishing Rule 106 summaries from pedagogical summaries).

In sum, while the distinction between demonstrative evidence and illustrative aids can be clearly stated, there remains some confusion about whether an illustrative aid can be sent to the jury. And while the distinction between an illustrative aid and a Rule 1006 summary can be articulated, some courts have had problem recognizing the distinction.

II. Maine Rule 616

Maine Rule of Evidence 616 is the only rule of evidence in the country that is specifically designed to treat any aspect of "demonstrative" evidence defined broadly. The Maine rule regulates the use of evidence referred to in this memo as "illustrative" or "pedagogical" i.e., offered to assist the jury in understanding a witness's testimony or a party's argument. Rule 616 is entitled "Illustrative Aids"; and its placement as Rule 616 indicates an attempt to place it close to Rule

[8] In *Verizon Directories Corp. v. Yellow Book USA, Inc.,* 331 F. Supp. 2d 136, 140 (E.D.N.Y. 2004), Judge Jack Weinstein also suggested that pedagogical devices and summaries not within Rule 1006 could be admitted into evidence and sent to the jury room in appropriate cases. He stated that increased flexibility in the use of educational devices "will probably result in courtroom findings more consonant with truth and law" and so whether designated as "pedagogical devices" or "demonstratives," this material "may be admitted as evidence when it is accurate, reliable and will assist the factfinder in understanding the evidence."

611(a), the rule that many courts have cited as a source of authority for admitting illustrative information.[9]

Maine Rule 616 provides as follows:

Rule 616. Illustrative Aids

(a) Otherwise inadmissible objects or depictions may be used to illustrate witness testimony or counsel's arguments.

(b) The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time.

(c) Opposing counsel must be given reasonable opportunity to object to the use of any illustrative aid prepared before trial.

(d) The jury may use illustrative aids during deliberations only if all parties consent, or if the court so orders after a party has shown good cause. Illustrative aids remain the property of the party that prepared them. They may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.

Reporter's Comment on Maine Rule 616: This seems to be a helpful and clear statement about how illustrative evidence should be treated. It could be improved in a few ways, however:

1) Subdivision (b) could more clearly track the Rule 403 test, e.g., "the court may limit or prohibit the use of an illustrative aid if its value in assisting the jury is substantially outweighed by the risk of unfair prejudice, confusion or delay."

2) The last three sentences of subdivision (d) should be a separate subdivision as they are about a different matter than the first sentence. The first sentence is about allowing the jury to use the aid in deliberation. That should be a separate point. The remaining three sentences are about procedural details.

3) Under federal rulemaking, the subdivisions would each need a caption.

_____

[9] If placement near Rule 611(a) was the goal, one might think a better choice would have been to make it part of Rule 611 itself. That possibility is explored for a Federal Rule in the last section of the memo.

Maine Rule 616 contains a substantial and detailed Committee Note. **The Committee Note to Maine Rule 616 provides as follows:**

> This rule is intended to authorize and regulate the use of "illustrative aids" during trial.
>
> Objects, including papers, drawings, diagrams, the blackboard and the like which are used during the trial to provide information to the finder of fact can be classified in two categories. The first category, admissible exhibits, are those objects, papers, etc., which in themselves have probative force on the issues in the case and hence are relevant under Rule 401. Such objects are admissible in evidence upon laying the foundation necessary to establish authenticity and relevancy and to avoid the strictures of the hearsay rule and other evidentiary screens. Usually the jury is permitted to take these objects with them to the jury room, to study them and to draw inferences directly from them relating to the issues in the case.
>
> The second class of objects are those objects which do not carry probative force in themselves, but are used to assist in the communication of facts by a lay or expert witness testifying or by counsel arguing. These may include blackboard drawings, pre-prepared drawings, video recreations, charts, graphs, computer simulations, etc. They are not admissible in evidence because they themselves have no relevance to the issues in the case. Their utility lies in their ability to convey relevant information which must be provided directly from some actual evidentiary source, whether that source be witness or exhibit which is admissible in evidence. The ultimate credibility and scope of the information conveyed is that of the source, not that of the illustrative media.
>
> This latter group of objects can be referred to as "illustrative aids." Sometimes they have been referred to as "demonstrative exhibits" or even "chalks."
>
> Frequently voluminous evidentiary data is summarized in tabular, or even graphic form, and is offered as a summary under Rule 1006. A summary which presents the data substantially in its original form would be admissible in evidence. A summary which presents the data in a tabular or graphic form to "argue" the case or support specific inferences would be an illustrative aid and would be governed by this rule.
>
> While such aids do not have evidentiary force in themselves, they can be extremely helpful in assisting the trier of fact to visualize evidentiary material which is otherwise difficult to understand. For the same reason, illustrative aids can also be subject to abuse. Sometimes the form of the illustrative may be grossly or subtly distorted to "improve" upon the underlying testimony, to oversimplify, or to provide subliminal messages. The opportunity for inventiveness and creativity in illustrative aids may exaggerate the effect of disparities in financial resources between parties.
>
> The proposed rule addresses some of the most common issues associated with the use of illustrative aids.

First of all, Rule 616(a) permits the use of illustrative aids for the purpose of illustrating the testimony of witnesses or the arguments of counsel. In the case of witness testimony, the foundation for the use of an illustrative aid would be testimony to the effect that the aid would assist the witness in illustrating her testimony. It is clear that the object need not be admissible in evidence to be useful as an illustrative aid. Thus there is no need to establish the authenticity of an illustrative aid or even its accuracy as long as it has no probative force beyond that of illustrating a witness's testimony.

Paragraph (b) of the proposed rule makes clear, however, that the court retains the discretion to condition, restrict or exclude the use of any illustrative aid in order to avoid the risk of unfair prejudice, surprise, confusion or waste of time. This is similar to the discretion exercised by the court under Rule 403 in dealing with objects which are admissible in evidence. Because of the multiplicity of potential problems which may be encountered, it is deemed wiser to allow the court a measure of discretion in applying general standards rather than to establish a legal test for utilization of these media.

Some of the problems associated with the use of illustrative aids can include the following:

1. Cases where the illustrative aid is so crafted as to have probative force of its own. Few people would attribute much probative force to a blackboard drawing which is used to illustrate a witness's testimony. However, with a precisely drawn chart, or even more a computer video display, the perceived quality of the media may impart to the information conveyed a degree of authority, accuracy and credibility much greater than the source from which the information originally came. If the court finds that the use of illustrative aids results in a "dressing up" of testimony to a level of perceived dignity, accuracy or quality greater than it deserves and this works an unfair prejudice, the aid could be limited or excluded under Rule 616(b).

2. Sometimes illustrative aids are used to take advantage of and heighten a disparity in economic resources. The entertainment quality of certain media may give an edge to a wealthy litigant which is entirely unjustified by the actual facts.

3. There is risk that the jury may draw inferences from the illustrative aids different from those for which the illustrative aid was created and offered. This is especially likely to be a risk if the jury takes the aids with them in the jury room to experiment with or scrutinize.

4. Use of illustrative aids often makes a more informative visual presentation which is difficult to capture on an oral record. Problems of ownership and control of the aids may make it impossible to document in the transcript a meaningful record on appeal.

5. Ordinary discovery procedures concentrate on the actual information possessed by the witnesses and known exhibits. Illustrative aids as such are not usually subject to discovery and often are not prepared far enough in advance of trial. Their sudden

appearance at trial may not give sufficient opportunity for analysis, particularly if they are complex, and may cause unfair surprise.

Illustrative aids may themselves become issues in the case leading to waste of time quibbling over the fairness of the illustrative aid, or battles between opponents marking up each other's illustrative aid, and the like.

One of the primary means of safeguarding and regulating the use of the illustrative aids is to require advance disclosure. The rule proposes that illustrative aids prepared before use in court be disclosed prior to use so as to permit reasonable opportunity for objection. The 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.

"Reasonable opportunity" for objection means reasonable under the circumstances. In a case where the aid is simple and is generated shortly before or even during trial, disclosure immediately before use would allow reasonable opportunity for the opponent to check out the aid. On the other hand counsel proposing to use a computer simulation or other complex illustrative media should be expected to make the aid and any information necessary to check its accuracy available sufficiently far in advance of use so as to permit a realistic appraisal and understanding of the proposed aid. The idea is to permit opposing counsel the opportunity to raise any issues of fairness or prejudice with the court out of the presence of the jury and before the jury may have been tainted by the use of the illustrative aid. This requirement of prior disclosure should be applied to both prosecution and defense in criminal cases consistent with constitutional rights of criminal defendants. The rule also provides that illustrative aids are not to go to the jury room unless all parties agree or unless the court orders. In many cases, it is likely that the parties will agree that certain illustrative aids might go to the jury room to aid the jury in their understanding of the issues. In other cases, it is possible that, despite the protest of one party, the court may determine that the jury's consideration of the issues might be so aided by an illustrative aid used during the trial that it should go with the jury to the jury room. But in the absence of such agreement or specific order, the residual rule would be that illustrative aids may be used in the courtroom only.

A recurrent problem with the use of illustrative aids arises from the fact that these are often proprietary items prepared by a particular party to give that party an advantage in the courtroom presentation. However, when a witness has relied heavily on an illustrative aid in giving her testimony, it is often impossible to cross-examine that witness effectively without the use of the same illustrative aid. Similarly, if an illustrative aid has been important in the presentation of one side, the other side ought to have access to that illustrative aid in meeting the testimony illustrated. "Use" of an illustrative aid does not mean despoiling it. Mutual courtesy and respect, reinforced if necessary by court supervision and aided by mylar overlays and the like, should suffice to preserve each party's illustrative aids from detracting markings by opposing counsel or witnesses.

The authorization here provided for the use of non-admissible "illustrative aids" does not prevent a party from using an actual probative exhibit also as an illustrative aid. For instance, a witness might be asked to indicate by marking on a photograph the location of an object which was not present at the time the photograph was taken. The photograph, as an exhibit, would be probative in itself. The jury could draw inferences directly from it. But the marks added by the witnesses would be a visual form of witness testimony. The preservation of that particular testimony in visual form for later inspection by the jury during deliberations might give that testimony undue weight and durability under the circumstances. Thus the court would have the discretion under this rule to withhold from the jury room an exhibit to which illustrative markings had been added if the markings would give undue weight to a witness's testimony on a disputed issue or otherwise would have some unfairly prejudicial effect.

The court would also have the discretion under this rule to restrict or prohibit marking on an evidentiary exhibit if the effect would be to remove the exhibit from the jury room during deliberations. Thus, if a counsel wishes to mark or to enhance an admitted exhibit or add additional material as an illustrative aid, it probably should be done on another counterpart of the exhibit or with a mylar overlay or some other suitable removable means so that the exhibit could be considered in the jury room in its original state.

Reporter Comment on the Maine Committee Note

This Committee Note seems extremely helpful, though much more detailed than Federal Notes have been in recent years. It reads like a helpful treatise entry. If an amendment is to be proposed to cover illustrative aids and distinguish them from demonstrative evidence, there is much from this Note that should be used. The text and the Note together seem helpful in working out some of the nomenclature --- differentiating "demonstrative" evidence, and discussing the more particularized problem that is at the heart of the cases, which is regulating illustrative information and preventing it from going into the deliberation room if it is used at trial.

The commentary makes clear that, upon objection, there needs to be a balancing of negative and positive factors before allowing an illustrative aid to be used. And the relevant factors are different from those applied when the presentation is offered as demonstrative proof of a fact. If it is offered to prove a fact in dispute, the question is its probative value in proving that fact, balanced against the risk that the jury will be confused or unfairly prejudiced. Generally in the case of demonstrative evidence offered to prove a fact in dispute, the unfair prejudice will be that the jury will make more of the evidence than it is really worth (because, for example, there are differences between the demonstration and the actual event that the jury might gloss over).[10] If the information is offered for illustrative purposes only, then the balance is to figure out probative value (how

[10] But there could also be unfair prejudice from the demonstration itself in some cases involving extreme or inflammatory conduct. See, e.g., *United States v. Gaskell,* 985 F.2d 1056, 1063 (11th Cir. 1993) (in a case involving shaken baby syndrome, the trial court erred in allowing an expert to shake a doll with a higher degree of force than would have been necessary to cause the syndrome in a real baby).

helpful it is to the jury in understanding a witness's testimony or a party's argument --- and that will depend among other things on whether it is a fair presentation) against the risk of prejudice or confusion (which in this instance is likely to mean that the jury may actually consider the information as proof of a fact asserted in it).[11]

There seems to be no reason, when it comes to illustrative aids, to get hung up on the theoretical question of "what is evidence" and "what is relevance"? Certainly the courts are not doing that kind of evidentiary navel-gazing. So the question of adding a rule on demonstrative evidence is instead whether it would be helpful to solve a real problem. If so, Maine Rule 616 would appear to be very a good starting point toward a rule, with the provisos discussed above, and recasting the problem as one not of "irrelevant" evidence but rather as information that is relevant because it helps the factfinder understand other evidence. [12]

III. Costs and Benefits of a Rule Covering Some Aspect of "Demonstrative Evidence"

The major benefit of the amendment is that it might provide some clarity and procedural regulation --- and user-friendliness --- to the use of illustrative aids. It would create a convenient location for standards governing illustrative aids --- which currently are found in scattered case law. It would certainly help the neophyte figure out the limits of Rule 1006 and the distinction between summaries admissible under that rule and illustrative aids (especially if coupled with changes to Rule 1006 that are discussed in Professor Richter's memo). And it would mean that the neophyte would not have to master the case law distinguishing "demonstrative evidence" offered to prove a fact from other demonstrations that are offered only to illustrate an expert's opinion or the party's argument --- a daunting problem because, as discussed above, the courts use the term "demonstrative evidence" quite loosely. It is undeniable that the terms used are often slippery and vague, and that mistakes are sometimes made, as in *Baugh.* And as noted above, there are some contrary cases suggesting that illustrative aids can be sent to the jury over an objection. So in particular it might be valuable to provide in a rule that if information is admitted only for illustrative purposes, it cannot be provided to the jury in deliberation unless all parties agree. That limiting principle would not only be a helpful statement but would also resolve whatever conflict exists in the case law. Moreover, that limiting principle is already found in Rules 803(5) and 803(18) --- which are both designed to prevent the jury from being more influenced by the information than should be permitted given the purpose for which it is offered (in those cases the hearsay is offered as trial testimony, which is not provided to the jury in deliberations). Thus, a

[11] And again, there might be unfair prejudice from the presentation itself. For example, the presentation in *Gaskell,* note 10 supra, purported to be both demonstrative evidence and a scientific illustration on how shaken baby syndrome occurs.

[12] It should be noted that the original Advisory Committee Note to Rule 611(a) states that the rule is a source of authority for regulating "the use of demonstrative evidence" and it seems clear that by the citation to McCormick the Advisory Committee was thinking of evidence that is used for illustrative purposes.

rule preventing use of certain evidence by jurors in deliberations is not foreign to the Evidence Rules. [Or, another helpful alternative could be to track the Maine rule and provide, as a default, that the illustrative aid cannot be sent to the jury room, but to allow the court to send it upon a finding of good cause. Either solution will provide a welcome dose of uniformity.]

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

The cost of an amendment like Maine Rule 616 is not zero --- because an amendment by definition imposes transaction costs. But there is an upside in providing guidance in what courts and commentators have recognized is a difficult and complex area.

Where Would an Amendment be Located?

Assuming an amendment to address illustrative aids would be a worthwhile addition, the question is where to put it. As stated above, adding a Rule 616 is an understandable move, but perhaps a better place is Rule 611 itself. That is where the Advisory Committee thought the court's authority to admit illustrative aids would lie.[13] That is where the federal courts have found the authority to regulate summaries that are offered only as pedagogical aids rather than proof of the underlying records. [Of course, any amendment to Rule 611 would have to be integrated with the other possible amendment to that rule to provide guidelines for juror questioning. If both are proposed, the Committee (and the restylists) can decide the most logical order.]

Application in the Maine Laboratory --- Costs and Benefits?

The Maine practice under Rule 616 might give some indication of whether a similar amendment to the Federal Rules would be useful. There is an intangible, though: the effect would not be in result as much as in nomenclature and user-friendliness. With that proviso, here is a discussion of the handful of reported decisions on Maine Rule 616: [14]

Irish v. Gimbel, 743 A.2d 736 (Me. 2000): In a medical malpractice case, the trial judge allowed the defendant to use a two foot by three foot enlargement of the finding of a medical malpractice panel. The court held that under Rule 616, this enlargement could be used by counsel

[13] See Advisory Committee Note to Rule 611(a) (saying that Rule 611(a) is intended to cover "the use of demonstrative evidence").

[14] This is the same case law discussion as was set forth in the memo for the previous committee meeting. I found no new reported cases.

in argument, but could only be put up while counsel was referring to it. In the previous trial in this case, the court had found error under Rule 616 when the enlargement was left facing the jury during the entirety of the trial. The case did not present the question of submitting the illustrative aid to the jury during deliberations.

Merrill v. Sugarloaf Mtn. Corp., 745 A.2d 378 (Me. 2000): The plaintiff was injured on a ski slope and brought an action against the ski resort. The defendant was allowed to use an illustrative aid depicting unrelated areas of the ski slope for the purpose of educating the jury on the difference between groomed and ungroomed snow conditions. The court found no error, saying only that under Rule 616, "use of an illustrative aid is within the trial court's discretion." There was no issue about submitting the aid to the jury.

State v. Irving, 818 A.2d 204 (Me. 2003): The defendant was charged with vehicular manslaughter. At trial the government was allowed to put up the high school graduation photo of the victim during its opening argument. It was a blowup placed on an easel and it was taken down after the opening. The court found no error under Rule 616 and had this to say:

> An illustrative aid is a depiction or object which illustrates testimony or argument. M.R. Evid. 616(a). It does not go into the jury room unless counsel agree or by order of the court for good cause. While it does not have to meet the requirements of admissibility, *id.* 616(a), it has to be related to the testimony or argument which it illuminates. When used to illustrate argument, the aid must not be used for an improper purpose just as an opening statement or closing argument cannot contain improper references. * * * An illustrative aid used during argument that diverts a jury from the evidence or injects a risk of unfair prejudice would be improper.
>
> Because there is no transcript of the State's opening statement, there is nothing in the record that demonstrates that the State did not relate its display of the photograph to its statement. Furthermore, on this record, neither an improper purpose for displaying the photograph nor a risk of unfair prejudice is apparent. Irving argues that the photograph risked sidetracking the jury into comparing the defendant and the victim, but nothing in this record supports that assertion. By allowing the State a narrowly restricted use of Massey's photograph, the court did not abuse its discretion. The court obviously retained control over the manner in which the State used the photograph and could have restricted its use further if the State's comments about it during the opening statement gave the court concern about improper use or unfair prejudice.

Thus the court made clear that the decision to allow an illustrative aid is a question to be decided under Rule 403-type principles.

Jacob v. Kippax, 10 A.3d 1159 (Me. 2011): In a medical malpractice action, as in *Irish, supra,* defense counsel used a blowup of the medical malpractice panel opinion, this time during closing argument. The court found no error, stating that "the display of the enlargement for limited periods during Kippax's closing * * * was permissible pursuant to *Irish* and M.R. Evid. 616, which allows the use of illustrative aids in certain circumstances."

State v. Corbin, 759 A.2d 727 (Me. 2000): In a trial on charges of theft and tax evasion, the government used a summary chart that was an enlargement of a list of several checks used by the defendant to embezzle funds. That chart was allowed into the jury room for deliberations. The court found no error because the chart was offered as evidence of acts of the defendant. So as it was not being used as an illustrative aid, and Rule 616 was inapplicable.

Summary Comment on Maine Cases:

It appears that since 1997, when Rule 616 was enacted, there has been very little (reported) litigation over its meaning or application. This may be due to the fact that the line between illustrative aid and demonstrative evidence that is substantive proof is one that can be fairly easily understood once it is articulated, and also because the Rule serves more to clarify and provide a location for the law on the subject, rather than to change it.

IV. A Draft for Consideration

What follows is a possible draft and Committee Note for a new subdivision to Rule 611. Whether that subdivision would be (d) or (e) would depend on whether the Committee decides to proceed with another possible amendment to Rule 611 that would govern the use of juror questioning – a matter discussed in another memo in this agenda book.

The draft uses Maine Rule 616, and its extensive Committee Note, as a model, but it makes a number of changes in light of the comments and suggestions contained in this memo.

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

* * *

(d/e) Illustrative Aids. The court may allow a party to present an illustrative aid to assist the factfinder in understanding a witness's testimony or the proponent's argument if:

(1) its utility in helping the jury to understand the testimony or argument is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time;[15]

(2) all adverse parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use;

(3) it is not provided to the jury during deliberations over a party's objection [unless the court, for good cause, orders otherwise]; and

(4) it is entered into the record.

Comments:

1. Maine Rule 616 talks in terms of illustrative aids as being "otherwise inadmissible" but that is what gets everyone confused. The benefit of a new rule would be to get courts and parties thinking directly about a different kind of "evidence" --- offered only to illustrate --- the consequence of which is that the information is presented only for that purpose at trial and then is kept from the jury during deliberations.

2. Subparagraph (a) basically tracks the Rule 403 test. So why not just say "Rule 403"? Because the whole innovation is that Rule 403 has a different focus when it comes to illustrative aids --- the "probative value" to be considered is whether it assists the jury in understanding a witness or a party's presentation. It is not an assessment of how far it tends to prove a substantive fact in dispute. In this way the test is articulated like the one added to Rule 703 in 2000 --- which tracked (albeit in reverse) the Rule 403 balancing test but went further and described what the evidence was supposed to be probative for. That articulation received good reviews, and the above proposal applies the same kind of articulation of probative value.

3. Some of the procedural provisions of the Maine provision have been shifted to the Committee Note.

[15] Rule 403 also refers to "needlessly presenting cumulative evidence" but that phrase would be confusing her, because what is being offered is not evidence.

Draft Committee Note

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

Writings, objects, charts, or other presentations that are used during the trial to provide information to the factfinder can be classified in two categories. The first category is evidence that is offered to prove a disputed fact; admissibility for such evidence is dependent upon laying the foundation necessary to establish authenticity and relevancy and to satisfy the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this evidence to the jury room, to study it and to use it to help determine the disputed facts.

The second category --- the category covered by this Rule --- is information that is offered for the narrow purpose of assisting the jurors to understand what is being communicated to them by the witness or party. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, computer simulations, etc. These kinds of presentations, referred to in the Rule as "illustrative aids," have also been labelled "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations" --- that latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to assist in the presentation of another source of evidence or argument.

There is thus a distinction, as the courts have recognized, between a summary of voluminous, admissible information to prove a fact and a summary of evidence or argument that is offered solely to assist the jury in evaluating the evidence. The former is subject to the strictures of Rule 1006. The latter are illustrative aids, which the courts have regulated pursuant to the broad standards of Rule 611(a), and which are now to be regulated by the more particularized requirements of this Rule 611(d/e).

While an illustrative aid is by definition not offered directly to prove a fact in dispute, this does not of course mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be prepared to distort the testimony or argument, to oversimplify, to stoke unfair prejudice, or to provide subliminal messages. The Rule requires the court to assess the value of the illustrative aid in assisting the jury to understand the witness's testimony or the proponent's presentation. Cf. Fed.R.Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403 --- the most likely problem being that the illustrative aid might appear to be a

demonstrative evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the jury, the trial court should exercise its discretion to prohibit --- or modify --- the presentation of the illustrative aid. And if the court does allow the aid to be presented at trial, the adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used. See Rule 105.

One of the primary means of safeguarding and regulating the use of illustrative aids is to require advance disclosure. The Rule provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection. The rule applies to aids prepared before trial or during trial before actual use in the courtroom.

Because an illustrative aid is not offered to prove a fact in dispute, and is only admissible in accompaniment with testimony or presentation by the proponent, the Rule provides that illustrative aids are not to go to the jury room unless all parties agree. This rule is consistent with the holdings of the vast majority of federal and state courts. Allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or presentation, runs the serious risk that the jury may confuse the import, usefulness, and purpose of the illustrative aid. *See* Fed.R.Evid. 803(5), (18).

[Alternative to the prior paragraph: Because an illustrative aid is not offered to prove a fact in dispute, and is only admissible in accompaniment with testimony or presentation by the proponent, the Rule provides that illustrative aids ordinarily are not to go to the jury room unless all parties agree. But the rule does allow the trial court, upon a showing of good cause, to submit the illustrative aid to the jury over objection. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or presentation, runs the serious risk that the jury may confuse the import, usefulness, and purpose of the illustrative aid. But nonetheless, the Committee concluded that trial courts should have some discretion to allow use of the aid by the jury; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid.]

The Rule does not prevent a party from using evidence offered to prove a disputed fact as an illustrative aid as well. For instance, a witness might be asked to indicate by marking on a photograph the location of an object which was not present at the time the photograph was taken. The photograph, if properly authenticated and probative of a fact, could be admissible as substantive evidence. The jury could draw inferences directly from it. But the marks added by the witnesses would be a visual form of witness testimony. The preservation of that particular testimony in visual form for later inspection by the jury during deliberations might give that testimony undue weight under the circumstances. Thus the court would have the discretion under this Rule to withhold from the jury room an exhibit to which illustrative markings had been added, if the markings would give undue weight to a witness's testimony on a disputed issue or otherwise would have some unfairly prejudicial effect. The court would also have the discretion under this rule to restrict or

prohibit marking on an evidentiary exhibit if the effect would be to remove the exhibit from the jury room during deliberations.

Illustrative aids remain the property of the party that prepared them, but they may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.

TAB 4B

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 1006: Summaries to Prove Content of Voluminous Writings, Recordings, or Photographs
Date: October 1, 2021

The Committee is considering the possibility of amending Rule 1006, governing the use of summaries to prove voluminous content, to clarify certain aspects of the Rule that appear to cause repeated problems for some federal courts. The difficulties courts experience in applying Rule 1006 largely stem from confusion about the distinctions between a summary offered as an illustrative or pedagogical aid pursuant to Rule 611(a) and a Rule 1006 summary offered as alternative substantive evidence of underlying voluminous content. The Reporter has prepared a separate memorandum regarding illustrative aids offered through Rule 611(a) and a possible amendment to Rule 611 to better regulate and clarify the use of such aids at trial. Any amendment to Rule 1006 could be a useful companion to a Rule 611 amendment to help delineate important distinctions between Rule 611(a) and Rule 1006 summaries.

An amendment to Rule 1006 is not an action item for this meeting. If the Committee wishes to proceed with a potential amendment to Rule 1006, draft amendment language and Committee notes reflecting the Committee's discussion will be prepared for the spring meeting.

Rule 1006 of the Federal Rules of Evidence is an exception to the Best Evidence rule that permits the use of "a summary, chart, or calculation" to prove the content of writings, recordings, or photographs so "voluminous" that they cannot be conveniently examined in court. Of course, the underlying writings, recordings, and photographs must be "admissible" -- even if not admitted -- in order for a summary of them to be admitted at trial.[1] The proponent of a Rule 1006 summary must lay a proper foundation for its admission as well, demonstrating that the summary accurately reflects the underlying documents. And Rule 1006 requires that the proponent of the summary make the underlying originals (or duplicates of them) available for examination or copying by other parties at a reasonable time and place.[2] Finally, the court has discretion under Rule 1006 to

[1] *See United States v. Trevino*, 7 F.4th 414 (6th Cir. 2021) (Rule 1006 summary of voluminous marijuana sales records appropriate where underlying sales records would have been admissible under the business records exception to the hearsay rule).

[2] *See United States v. Isaacs*, 593 F.3d 517, 527 (7th Cir. 2010) (A reasonable time and place "has been understood to be such that the opposing party has adequate time to examine the records to check the accuracy of the summary.")

require the proponent of the summary to "produce" the underlying writings, recordings, or photographs "in court."

Although many federal courts properly apply Rule 1006, courts repeatedly struggle with four issues under Rule 1006. Part I of this memorandum will highlight confusion over the evidentiary status of a Rule 1006 summary and will describe decisions holding that Rule 1006 summaries are "not evidence" and may be relied upon merely as aids to understanding. Part II will address related confusion over the use of the underlying voluminous writings or recordings at trial. Some courts mistakenly demand admission of the underlying material, while others prohibit resort to a Rule 1006 summary if the underlying records have been admitted into evidence. Part III will describe opinions that permit Rule 1006 summaries – which are supposed to be true and accurate summaries proving the "content" of the voluminous underlying material – to include assumptions, conclusions, and arguments not found in the underlying material. Part IV will discuss the use of testimonial summaries pursuant to Rule 1006 and the complications that arise in connection with this practice. Part V will address a potential Rule 1006 issue that does not appear to be causing confusion in federal opinions as of yet – the use of the locational term "in court" throughout Rule 1006. Finally, Part VI will offer preliminary drafting options for an amendment to Rule 1006, as well as draft Committee notes, for the Committee's consideration.

I. Courts that Mistakenly Hold that Rule 1006 Summaries are "Not Evidence"

As noted above, a Rule 1006 summary is designed to substitute for proof of writings and recordings that are too voluminous to be conveniently examined in court. To serve this purpose, the summary must be admitted as evidence and the jury must be permitted to rely upon it for proof of the content of the underlying materials. The Advisory Committee's 1973 note to Rule 1006 reinforces the use of summaries as proof: "The *admission* of summaries of voluminous books, records, or documents offers the only practicable means of making their content available to the jury."[3] Most courts have recognized the proper status of a Rule 1006 summary as evidence.[4] As the Fourth Circuit explained in *United States v. Janati*:

> Because the underlying documents need not be introduced into evidence, the chart itself is admitted as evidence in order to give the jury evidence of the underlying documents.[5]

[3] Advisory Committee's 1973 note to Fed. R. Evid. 1006 (emphasis added).

[4] *See, e.g.*, *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013) ("[T]he summary itself is substantive evidence—in part because the party is not obligated to introduce the underlying documents themselves."); *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004) ("Because the underlying documents need not be introduced into evidence, the chart itself is admitted as evidence in order to give the jury evidence of the underlying documents."); *United States v. Weaver*, 281 F.3d 228, 232–33 (D.C. Cir. 2002) ("As to Weaver's claim that the court should have issued some sort of 'safeguards' with respect to [a Rule 1006 summary], we think he misapprehends the Rules of Evidence. . . . We therefore do not understand Weaver's point that an instruction was needed because the exhibit constituted inadmissible evidence.").

[5] *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004).

A recent Fourth Circuit opinion reinforced the proper role of a Rule 1006 summary and the distinction between Rule 1006 summaries and Rule 611(a) summaries:

> The Federal Rules of Evidence provide two ways for a party to use summary charts at trial. Rule 1006 permits summary charts to be admitted into evidence "as a surrogate for underlying voluminous records that would otherwise be admissible into evidence." And Rule 611 permits the admission of summary charts "to facilitate the presentation and comprehension of evidence already in the record."[6]

Opinions in the Fifth and Sixth Circuit Courts of Appeals hold, however, that a Rule 1006 summary does not constitute evidence and must, therefore, be accompanied by a limiting instruction restricting the jury's use of it. Again, such holdings appear to stem from confusion concerning the distinction between a Rule 611(a) summary (a pedagogical aid illustrating evidence already admitted) and a Rule 1006 summary (which takes the place of underlying voluminous evidence).

In *United States v. Bailey*, a panel of the Sixth Circuit discussed the proper use of a Rule 1006 summary.[7] In that case, the trial court had permitted the government to play an eight-minute tape combining "portions of various recorded phone calls between the defendants and co-conspirators that had already been entered into evidence in their entirety." Some of the recordings had even been played for the jury previously. On appeal, the Sixth Circuit analyzed the admission of the summary recording under Rule 1006. After laying out the requirements for admission of a Rule 1006 summary, the court explained that a Rule 1006 "summary should be accompanied by a limiting instruction which informs the jury of the summary's purpose and *that it does not constitute evidence*."[8] Although it found the error harmless, the Sixth Circuit found that the district court had erred in admitting a summary of voluminous recordings without such a limiting instruction.[9]

The *Bailey* court's error in characterizing a Rule 1006 summary as "not evidence" stemmed from its reliance on the Sixth Circuit's 1979 decision in *United States v. Scales*.[10] In that case, the

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[6] *United States v. Simmons*, No. 18-4875, 2021 WL 3744123, at *14 (4th Cir. Aug. 23, 2021) (citations omitted). The *Simmons* opinion still revealed confusion within the Fourth Circuit regarding the proper use of a Rule 611(a) summary, however. *Id.* at n. 12 ("In *Johnson*, we expressly disagreed with other circuits that appeared to suggest that summary charts introduced under Rule 611(a) may not be formally admitted into evidence. But later we suggested in dicta that Rule 611(a) summary charts may not be admitted as substantive evidence and are permitted solely to facilitate the jury's understanding of the evidence. That dictum was endorsed by a 2019 panel in *United States v. Oloyede*, 933 F.3d 302, 310–11 (4th Cir. 2019). But even if we were to consider *Oloyede*'s endorsement of *Janati* essential to its holding, "one panel cannot overrule a decision issued by another panel." And if two decisions conflict, the earlier controls. For that reason, reliance on *Janati* is misplaced. *Johnson* governs this question—summary charts may be admitted into evidence under Rule 611(a).") (citations omitted).

[7] *United States v. Bailey*, 973 F.3d 548, 567 (6th Cir. 2020) (emphasis added).

[8] *Id.* (quoting *United States v. Vasilakos*, 508 F.3d 401, 412 (6th Cir. 2007)).

[9] *Id.*

[10] 594 F.2d 558, 561 (6th Cir. 1979).

government admitted a series of charts summarizing all the charges contained in the indictment, as well as various counts and overt acts, "by reproducing, or making reference to, some of the documentary proof already in evidence." On appeal, the court first examined and approved admission of the charts under Rule 1006. Thereafter, the court went on to note that the charts would also have been admissible "entirely aside from Rule 1006" to illustrate evidence and testimony already given through Rule 611(a). In the context of discussing admission of a Rule 611(a) summary as a demonstrative or illustrative aid, the court explained that "guarding instructions" cautioning the jury that such summaries are not evidence are commonly required. In 2020, the *Bailey* court cited the portion of *Scales* discussing Rule 611(a) summaries in connection with its discussion of Rule 1006, noting broadly that "*Scales* requires district courts to provide juries a limiting instruction whenever summary evidence is presented."[11]

Other Sixth Circuit cases properly treat Rule 1006 summaries as "evidence," however. In *United States v. Bray*, the defendant was convicted of embezzlement from the United States Postal Service.[12] On appeal, he challenged the district court's admission of summary charts reflecting postal sales, claiming that the charts should not have been admitted in place of the underlying data about the postal sales and should not have been admitted in the absence of a limiting instruction cautioning the jury that the charts themselves were "not evidence."[13] The Sixth Circuit correctly articulated the role of a Rule 1006 summary, explaining that "[s]ince Rule 1006 authorizes the admission in evidence of the summary itself, it is generally inappropriate to give a limiting instruction for a Rule 1006 summary."[14] Because the summaries at issue were properly admitted through Rule 1006, the court held that the district court's refusal to give a limiting instruction was proper.[15]

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[11] *Bailey*, 973 F.3d at 568.

[12] *United States v. Bray,*139 F.3d 1104, 1111–12 (6th Cir. 1998). *See also United States v. Dunnican*, 961 F.3d 859, 873 (6th Cir. 2020) (affirming admission of summary of over 11,000 pages of evidence extracted from defendant's cell phone under Rule 1006 to prove defendant's prior drug transactions).

[13] *Id.* at 1109 ("Bray now argues that the district court committed reversible error by admitting the government's summary exhibits without admitting the underlying documents and without giving a limiting instruction.").

[14] *Id.* at 1111–12.

[15] The *Bray* court went on to document the confusion concerning Rule 10006 summaries in the Sixth Circuit:

> This is a point, however, on which in the past this court has been less than clear. In *United States v. DeBoer,* 966 F.2d 1066 (6th Cir.1992), for example, the court observed in *dicta* that "the district court properly instructed the jury that the [Rule 1006] summaries ... were not evidence or proof of facts." *Id.* at 1069. Other opinions likewise suggest a pervasive misunderstanding. *Cf. Seelig,* 622 F.2d at 214; *Scales,* 594 F.2d at 563-64. The problem hinges on the distinction between Rule 1006 summaries and summaries used as "pedagogical devices," which are more properly considered under Rule 611(a).

Id. The *Bray* court also identified a third type of summary – a "secondary-evidence summary." The court described this type of summary as:

> a combination of (1) and (2), in that they are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case. These

The Fifth Circuit also has conflicting precedent on the status of a Rule 1006 summary and the need for a limiting instruction. In *United States v. Bishop*, the defendant was prosecuted for tax evasion and the government presented charts "summarizing and clarifying the government witnesses' analysis."[16] Although it is not clear from the opinion whether these charts were true Rule 1006 summaries of voluminous "writings, recordings, or photographs," the Fifth Circuit analyzed their admissibility under Rule 1006. In so doing, the court held that a Rule 1006 summary "must have an adequate foundation in evidence that is already admitted, and should be accompanied by a cautionary jury instruction."[17] The court approved the limiting instruction given by the district court, noting that it "covered both the summary testimony and charts, and properly advises the jury that the information underlying the summaries, not the summaries themselves, is evidence, although the summaries may be a useful aid."[18]

That same year, in *United States v. Williams*, however, a panel of the Fifth Circuit wrote that a "summary chart that meets the requirements of Rule 1006 is itself evidence and no instruction is needed."[19] In that case, the government introduced a summary chart detailing underlying telephone records showing calls between the defendant and other alleged co-conspirators. On appeal, the defendant argued that the chart should not have been admitted without an accompanying jury instruction explaining that the chart was merely a "jury aid" and not evidence. The Fifth Circuit rejected that argument, explaining that because the chart was properly admitted through Rule 1006, it was evidence, and that no limiting instruction was necessary.

More recently, a panel of the Fifth Circuit reviewed the admission of summaries of bank records containing added evaluative conclusions about the expenses reflected in the records in *United States v. Spalding*. [20] The court explained that summaries admitted through Rule 1006 "are elevated to the position" of substantive evidence.[21] The court also distinguished charts admitted

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> secondary-evidence summaries are admitted in evidence not in lieu of the evidence they summarize but *in addition thereto,* because in the judgment of the trial court such summaries so accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence. In the *unusual* instance in which this third form of secondary evidence summary is admitted, the jury should be instructed that the summary is not independent evidence of its subject matter, and is only as valid and reliable as the underlying evidence it summarizes.

Id. at 1112. The attempt in *Bray* to classify different types of summaries and the rules attending their use suggests that amendments to Rules 611 and 1006 to clarify and classify in rule text may be beneficial.

[16] 264 F.3d 535, 546 (5th Cir. 2001).

[17] *Id.* at 547; *see also United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985) (approving admission of Rule 1006 summary with instruction that it was "not to be considered the evidence in the case").

[18] *Id.*at 548; *see also United States v. Hart*, 295 F.3d 451, 454 (5th Cir. 2002) ("The trial court has discretion to determine whether *illustrative* charts may be used pursuant to Fed. R. Evid. 1006.") (emphasis added).\

[19] *United States v. Williams*, 264 F.3d 561, 575 (5th Cir. 2001).

[20] *United States v. Spalding,* 894 F.3d 173, 185 n.17 (5th Cir. 2018).

[21] *Id.*

as pedagogical aids through Rule 611(a), which do not constitute substantive evidence.[22] Therefore, the Fifth Circuit has conflicting precedent regarding the proper evidentiary status of a Rule 1006 summary.[23]

It seems clear that the opinions denying Rule 1006 summaries substantive evidentiary status are confusing them with pedagogical aids and summaries of trial evidence submitted pursuant to Rule 611(a). A potential amendment to Rule 1006 could clarify the role and purpose of a Rule 1006 summary as alternate proof of content. Such an amendment could be a useful companion to one to Rule 611 clarifying the principles governing pedagogical summaries. Draft amendments clarifying the evidentiary status of a Rule 1006 summary appear in Part VI.

II. Admission of the Underlying Documents or Recordings

Rule 1006 is designed to allow a summary of voluminous writings or recordings to be admitted *in lieu of* admitting the voluminous writings or recordings themselves. Some federal courts have mistakenly held that the underlying voluminous writings or recordings themselves *must be admitted* into evidence before a Rule 1006 summary may be used. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings – or a portion of them -- *have been* admitted into evidence.

Several Circuits have correctly held that the voluminous materials underlying a Rule 1006 summary themselves need not be introduced into evidence. For example, in *United States v. Appolon*, the First Circuit explained, as follows:

> Federal Rule of Evidence 1006 does not require that the documents being summarized also be admitted. . . . Accordingly, whether the documents themselves were introduced is of no consequence.[24]

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[22] *Id.* at n. 16.

[23] Other Circuits occasionally mix and match standards applicable to Rule 1006 and Rule 611(a) summaries. *See e.g.*, *United States v. Osborne*, 677 F. App'x 648, 656 (11th Cir. 2017) ("the [Rule 1006] exhibits were supported by the record, the supporting evidence was presented to the jury (and, in fact, included with the summary exhibits), and the court properly instructed the jury on the role of the summary exhibits, explaining that the jury could rely on them only to the extent that it found them helpful *but that the summaries should not replace the source evidence*.") (emphasis added); *United States v. Ho*, 984 F.3d 191, 209 (2d Cir. 2020) (discussing requirements for admission of a Rule 1006 summary and simultaneously noting that the admission of summaries is within the trial judge's discretion so long as the jury is instructed that the summaries themselves are not evidence), *cert. denied,* No. 20-1671, 2021 WL 2637904 (U.S. June 28, 2021). The charts in *Ho* appeared to summarize admitted evidence and may, indeed, have been proper Rule 611(a) summaries which were not themselves evidence notwithstanding the discussion of Rule 1006. Confusion often arises when a case analyzing a Rule 611(a) summary is later used in analyzing the admissibility of a Rule 1006 summary. *See, e.g.*, *United States v. Lauria*, No. S119CR449NSR0103, 2021 WL 2139041, at *3 (S.D.N.Y. May 26, 2021) (summary charts of voluminous phone records sought to be admitted through Rule 1006; court cites *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989), which analyzed admissibility of Rule 611(a) summaries).

[24] 715 F.3d 362, 374 (1st Cir. 2013) (citations omitted).

Similarly, the Seventh Circuit, in *United States v. White*, emphasized that a party relying upon a proper Rule 1006 summary "is not required to introduce the underlying evidence."[25] In *United States v. Hemphill*, the D.C. Circuit rejected an argument that the proponent must introduce the documents underlying a Rule 1006 summary, noting that the point of Rule 1006 is to *avoid* introducing all the documents where an appropriate foundation has been laid.[26]

In contrast, multiple cases in the Eighth Circuit set forth a standard for admitting a Rule 1006 summary that requires admission of underlying materials:

> Summary evidence is properly admitted when (1) the charts 'fairly summarize' voluminous *trial evidence*; (2) they assist the jury in 'understanding the *testimony already introduced'*; and (3) 'the witness who prepared the charts is subject to cross-examination *with all documents used to prepare the summary*.[27]

Several cases from the Fifth Circuit also hold that Rule 1006 summaries must be "based on competent evidence already before the jury."[28] In *United States v. Mazkouri*, the court upheld the use of Rule 1006 summary charts, in part, because "the charts were based on data in two spreadsheets that the court admitted into evidence."[29] In *United States v. Harms*, the Fifth Circuit explained that Rule 1006 "applies to summary charts based on evidence previously admitted but which is so voluminous that in-court review by the jury would be inconvenient."[30]

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[25] *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013).

[26] 514 F.3d 1350, 1358 (D.C. Cir. 2008); *see also United States v. Manamela*, 463 F. App'x 127, 132 (3d Cir. 2012) ("Rule 1006 does not require that the underlying materials actually be admitted into evidence.") (citing *United States v. Pelullo*, 399 F.3d 197, 204 (3d Cir. 2005)); *United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011) ("Rule 1006 permits admission of summaries based on voluminous records that cannot readily be presented in evidence to a jury and comprehended. It is essential that the underlying records from which the summaries are made be admissible in evidence, and available to the opposing party for inspection, *but the underlying evidence does not itself have to be admitted in evidence and presented to the jury*.") (emphasis added).

[27] *See, e.g., United States v. Green*, 428 F.3d 1131, 1134 (8th Cir. 2005) (emphasis added); *United States v. Fechner*, 952 F.3d 954, 959–60 (8th Cir. 2020) (applying this standard); *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 771 (8th Cir. 2020), *cert. denied,* 209 L. Ed. 2d 577 (Apr. 19, 2021) (same). Again, it appears that this misapprehension of Rule 1006 stems from the intermingling of standards applicable to Rule 611(a) aids. *See United States v. Shorter*, 874 F.3d 969, 978 (7th Cir. 2017) (noting that the *Green* opinion mistakenly recited the requirements for admission of a 1006 summary because it "misapplied its earlier decision … which was a case involving the admissibility of pedagogical charts").

[28] *See, e.g.*, *United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018); *United States v. Mazkouri*, 945 F.3d 293, 301 n.1 (5th Cir. 2019).

[29] *United States v. Mazkouri*, 945 F.3d 293, 301 n.1 (5th Cir. 2019).

[30] 442 F.3d 367, 375 (5th Cir. 2006) (quoting *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000)). *But see United States v. Buck,* 324 F.3d 786, 790 (5th Cir.2003) ("Th[e] use of summaries [allowed under rule 1006] should be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted .... Although some Courts have considered such charts and summaries under Rule 1006, the Rule is really not applicable because pedagogical summaries are not evidence. Rather, they are demonstrative aids governed by Rules 403 and 611" (quoting 5 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 1006.02[5], at 1006–6 (8th ed.2002)).

Paradoxically, other Fifth Circuit cases suggest that a Rule 1006 summary may *not* be used when the underlying evidence has already been admitted:

> Fifth Circuit precedent conflicts on whether rule 1006 allows the introduction of summaries of evidence that is already before the jury, or whether instead it is limited to summaries of voluminous records that have not been presented in court.[31]

The Eighth Circuit has suggested a similar limitation on the use of Rule 1006. In *United States v. Grajales-Montoya*, the court found that the trial judge had erred in admitting a summary exhibit pursuant to Rule 1006, in part, because it was based upon evidence already admitted at trial.[32]

Other Circuits have held that the admission of the underlying voluminous records themselves does not *prevent* admission of a Rule 1006 summary, however. The First Circuit explained why admission of both the voluminous records and a summary might be appropriate under Rule 1006 in *United States v. Milkiewicz*.[33] In that case, the trial court refused to admit a summary that otherwise would have qualified under Rule 1006 because many of the underlying documents had been admitted at trial. The First Circuit held that the admission of underlying documents does not foreclose use of Rule 1006 if all the requirements of the Rule are otherwise satisfied:

> [S]ummaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence …. The discretion accorded the trial court to order production of the documents means that the evidence underlying Rule 1006 summaries need not be introduced into evidence, but nothing in the rule forecloses a party from doing so. For example, we can imagine instances in which an attorney does not realize until well into a trial that a summary chart would be beneficial, and admissible as evidence under Rule 1006, because the documents already admitted were too voluminous to be conveniently examined by the jury.
>
> Consequently, while in most cases a Rule 1006 chart will be the *only* evidence the fact finder will examine concerning a voluminous set of documents, in other instances the summary may be admitted *in addition to* the underlying documents to provide the jury with easier access to the relevant information.
>
> This latter practice has drawn criticism as inconsistent with the purpose of Rule 1006 to provide an exception to the "best evidence rule" because, "[i]f the underlying evidence is already admitted, there is no concern that a summary is used in lieu of the 'best evidence.'" We agree with the Fifth Circuit, however, that "[t]he fact that the underlying documents are already in evidence does not mean that they can be 'conveniently examined in court.'" Thus, in such instances, Rule 1006 still

[31] *United States v. Armstrong*, 619 F.3d 380, 383 (5th Cir. 2010); *see also United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985) ("The fact that the underlying documents are already in evidence does not mean that they can be "conveniently examined in court.").

[32] 117 F.3d 356, 361 (8th Cir. 1997) ("The rule appears to contemplate, however, that a summary will be admitted instead of, not in addition to, the documents that it summarizes.").

[33] 470 F.3d 390, 395–98 (1st Cir. 2006).

> serves its purpose of allowing the jury to consider secondary evidence as a substitute for the originals.[34]

Similarly, the Seventh Circuit in *United States v. White* explained that a "party is not required to introduce the underlying evidence" supporting a Rule 1006 summary, but held that a "summary fulfilled every requirement of Rule 1006" even though the proponent "introduced the [summarized] documents themselves into evidence."[35]

Again, decisions *requiring* the admission of the underlying records themselves misapprehend the purpose of a Rule 1006 summary to stand in for those records once the trial judge has determined that they are so voluminous that they cannot be conveniently examined in court. These decisions also appear to arise out of confusion concerning the distinction between Rule 611(a) pedagogical aids (which must be based upon record evidence and are not themselves evidence) and Rule 1006 summaries (which offer alternate proof of the "content" of voluminous records). Although Rule 1006 is certainly designed to permit introduction of a summary without admission of the underlying records, the opinions suggesting that *both* the records (or some portion thereof) *and* a Rule 1006 summary might be admitted in appropriate cases seem better reasoned. As the First Circuit has recognized, records might be too voluminous to be "conveniently examined in court" even though they have been moved into evidence. These misunderstandings regarding the treatment of the underlying voluminous records under Rule 1006 might be addressed in an amendment, as well as through an Advisory Committee note. The draft amendments included in Part VI also seek to address the admission of the underlying records.

III. Courts that Allow Rule 1006 Summaries Containing Assumptions and Conclusions Not Included in Underlying Writings or Recordings

Because a Rule 1006 summary is designed to substitute for evidence of originals too voluminous to be examined conveniently themselves, many federal courts have held that a Rule 1006 summary must accurately reflect the underlying documents and must not include assumptions, conclusions, or arguments not reflected in those underlying documents.[36] The Seventh Circuit in *United States v. White* explained:

> Because a Rule 1006 exhibit is supposed to substitute for the voluminous documents themselves, however, the exhibit must accurately summarize those documents. It must not

[34] *United States v. Milkiewicz*, 470 F.3d 390, 395–98 (1st Cir. 2006) (citations omitted).

[35] 737 F.3d 1121, 1135–36 (7th Cir. 2013); *see also United States v. Anekwu*, 695 F.3d 981-82 (9th Cir. 2012) (trial court did not abuse its discretion in admitting chart summarizing foreign bank records when records were already in evidence).

[36] *See, e.g.*, *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013); *United States v. Milkiewicz*, 470 F.3d 390, 395–98 (1st Cir. 2006) ("Charts admitted under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently, they must fairly represent the underlying documents and be 'accurate and nonprejudicial.").

> misrepresent their contents or make arguments about the inferences the jury should draw from them.[37]

Recently, the Sixth Circuit in *United States v. Bailey* echoed these principles, stating that "[a] party seeking the admission of a summary under Rule 1006 must demonstrate, . . . that the summary is accurate and nonprejudicial."[38] Similarly, in an unpublished opinion in 2018, the Third Circuit explained:

> In this Circuit, a district court's finding that the exhibits qualified under Rule 1006 is itself a determination that they are not infected with the preparer's own subjective views. Prior to permitting the use of a summary document under Rule 1006, the district court must assure that 'the summation accurately summarizes the materials involved by not referring to information not contained in the original.'[39]

Due again to apparent confusion between Rule 1006 summaries and Rule 611(a) pedagogical aids, however, the Fifth, Eighth, and Eleventh Circuits have held that Rule 1006 summaries *may* include assumptions and conclusions so long as they are based on record evidence. In *United States v. Mazkouri*, the Fifth Circuit explained that:"[w]e have held that for Rule 1006, the 'essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record.'"[40] The Eighth Circuit recently agreed in *United States v. Fechner*.[41] And the Eleventh Circuit also expressed the view that Rule 1006 summaries may contain assumptions and conclusions not reflected in the original records in its recent opinion in *United States v. Melgen*.[42]

An amendment to Rule 1006 might also emphasize that a summary admitted pursuant to the Rule must accurately reflect underlying voluminous materials due to its substantive evidentiary status and its purpose to substitute for the underlying records which need not be introduced into evidence. Of course, the trial judge would still have discretion to determine whether a Rule 1006

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[37] 737 F.3d 1121, 1135–36 (7th Cir. 2013); *see also United States v. Moore*, 843 F. App'x 498, 504 (4th Cir. 2021) (stating that the purpose of Rule 1006 "is to reduce the volume of written documents that are introduced into evidence by allowing in evidence accurate derivatives."); *United States v. Oloyede*, 933 F.3d 302, 311 (4th Cir. 2019) (a district court abuses its discretion by admitting a proffered summary under Rule 1006 that amounts to "a skewed selection of *some* of the [underlying] documents to further the proponent's theory of the case.") (emphasis in original).

[38] 973 F.3d 548, 567 (6th Cir. 2020); *see also United States v. Fahnbulleh*, 752 F.3d 470, 479 (D.C. Cir. 2014) ("For a summary of documents to be admissible . . . the summary must be accurate and nonprejudicial.").

[39] *United States v. Lynch*, 735 F. App'x 780, 787 (3d Cir. 2018) (citation omitted).

[40] 945 F.3d 293, 301 (5th Cir. 2019) (quoting *Armstrong*, 619 F.3d 380, 384 (5th Cir. 2010)); *But see United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018)("[B]ecause summaries are elevated under Rule 1006 to the position of evidence," we have warned, "care must be taken to omit argumentative matter in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes.").

[41] 952 F.3d 954, 959 (8th Cir. 2020) ("Any assumptions or conclusions contained in a Rule 1006 summary must be based on evidence already in the record." (citing *Green*, 428 F.3d 1131, 1134 (8th Cir. 2005)).

[42] 967 F.3d 1250, 1260 (11th Cir. 2020) ("Under [FRE 1006], 'the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record.'") (citation omitted).

summary was accurate – the addition of arrows or other aids to understanding summarized information may remain appropriate and non-prejudicial.[43] It may be helpful to include some discussion reinforcing the court's discretion to determine accuracy in an Advisory Committee note. Part VI also provides preliminary amendment possibilities along these lines.

IV. Testimonial Summaries

Most summaries admitted under Rule 1006 are *written* summaries admitted in the form of a chart, graph, spreadsheet, or other record that captures the content of the underlying "voluminous writings, recordings, or photographs that cannot conveniently be examined in court." Even when a written summary is offered under Rule 1006, a foundational witness is necessary to testify to the accuracy of the summary.[44] A written Rule 1006 summary makes sense where the Rule speaks of "charts" and "calculations" and seems to contemplate a summary that can be admitted as an exhibit. In addition, a written chart or other graphic would seem most effective for the proponent in trying to convey a voluminous amount of information to the fact-finder. Finally, having a trial witness *orally* summarize records so voluminous that they "cannot be conveniently examined in court" seems at odds with the fundamental principles underlying the Best Evidence rule (to which Rule 1006 is an exception). The Best Evidence rule is designed to promote the accuracy of the fact-finding process, in part, due to concerns about mis-transmission of critical facts due to reliance on human recollection:

> [Oral testimony as to the terms of a writing] is subject to a greater risk of error than oral testimony as to events or other situations; human memory is not often capable of reciting

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[43] *See United States v. Gordon*, No. 1:19-CR-00007-JAW, 2019 WL 4308127, at *5 (D. Me. Sept. 11, 2019) ("Summaries admitted 'in lieu of the underlying documents' must not be 'embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise.' The goal is to prevent 'a summary containing elements of argumentation' from functioning as 'a mini-summation by the chart's proponent every time the jurors look at it during their deliberations.'"); *United States v. Babichenko*, 2021 WL 2364359 (D. Idaho June 9, 2021) (finding arrows used to illustrate flow of money between defendant's business entities appropriate in Rule 1006 summary of voluminous transactions; rejecting defendant's argument that arrows were "argumentative" and "inference-based").

[44] *Herrmann v. United States*, 129 Fed. Cl. 780, 788–89 (2017) ("The testimony of the individual who prepares a summary exhibit is not required under Rule 1006, but 'almost always his testimony is indispensable as a practical matter' to authenticate the exhibit."). There is some conflict in the federal courts concerning the foundation necessary for the introduction of a Rule 1006 summary. Some circuits mandate that a person involved in preparing the summary testify. *See, e.g.*, *United States v. Fechner*, 952 F.3d 954, 959 (8th Cir. 2020) ("[Rule 1006 s]ummaries are properly admissible when . . . the witness who prepared it is subject to cross-examination with all documents used to prepare the summary."); *United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018) ("[Rule 1006] charts are admissible when . . . the chart preparer is available for cross-examination."); *United States v. Fahnbulleh*, 752 F.3d 470, 479 (D.C. Cir. 2014) ("[T]he witness who prepared the summary should introduce it."); *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998) ("In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation."). At least one circuit has rejected that premise in an unpublished opinion. *See United States v. Lynch*, 735 F. App'x 780, 786 (3d Cir. 2018) (stating that "Lynch argues that Rule 1006 requires that the summary preparer be made available to testify. Rule 1006 contains no such requirement" and allowing an FBI agent who did not participate in preparing a chart to lay its foundation with his testimony). A Committee note to an amendment might weigh in on this debate were the Committee to pursue an amendment to Rule 1006.

> the precise terms of a writing, and when the terms are in dispute only the writing itself, or a true copy, provides reliable evidence.[45]

The risk of mis-transmission of information contained in *voluminous* records seems particularly great with an oral, testimonial summary. In addition, an oral testimonial summary of voluminous underlying records would seem to undermine an opponent's ability to review the summary for errors and to reveal them to the court or jury.

The text of Rule 1006 does not expressly require a summary to be presented in *written* or exhibit form, however. The language of the Rule leaves open the possibility of an oral, testimonial summary of voluminous records, providing only that the proponent "may use a summary, chart, or calculation" with no limitation as to the type of summary that can be offered. Though most Rule 1006 summaries are written charts, graphs, spreadsheets, or diagrams, parties sometimes rely upon Rule 1006 in offering an oral, testimonial summary.[46] And federal courts have held that Rule 1006 authorizes a testimonial summary by a witness. In *United States v. Lucas*, an agent orally summarized portions of the defendant's twelve to thirteen-hour deposition testimony from a related civil proceeding during the defendant's criminal fraud trial.[47] Although the Fifth Circuit found the particular testimonial summary inappropriate due to the government's ability to present clips of the deposition, the court generally approved the use of testimonial summaries pursuant to Rule 1006, as follows:

> Under our precedents, the rule allows the summarization of voluminous writings, recordings, or photographs *through testimony* if the case is sufficiently complex and the evidence being summarized is not "live testimony presented in court."[48]

A proper Rule 1006 testimonial summary by a witness conveys the content of underlying voluminous records accurately and does not draw inferences about the records or offer opinions

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[45] *Seiler v. Lucasfilm*, Ltd. 808 F.2d 1316, 1319 (9th Cir. 1986).

[46] And sometimes testimonial summaries accompany the presentation of other written summary materials, such as charts or calculations. *See, e.g.*, *United States v. Lebedev*, 932 F.3d 40, 49–50 (2d Cir. 2019); *S.E.C. v. Amazon Nat. Treasures, Inc.*, 132 F. App'x 701, 703 (9th Cir. 2005).

[47] 849 F.3d 638, 645 (5th Cir. 2017).

[48] *Id.* (emphasis added). *See also United States v. Armstrong*, 619 F.3d 380, 383 (5th Cir. 2010) ("such witnesses may be appropriate for summarizing voluminous records, as contemplated by Rule 1006"); *United States v. Caballero*, 277 F.3d 1235, 1247 (10th Cir. 2002) ("Norman summarized business records and client lists and presented them in condensed form, a process clearly permitted by Federal Rule of Evidence 1006").

Courts sometimes seem to confuse a true summary witness who gives an oral summary of underlying records with the foundation witness needed to admit a written Rule 1006 summary. *See, e.g., Herrmann v. United States*, 129 Fed. Cl. 780, 788–89 (2017) ("Although Mr. Cohen has testified as an expert witness in past cases involving foreign tax credits and partnership tax issues, the plaintiffs here are only offering his testimony as a summary witness under Rule 1006. As previously stated, the exhibits summarize documents available to both parties and do not contain any expert analysis or opinions. Mr. Cohen's testimony presumably will serve to authenticate the summaries so they may be considered by the court as evidence, and the government has fully available means to cross-examine him regarding the content and preparation of the summaries. The testimony of the individual who prepares a summary exhibit is not required under Rule 1006, but "almost always his testimony is indispensable as a practical matter" to authenticate the exhibit.") (citations omitted).

based upon them.[49] Problems sometimes arise when a party seeks to call a witness who was not disclosed as an expert witness as a "summary witness" under Rule 1006. Courts acknowledge difficulty in distinguishing between a proper Rule 1006 summary witness and an expert witness who must be qualified under Rule 702. In *United States v. Honeywell Int'l Inc.*, the district court discussed the distinction between an expert witness and a summary witness properly offered under Rule 1006:

> An expert witness is qualified to offer opinions or conclusions because of his or her specialized knowledge, skill, experience, training, or education. Fed. R. Evid. 702, 703. A summary witness is not an expert and is not permitted to express opinions or conclusions.[50]

The court found that a witness's calculation of profits from underlying invoices and deposition testimony constituted proper summary testimony because Rule 1006 expressly allows for a "calculation to prove the content of voluminous writings" and because the calculation did not require the witness to express an opinion based upon specialized knowledge.[51] So, while a properly qualified expert may also provide summary testimony, a "summary witness" not qualified as an expert cannot offer opinions and inferences.

Another difficulty arises when courts conflate Rule 1006 summary witnesses with what appear to be Rule 611(a) summary witnesses. Courts have sometimes permitted summary witnesses to organize and explain admitted evidence to assist the jury in piecing together a complex

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[49] *United States v. Honeywell Int'l Inc.*, 337 F.R.D. 456, 459 (D.D.C. 2020) ("A summary witness is not an expert and is not permitted to express opinions or conclusions."); *United States v. Shulick*, 994 F.3d 123, 138-139 (3d Cir. 2021) (district court properly excluded undisclosed defense expert witness offered by the defense as a "summary" witness pursuant to Rule 1006; "[i]f a purported summary includes "assumptions" and "inferences" that "represent [the witness's] opinion, rather than the underlying information," it is actually expert testimony "subject to the rules governing opinion testimony.").

[50] *Id.* at 459 (D.D.C. 2020).

[51] *Id.* The court found that one statement in a declaration by the summary witness concerning his asserted rationale for a lack of invoices constituted opinion not properly offered by a summary witness. *See also DuBay v. King,* 844 F. App'x 257, 263 (11th Cir. 2021) (literary expert's written summaries of voluminous works by Stephen King admissible through Rule 1006 because it would have been inconvenient for the district court to review all the relevant material); *United States v. Lebedev*, 932 F.3d 40, 50 (2d Cir. 2019) (approving testimony by accountant and litigation consultant based upon financial records using "FIFO" method to show that defendant used donations to pay for personal expenses as summary testimony under Rule 1006; rejecting defendant's argument that testimony was expert testimony subject to Rule 702 and Rule 16 disclosure requirements); *But see Fed. Trade Comm'n v. Am. Precious Metals, LLC*, 726 F. App'x 729, 732–33 (11th Cir. 2018) (holding Fed. R. Evid. 1006 did not apply to declaration based upon a review of bank records; declaration presented expert conclusions to the district court in the form of a tracing analysis and thus was not offered to "prove the content" of the bank records); *United States v. Shulick*, 994 F.3d 123, 138-139 (3d Cir. 2021) (district court properly excluded undisclosed defense expert witness offered by the defense as a "summary" witness pursuant to Rule 1006 because witness would offer "assumptions" and "inferences" that "represent [the witness's] opinion, rather than the underlying information"); *United States v. Hart*, 295 F.3d 451, 456 (5th Cir. 2002) ("In short, it is apparent to us that Davis functioned as the government's sole expert witness regarding the proper preparation of (1) FHPs generally, and (2) the Hart brothers' FHPs in particular, thereby unquestionably exceeding the scope of FRE 1006."); *In re King*, 2020 WL 6066015 (Bankr. N.D. Ga. Oct. 14, 2020) (witness's declaration and attached spreadsheet "tracking" funds paid and spent not admissible as a Rule 1006 summary of underlying bank records because they did not summarize records, but rather drew inferences about connection between funds that necessitated forensic accounting expertise).

case pursuant to Rule 611(a).[52] Unlike a true Rule 1006 summary witness, these witnesses do not simply summarize underlying records too voluminous to be examined in court; they instead seek to help organize the proponent's evidence and argue her case. Federal courts have recognized the dangers of permitting such summary witnesses and have cautioned against abuse:

> Although this court allows summary witness testimony in "limited circumstances" in complex cases, we have "repeatedly warned of its dangers." "While such witnesses may be appropriate for summarizing voluminous records, as contemplated by Rule 1006, rebuttal testimony by an advocate summarizing and organizing the case for the jury constitutes a very different phenomenon, not justified by the Federal Rules of Evidence or our precedent." In particular, "summary witnesses are not to be used as a substitute for, or a supplement to, closing argument." To minimize the danger of abuse, summary testimony "must have an adequate foundation in evidence that is already admitted, and should be accompanied by a cautionary jury instruction."[53]

Notwithstanding this admonition, the Fifth Circuit upheld admission of testimony by a postal inspector summarizing evidence for the jury that was already in the record.[54]

Because it is the only provision in the Rules expressly permitting a "summary," Rule 1006 is commonly cited by parties seeking to present problematic summary testimony organizing a case for the jury.[55] Again, the conflation of Rule 611(a) standards and Rule 1006 standards can be seen

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[52] *See United States v. Baker*, 923 F.3d 390, 397–98 (5th Cir. 2019) (allowing summary "testimony that tied specific, already-admitted exhibits to the substantive indictment counts listed on a demonstrative chart"); *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir.2001) (allowing IRS agent to testify as summary witness where summary had foundation in evidence already admitted and was accompanied by limiting instruction); *United States v. Moore*, 997 F.2d 55, 58 (5th Cir. 1993) ("expert summary witness" permitted to summarize both the government's own evidence and the trial testimony of all the witnesses); *United States v. Johnson*, 54 F.3d 1150, 1162 (4th Cir. 1995) ("we conclude that, as with the summary chart, the district court did not err in admitting the summary testimony into evidence pursuant to Rule 611(a) of the Federal Rules of Evidence.").

[53] *United States v. Armstrong*, 619 F.3d 380, 383 (5th Cir. 2010). *See also United States v. Fullwood*, 342 F.3d 409, 413-414 (5th Cir. 2003) ("The Government asserts that FED.R.EVID. 1006 allows the use of summary witnesses….As the Government concedes, this rule does not specifically address summary witnesses or summarization of trial testimony. This omission is significant—"[p]lainly, th[e] rule does not contemplate summarization of live testimony presented in court").

Federal courts have also sometimes disapproved testimony by "overview witnesses" in criminal cases describing criminal conduct, and a defendant's role in it, without first-hand knowledge of underlying events. These courts have held that such overview testimony is impermissible lay opinion testimony pursuant to Rule 701 because it is not rationally based upon the witness's perception and does not help the jury. *See, e.g.,* United States v. Meises, 645 F.3d 5 (1st Cir 2010) (overview testimony by law enforcement agent describing defendants' roles in drug conspiracy was impermissible lay opinion testimony not rationally based upon agent's personal perception).

[54] *Id.*

[55] *See, e.g., United States v. Fullwood,* 342 F.3d 409, 414 (5th Cir. 2003) (prosecution relied upon Rule 1006 to support rebuttal testimony by case agent recapping a significant portion of the testimony already introduced by the government); *United States v. Lemire*, 720 F.2d 1327, 1348 (D.C. Cir. 1983) (FBI agent and certified public accountant permitted to summarize evidence about complex cash flow through offshore companies in more organized fashion that the government had already introduced via direct examination of its witnesses; "[t]his court has not previously ruled on the admissibility of one witness's summary of evidence already presented by prior witnesses. Other courts,

in the cases dealing with oral, testimonial summaries. In *United States v. Lucas*, discussed above, for example, the Fifth Circuit addressed the admissibility of an oral summary of voluminous deposition testimony pursuant to Rule 1006.[56] Yet, the court cautioned that "the summary testimony must be accompanied by a limiting jury instruction, and the underlying evidence must be admitted and available to the jury" – standards incompatible with Rule 1006.[57] The court went on to acknowledge conflicting precedent as to whether the evidence relied upon for a testimonial summary must be presented to the jury or "merely admitted."[58] The court concluded that summary witness testimony is permissible when it is "based on evidence that is admitted and available, but not necessarily presented, to the jury."[59] Therefore, it appears that the standards governing Rule 611(a) pedagogical aids creep into the Rule 1006 precedent in the context of oral, testimonial summaries as well.

There are two possibilities for dealing with summary witnesses should the Committee decide to pursue an amendment to Rule 1006. First, the Committee could include a note with substantive amendments addressing other Rule 1006 issues, cautioning that testimonial summaries should be utilized only when a witness's testimony satisfies the Rule 1006 requirement that it accurately summarize the content of admissible records too voluminous to be examined during trial proceedings. A note could clarify that Rule 1006 does not authorize the admission of expert opinion testimony that must be evaluated pursuant to Rule 702. The note could further point out that Rule 1006 does not permit a summary witness to recap or argue admitted evidence and testimony akin to a closing argument. The second alternative would be to propose an amendment to the language of the Rule itself eliminating the possibility of a testimonial summary under Rule 1006. Such an amendment might limit parties to "written" summaries, charts, or calculations.

There are pretty obvious pros and cons to each approach. Utilizing a Committee note alone to address the problems with summary witnesses would not change the Rule itself and would allow parties to continue to argue for their problematic use through Rule 1006. Courts would have to wade through the Committee note to identify the limits to summary testimony. Further, attempting to articulate the permissible and impermissible uses of testimonial summaries in a note could pose a drafting challenge. Summary witnesses are utilized in many contexts and crafting note language that captures accurately the limitations applicable in every case could be difficult. For example, a properly qualified expert witness who prepared a written Rule 1006 summary might be the foundation witness for it, explaining that the summary accurately reflects voluminous, admissible

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however, have recently confronted the question and permitted such summaries under Rule 1006, allowing for admission into evidence of summaries of documents too voluminous to be conveniently examined in court.").

[56] 849 F.3d 638, 645 (5th Cir. 2017).

[57] Of course, the Fifth Circuit is one that has confused the Rule 1006 requirements even outside the context of oral, testimonial summaries.

[58] *Id.*

[59] *Id.* at n. 3; *see also United States v. Harms*, 442 F.3d 367, 376 (5th Cir. 2006) ("After reviewing the Government's exhibits and Hager's testimony, we believe the district court did not abuse its discretion in permitting Hager's summary testimony. The evidence at issue presented an appreciable degree of complexity and the district court gave a limiting instruction to the jury."); *United States v. Okoronkwo,* 46 F.3d 426, 435 (5th Cir.1995) (use of summary witness not reversible error where merely cumulative of substantive evidence); *United States v. Winn,* 948 F.2d 145, 157–58 (5th Cir.1991) (use of summary chart and testimony not reversible error where prejudice neutralized by instruction).

records. And the expert might also provide an appropriate expert opinion authorized under Rule 702 using the summary as support. This would be wholly proper. A Committee note that cautions against using Rule 1006 to admit expert testimony might be misinterpreted to prohibit such testimony.

There is much to be said for a textual amendment limiting Rule 1006 to "written" summaries. As noted above, such a limitation appears consistent with the fundamental policy underlying the Best Evidence rule that expresses distrust for oral characterizations of writings and other records. Such distrust seems particularly appropriate in connection with voluminous records. Requiring a written summary also would afford its opponent a fairer opportunity to test its accuracy. Such a rule change would also eliminate the inappropriate reliance on Rule 1006 to call a witness to recap and summarize trial testimony.[60] And it would not require trial courts and litigants to wade into the Committee note to comprehend the proper use of testimonial summaries – because the rule would eliminate them on its face.

The principal downside of eliminating testimonial summaries would be disruption of the status quo – the federal cases currently accept testimonial summaries under Rule 1006. Of course, the federal courts are relying on the current language of Rule 1006 (rather than on policy) to conclude that testimonial summaries are permissible so a change to the language of the Rule would eliminate the existing rationale for Rule 1006 summary witnesses. Still, eliminating an existing trial technique risks unintended consequences because a rule change always has the capacity to disturb established practice to some degree. While it seems that a written Rule 1006 summary could be prepared to comply with an amended rule in any case, there could be circumstances not well reflected in the reported opinions in which testimonial summaries are utilized and these cases would be disrupted by a rule change.[61] Releasing a proposed amendment eliminating testimonial summaries for public comment could help ferret out any unanticipated disruptions to existing practice, however. Amendment and Committee note options dealing with testimonial summaries are included in Part VI.

V. Rule 1006 "In Court" Terminology

[60] *See United States v. Nguyen,* 504 F.3d 561 (5th Cir.2007) (trial court erred in allowing summary testimony by FBI financial analyst under Rule 1006; testimony inappropriately made conclusions as to defendant's state of mind and improperly introduced evidence from out-of-court witnesses).

[61] For example, parties sometimes seek to characterize witness declarations submitted in support of or in opposition to summary judgment as testimonial summaries of underlying records pursuant to Rule 1006. *See, e.g., In re King*, 2020 WL 6066015 (Bankr. N.D. Ga. Oct. 14, 2020) (proponent sought to admit witness's declaration and attached spreadsheet "tracking" funds paid and spent as a Rule 1006 summary of underlying bank records). Because summary judgment requires "admissible" evidence, an opponent could argue that such a declaration -- that simply reflects what the witness's trial testimony would be -- is not admissible under an amended Rule 1006 because it would not comply with the "written or recorded" limit in the testimonial form in which it would be presented at trial. Therefore, a "written or recorded" limitation could eliminate the use of a witness declaration summarizing voluminous records under Rule 1006 on summary judgement. Still, most declarations of this sort attach exhibits that could qualify as "written or recorded" Rule 1006 summaries at trial when all other Rule 1006 requirements are satisfied. *Id.* (attaching underlying bank records and spreadsheet to declaration). So, parties would likely be able to adapt to the new limitation. Still, amending the Rule could affect certain existing uses of Rule 1006 summaries.

One Rule 1006 issue that has yet to cause any confusion in the reported cases is the use of the locational term "in court" in two places in the Rule. Rule 1006 permits the admission of a summary of voluminous records when those records cannot be conveniently examined "in court." The Rule also authorizes the court to order production of the underlying records to the opponent "in court."

As we all know, some federal courts have already authorized virtual trials over platforms like Zoom and Microsoft Teams pursuant to their Rule 611(a) authority during the pandemic.[62] I could not find any reported cases addressing Rule 1006 in the context of a virtual trial, so it does not appear that the use of the "in court" locational terminology has caused any confusion or difficulty to date in the context of a virtual trial. Even if the issue were to arise, a trial judge conducting a virtual trial proceeding could certainly translate Rule 1006 procedure into a virtual trial setting, ascertaining whether voluminous materials could conveniently be examined during the course of the virtual proceedings and exercising discretion to require their "production" in a virtual environment. Accordingly, the "in court" terminology likely would not justify an amendment to Rule 1006 in its own right as things stand now.

Still, if other Rule 1006 amendments are proposed, it would make sense to consider altering the "in court" terminology, given its physical, in-person connotation, to accommodate the possibility of virtual trial proceedings in the future.[63] Employing slightly different language, such as "during court proceedings" or "in court, or otherwise as the court directs" could head off any future issues related to virtual presentation. The draft amendment language in Part VI includes changes designed to address this concern.

VI. Amending Rule 1006

The common misunderstandings regarding a Rule 1006 summary could be dealt with in modest amendments to Rule 1006 accompanied by an explanatory Advisory Committee note. Three potential drafts of an amendment and note follow. The first draft deals with all of the above concerns, but does not address testimonial summaries in rule text. Instead, the draft Committee note includes a brief cautionary note about summary witnesses. The second draft amendment would require a "written" summary and includes note language explaining such a change. The third draft addresses all Rule 1006 issues in rule text and restructures the existing provision into subsections to highlight more expressly the clarifications made by the amendment.

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[62] *See, e.g., In re RFC and ResCap Liquidating Trust Action*, 444 F. Supp.3d 967 (D. Minn. 2020) (finding that global pandemic created good cause for remote testimony in ongoing civil trial and that the court's discretion to order remote testimony is supplemented by its "wide latitude" in determining the manner in which evidence is presented under Rule 611(a)).

[63] This was done in the recent amendment to Rule 404(b), when the heading "Crimes, Wrongs, or Other Acts" was re-ordered as "Other Crimes, Wrongs, or Acts" to better reflect the operation of that provision as a tag-a-long to the new notice provision. And the Committee recently proposed publication of a similar tag-a-long amendment to the proposed Rule 615 amendment, clarifying the number of designated representatives an entity party may automatically exempt from sequestration.

Draft One: No Textual Change to Deal with Testimonial Summaries

RULE 1006. SUMMARIES TO PROVE CONTENT

The proponent may offer as evidence ~~use~~ an accurate summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined during court proceedings ~~in court~~ whether or not they have been introduced into evidence. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them during court proceedings ~~in court~~.

Draft Committee Note

Rule 1006 has been amended to clarify misperceptions about the operation of the Rule by some federal courts. Courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the Rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence. Use of a summary as an illustrative aid to evidence and argument is not governed by this provision; such use of a summary or chart is governed by Rule 611(d/e).

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some federal courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings – or a portion of them -- *have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. While in most cases a Rule 1006 chart may be the only evidence the fact finder will examine concerning a voluminous set of documents, in other instances the summary may be admitted in addition to the underlying documents to provide the jury with easier access to the relevant information.

Rule 1006 has also been amended to clarify that a summary offered as alternate proof of the content of voluminous writings, recordings, or photographs must accurately reflect the underlying voluminous materials. Rule 1006 summaries may not misrepresent the contents of the underlying materials or make arguments about the inferences the jury should draw from them. The trial judge retains discretion to determine whether a particular Rule 1006 summary accurately reflects the underlying voluminous material. The use of

symbols or other shortcuts to aid in summarizing voluminous material may in some circumstances be appropriate and nonprejudicial where the summary still accurately reflects underlying material without added argument or inference.

The amendment also makes clear that a Rule 1006 summary may be offered as evidence when the court determines that underlying materials are too voluminous to be conveniently examined during any court proceeding, including one conducted virtually according to the court's discretion. Rule 1006 previously required a finding that materials were too voluminous to be examined "in court," which suggested a physical courtroom. The amendment modifies that terminology to clarify the Rule's application to proceedings not conducted in a physical courtroom. Similarly, the amendment allows the trial judge to require production of the underlying materials "during court proceedings" rather than "in court."

Finally, although the Rule by its terms permits testimonial summaries, testimonial summaries should be utilized only when a witness's testimony satisfies the Rule 1006 requirement that it accurately summarize the content of admissible records too voluminous to be examined during trial proceedings. Rule 1006 does not authorize the admission of expert opinion testimony that must be evaluated pursuant to Rule 702. Nor does it permit a summary witness to offer improper overview testimony or to recap or argue admitted evidence and testimony akin to a closing argument. Of course, a foundation witness who can demonstrate that a summary accurately reflects underlying voluminous content is necessary and appropriate.

Draft Two: Written Summaries Required

RULE 1006. SUMMARIES TO PROVE CONTENT

The proponent may offer as evidence ~~use~~ an accurate written[64] summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined during court proceedings ~~in court~~ whether or not they have been introduced into evidence. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them during court proceedings ~~in court~~.

Draft Committee Note

Rule 1006 has been amended to clarify misperceptions about the operation of the Rule by some federal courts, as well as to require a written summary, chart or calculation. Courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the Rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence. Use of a summary as an illustrative aid to evidence and argument is not governed by this provision; such use of a summary or chart is governed by Rule 611(d/e).

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some federal courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings – or a portion of them -- *have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. While in most cases a Rule 1006 chart may be the only evidence the fact finder will examine concerning a voluminous set of documents, in other instances the

[64] Because Rule 101 provides that "a reference to any kind of written material or any other medium includes electronically stored information," it would seem sufficient to use the modifier "written" only to establish a requirement that the summary appear in written or electronic form.

summary may be admitted in addition to the underlying documents to provide the jury with easier access to the relevant information.

Rule 1006 has also been amended to clarify that a summary offered as alternate proof of the content of voluminous writings, recordings, or photographs must accurately reflect the underlying voluminous materials. Rule 1006 summaries may not misrepresent the contents of the underlying materials or make arguments about the inferences the jury should draw from them. The trial judge retains discretion to determine whether a particular Rule 1006 summary accurately reflects the underlying voluminous material. The use of symbols or other shortcuts to aid in summarizing voluminous material may in some circumstances be appropriate and nonprejudicial where the summary still accurately reflects underlying material without added argument or inference.

The amendment also makes clear that a Rule 1006 summary may be offered as evidence when the court determines that underlying materials are too voluminous to be conveniently examined during any court proceeding, including one conducted virtually according to the court's discretion. Rule 1006 previously required a finding that materials were too voluminous to be examined "in court," which suggested a physical courtroom. The amendment modifies that terminology to clarify the Rule's application to proceedings not conducted in a physical courtroom. Similarly, the amendment allows the trial judge to require production of the underlying materials "during court proceedings" rather than "in court."

Finally, the amendment requires a "written" summary, chart, or calculation, eliminating the proffer of a "summary witness" or a purely testimonial summary under Rule 1006. Of course, a witness who can provide the requisite foundation for admission of a written summary remains necessary. But summary witnesses who purport to orally summarize voluminous materials are prone to abuse. *See United States v. Nguyen,* 504 F.3d 561 (5th Cir.2007) (summary testimony by an advocate summarizing and organizing the case for the jury is inappropriate). And purely testimonial summaries are inconsistent with policies underlying the Best Evidence rule that typically prohibits testimonial characterizations of written materials due to the risk of human mistransmission. The risk is uniquely salient when a witness provides a purely testimonial summary of materials too voluminous to be conveniently examined during court proceedings. The amendment requires a written summary, chart, or calculation accompanied by appropriate foundational testimony.

Draft Three: Rule Restructured, Written or Recorded Summaries Required

RULE 1006. SUMMARIES TO PROVE CONTENT

(a) The proponent may offer as evidence ~~use~~ an accurate written summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined during court proceedings ~~in court~~ whether or not they have been introduced into evidence. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them during court proceedings ~~in court~~.

(b) The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

(c) Use of a summary as an illustrative aid to evidence and argument is governed by Rule 611(d/e).

Draft Committee Note

Rule 1006 has been amended to clarify misperceptions about the operation of the Rule by some federal courts, as well as to require a written or recorded summary, chart or calculation. Courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the Rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence. Use of a summary as an illustrative aid to evidence and argument is not governed by this provision; such use of a summary or chart is governed by Rule 611(d/e).

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some federal courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary

because the underlying writings or recordings – or a portion of them -- *have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. While in most cases a Rule 1006 chart may be the only evidence the fact finder will examine concerning a voluminous set of documents, in other instances the summary may be admitted in addition to the underlying documents to provide the jury with easier access to the relevant information.

Rule 1006 has also been amended to clarify that a summary offered as alternate proof of the content of voluminous writings, recordings, or photographs must accurately reflect the underlying voluminous materials. Rule 1006 summaries may not misrepresent the contents of the underlying materials or make arguments about the inferences the jury should draw from them. The trial judge retains discretion to determine whether a particular Rule 1006 summary accurately reflects the underlying voluminous material. The use of symbols or other shortcuts to aid in summarizing voluminous material may in some circumstances be appropriate and nonprejudicial where the summary still accurately reflects underlying material without added argument or inference.

The amendment also makes clear that a Rule 1006 summary may be offered as evidence when the court determines that underlying materials are too voluminous to be conveniently examined during any court proceeding, including one conducted virtually according to the court's discretion. Rule 1006 previously required a finding that materials were too voluminous to be examined "in court," which suggested a physical courtroom. The amendment modifies that terminology to clarify the Rule's application to proceedings not conducted in a physical courtroom. Similarly, the amendment allows the trial judge to require production of the underlying materials "during court proceedings" rather than "in court."

Finally, the amendment requires a "written" summary, chart, or calculation, eliminating the proffer of a "summary witness" or a purely testimonial summary under Rule 1006. Of course, a witness who can provide the requisite foundation for admission of a written summary remains necessary. But summary witnesses who purport to orally summarize voluminous materials are prone to abuse. *See United States v. Nguyen,* 504 F.3d 561 (5th Cir.2007) (summary testimony by an advocate summarizing and organizing the case for the jury is inappropriate). And purely testimonial summaries are inconsistent with policies underlying the Best Evidence rule that typically prohibits testimonial characterizations of written materials due to the risk of human mistransmission. The risk is uniquely salient when a witness provides a purely testimonial summary of materials too voluminous to be conveniently examined during court proceedings. The amendment requires a written summary, chart, or calculation accompanied by appropriate foundational testimony.

TAB 5

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible addition to Rule 611 to add guidelines for allowing jurors to ask questions of witnesses
Date: October 1, 2021

At its last meeting, the Committee voted to review a possible change to Rule 611 that would add a subdivision providing procedural safeguards in cases where the trial judge has decided to allow jurors to ask questions of witnesses. Rule 611 currently provides as follows:

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

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;
(2) avoid wasting time; and
(3) protect witnesses from harassment or undue embarrassment.

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

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and
(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

For this meeting, the Committee asked the Reporter to prepare a possible amendment that would add a new subdivision to Rule 611, setting forth procedural requirements that would apply if the trial court allows jurors to question witnesses. This memorandum is in four parts. Part One discusses the case law on juror questioning of witnesses. Part Two discusses the possible advantages and disadvantages of an amendment that would set forth procedural requirements that must be employed if the judge allows jurors to question witnesses. Part Three discusses whether something should be said, in text or Committee Note, about when the judge should or should not allow jurors to ask questions of witnesses --- or should the rule just be agnostic on the subject? Part Four sets forth a proposed draft amendment and Committee Note.

I. Case Law on Juror Questioning of Witnesses

Every circuit court has issued a ruling on juror questioning of witnesses. It is probably fair to state that most of these rulings make two points: 1. Allowing juror questioning of witnesses raises concerns about prejudice to the parties (but the level of concern varies among the courts); and 2. If the judge does wish to allow jurors to question witnesses, there must be procedural safeguards employed.

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

- Questioning by jurors "risks turning jurors into advocates."

- It "creates the risk that jurors will ask prejudicial or other improper questions."

- "Remedial measures taken by the court to control jurors' improper questions may embarrass or even antagonize the jurors if they sense that their pursuit of the truth has been thwarted by rules they do not understand."

- Juror questioning "will often impale attorneys on the horns of a dilemma" because an attorney, by objecting to a question from a juror, risks alienating the jury.

The *Bush* court concluded that the balance of the prejudicial effect arising from juror questioning, against the benefits of issue-clarification, will "almost always lead trial courts to disallow juror questioning, in the absence of extraordinary or compelling circumstances."[1]

[1] For other cases expressing skepticism about juror questioning of witnesses, see, e.g., *United States v. Sutton*, 97 F.2d 1001, 1005 (1st Cir. 1992) ("[a]llowing jurors to pose questions during a criminal trial is a procedure fraught with perils"; but allowing the practice, subject to procedural safeguards, because "trial judges should be given wide latitude to manage trials."); *United States v. Cassiere*, 4 F.3d 1006, 1018 (1st Cir. 1993) ("the practice should be reserved for exceptional situations"); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512 (4th Cir. 1985) (expressing concern particularly about a juror's reaction whether their question is not asked); *United States v. George*, 986 F.2d 1176, 1178 (8th Cir. 1993) (warning against the risks of juror questioning and "the importance of maintaining the jury's role as neutral factfinder" but stating that "the practice of allowing juror questions is a matter committed to the sound discretion of the district court and is not prejudicial per se").

A number of courts are more positive about the practice of questioning by jurors. For example, in *SEC v Koenig*, 557 F.3d 736, 742 (7th Cir. 2009), the court noted that its prior decisions had expressed skepticism about juror questioning. But it observed that "[n]ow that several studies have concluded that the benefits exceed the costs, there is no reason to disfavor the practice."[2] Judge Easterbrook, writing in *Koenig,* referred to the following supportive data for allowing jurors to ask questions:

> Principle 13(C) of the ABA's American Jury Project recommends that judges permit jurors to ask questions of witnesses. The Final Report of the Seventh Circuit's American Jury Project 15–24 (Sept. 2008) concurs, with the proviso that jurors should submit their questions to the judge, who will edit them and pose appropriate, non-argumentative queries. District judges throughout the Seventh Circuit participated in that project. The judges, the lawyers for the winning side, and, tellingly, the lawyers for the losing side, all concluded (by substantial margins) that when jurors were allowed to ask questions, their attention improved, with benefits for the overall quality of adjudication. Keeping the jurors' minds on their work is an especially vital objective during a long trial about a technical subject, such as accounting.[3]

The Eleventh Circuit, in *United States v. Richardson,* 233 F.3d 1285, 1290 (11th Cir. 2000), was also positive about the use of juror questioning, especially in complex cases:

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

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[2] See also Third Circuit Pattern Jury Instruction for Civil Cases 1.8, Option 2 (recognizing that certain judges routinely allow juror questions). Compare Ninth Circuit Instruction 1.15 (comment) (recommending that no questions by jurors be permitted).

[3] Judge Easterbrook also cited scholarly works asserting the benefits of allowing jurors to ask questions of witnesses. *See, e.g.,* Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, *Juror Questions During Trial: A Window into Juror Thinking,* 59 Vand. L.Rev.1927 (2006); Nicole L. Mott, *The Current Debate on Juror Questions,* 78 Chi.-Kent L.Rev. 1099 (2003). See also *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979) ("If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to be asked about it").

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

> [T]o guard against abuses of discretion, district courts have been directed to employ measures that will protect against these risks. For example, in determining whether to permit juror questioning, the trial court should weigh the potential benefit to the jurors against the potential harm to the parties, especially when one of those parties is a criminal defendant. District courts must in each case balance the positive value of allowing a troubled juror to ask a question against the possible abuses that might occur if juror questioning became extensive. Questions should be permitted to clarify factual issues when necessary, especially in complex cases. However, the questioning procedure should not be used to test legal theories, to fill in perceived gaps in the case, or occur so repeatedly that they usurp the function of lawyer or judge, or go beyond the jurors' role as fact finders. Care should be taken that the procedure utilized is fair, and permits all the parties to exercise their rights. To this end, jurors should not be permitted to directly question a witness but rather should be required to submit their questions in writing to the trial judge, who should pose the questions to the witness in a neutral manner. Written submission of questions eliminates the possibility that a witness will answer an improper question and prevents jurors from hearing prejudicial comments that may be imbedded in improper questions. This procedure also allows the attorneys to make and argue objections without fear of alienating the jury. Moreover, the jury should be instructed throughout the trial regarding the limited purpose of the questions, the proper use of the procedure and should be constantly cautioned about the danger of reaching conclusions or taking a position before all of the evidence has been received or speculating about answers to unasked questions. Finally, the district court should make clear to the jury that questions are to be reserved for important points, that the rules of evidence may frequently require the judge to eschew certain questions, and that no implication should be drawn if a juror-inspired question withers on the vine.[4]

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

> When a court decides to allow juror questions, counsel should be promptly informed. At the beginning of the trial, jurors should be instructed that they will be allowed to submit questions, limited to

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

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

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

● The judge must consider the possible value of allowing questions against the risk of possible abuse.
● The court must notify the parties of the court's intent to allow juror questioning at the earliest possible time, and give the parties an opportunity to be heard in opposition to the practice.
● Questions must be submitted in writing.
● Questions should be limited to important points.
● Jurors must be instructed not to disclose to other jurors the content of any question submitted to the court.
● Questions should be factual and not argumentative or opinionated.
● The court must review each question with counsel --- outside the hearing of the jury --- to determine whether it is appropriate under the Evidence Rules.
● The court must allow a party's objection to a juror's question to be made outside the hearing of the jury.
● The court must notify the jury that it may rephrase questions to comply with the Evidence Rules.
● The court or the parties should read out the question to the witness.
● Counsel should be allowed to re-examine witnesses after a juror's question is answered by the witness.
● The court must instruct the jury that if a juror's question is not asked, or is rephrased, the juror should not draw any negative inferences against any party.
● The jurors should be reminded that they are not advocates but rather are impartial factfinders.
● The court must instruct the jury that answers to questions asked by jurors should not be given any greater weight than would be given to any other testimony.[5]

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

● When the court determines that a juror's question may be asked, the question is to be posed by the court, not the juror.

● Counsel should be allowed to re-examine witnesses after a juror's question is answered by the witness.

III. Pros and Cons of an Amendment Setting Forth Safeguards for Juror Questioning of Witnesses

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

Another possible benefit to the rule is that it may encourage judges so inclined to allow jurors to ask questions. One of the uncertainties that some judges might have is how the practice will play out --- and how the court of appeals will view it as playing out. But with the ready list of safeguards, the judge will have some assurance at the outset that the procedure will be properly regulated and safe on review.

If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys and decide whether it may be asked.

Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

Remember that you are not an advocate for one side or the other. Each of you is an impartial judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any question asked by any juror with any other juror until after deliberations begin.

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

You will have the opportunity to ask questions of the witnesses in writing. When a witness has been examined and cross-examined by counsel, and after I ask any clarifying questions of the witness, I will ask whether any juror has any further clarifying question for the witness.

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

Against these benefits are five possible concerns:

1. It is of course the case that every change to the Evidence Rules carries transactional costs --- the costs of keeping up with new rules, dealing with changed expectations, etc. Chief Justice Rehnquist thought that changes to the Evidence Rules carried special transactional costs because the rules of evidence are applied "on the fly, in the heat of trial" where there is no opportunity to consult a book for rules changes. All that said, it would seem that the transactional costs are minimal when the amendment is specifying safeguards for juror questioning of witnesses. First, the amendment is not so much a change of law as it is a codification of standards that are strewn through a few dozen appellate decisions. So if anything, the amendment limits costs---because courts and lawyers are not sent to hour-long Westlaw searches to figure out what to do if the court wants to allow jurors to ask questions. Moreover, this would be an amendment that is not applied in the heat of trial, with testimony and exhibits buzzing around. Rather the safeguards most likely are going to be worked out and implemented before any testimony is actually given.

2. It might be thought that in setting forth safeguards, the Committee is providing an imprimatur to the practice of allowing jurors to ask questions of witnesses. As stated above, the topic is controversial, and unless the Committee actually votes in favor of promoting the practice, there is a danger that some will think that the Committee by a rule amendment is favoring the practice, albeit with safeguards. To the extent this is a danger, it can probably be handled by a Committee Note explicitly stating that the Committee is agnostic about whether a judge should allow jurors to ask questions.

3. When a list of safeguards is added to the text of a rule, there is always the possibility of rigidity --- perhaps more safeguards will be developed, and the rule will not have accommodated them. Perhaps nobody will try to employ extra safeguards, in the thought that the Committee has implied that it is covering the waterfront. This is a legitimate concern, but again, it can probably be handled by the Rule or Note itself. It can be stated that these safeguards are not intended to be exclusive.

4. A fourth possible concern is that the rule is not resolving a circuit split --- and a circuit split has been the motivation for most of the changes to the Evidence Rules for the past 25 years. Certainly it is true that rectifying a circuit split is a great reason for proposing an amendment. But it is not the only reason. In the past 25 years, a number of amendments were proposed because they would reduce costs, simplify the rules, or simply make the rules more user-friendly. An example of reducing costs is Rule 502, which works to reduce the cost of preproduction privilege review. An example of simplifying the rules is Rule 801(d)(1)(B), which equates rehabilitation and substantive admissibility of prior consistent statements, thus avoiding complicated jury instructions that nobody will follow. And an example of user-friendliness is the restyling effort. None of those three amendments were addressed to a circuit split. So the fact that there is no circuit split being addressed is not a reason to reject an amendment that brings other benefits.

5. A final possible concern that might be expressed is that the amendment adds an evidence rule, but it is not a rule of admissibility. It's not a rule that authorizes a court to admit or exclude evidence. But that should not be a serious concern, because there are a number of evidence rules that are not predominately about admissibility of evidence. Indeed in Rule 611 itself, most of the

principles are not about admitting or excluding evidence, but rather about what kinds of questions can be asked of witnesses--- the form of the question (Rule 611(a)), cross-questions outside the scope of direct (Rule 611(b)), and leading questions (Rule 611(c)). There are other rules that are not primarily about admissibility as well, including Rule 103 (preserving a claim of error), Rule 604 (interpreters), and Rule 706 (court appointment of an expert witness).

In sum, there is a good argument to be made that the proposed amendment provides a relatively mild benefit (user-friendliness and efficiency), which outweighs the very limited costs.

III. Addressing Whether a Court Should Allow Juror Questioning of Witnesses

As stated above, the courts are essentially uniform on the safeguards that are to be employed if the court allows jurors to question witnesses. But as shown in the cases discussed above, courts are not uniform in their attitude towards the practice. Some courts have stated that jurors should be allowed to ask questions only in complex cases. Some courts use the unhelpful term "extraordinary circumstances." Other courts, in contrast, simply say that the practice is within the trial judge's discretion. It appears that the practice is used widely in some circuits and rarely in others.

Assuming an amendment is proposed, a question for the Committee is whether something should be said, in the text or the note, about the standards, if any, that must be met before the court can allow the practice of questioning witnesses.

There is much to be said for leaving the matter alone. As shown above, the topic of juror questioning of witnesses is controversial. It is unlikely that one size fits all. And it would be extremely difficult to write, at least in rule text, what the standard should be. For example, assume the text says "the court may, in its discretion, allow jurors to submit questions for witnesses." What is accomplished by that? The court has the discretion to do that, or not, without an evidence rule. As the court in *Richardson, supra,* pointed out, no trial court has ever been reversed for allowing jurors to submit questions, so long as proper procedural safeguards are undertaken. And if the Committee wished to place any limits on that discretion, the amendment would probably need to be written in fuzzy language like "in complex cases" or "where extraordinary circumstances exist." That is likely to be controversial, without being helpful.

A Committee Note could use language like "in complex cases," or "the court should proceed with caution," etc. But it is unlikely that note language is going to change anything in the circuits that are more embracing of juror questioning. There doesn't seem to be much of a benefit to stepping into a controversy that is unlikely to be solved by generalized language in a note.

The draft amendment in the next section avoids the question of whether a court should allow jurors to question witnesses. If the Committee does want to tackle that question, the draft will be rewritten in accordance with the Committee's guidance, and will be presented at the next meeting.

The draft amendment starts on the next page.

IV. Draft Amendment

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

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;
(2) avoid wasting time; and
(3) protect witnesses from harassment or undue embarrassment.

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

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and
(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

(d) Juror Questions of Witnesses. [6]

(1) Instructions to Jurors if Questions are Allowed. If the court allows jurors to ask questions of witnesses during trial, then before any witnesses are called, the court must instruct the jury that:

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

(B) a juror must not disclose its content to any other juror;

(C) the court may rephrase a question to comply with these rules;

(D) if a juror's question is not asked, or is rephrased, the juror should not draw any conclusions from that;

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

(F) the jurors are factfinders, not advocates.

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

[6] Many thanks to the restylists --- Joe Kimble, Bryan Garner, and Joe Spaniol --- for helping me with the structure of this complicated rule. I won't show you what I started out with, it's too embarrassing.

(A) review each question with counsel to determine whether it is appropriate under these rules.

(B) allow a party to object to a question outside the hearing of the jury.

(3) Reading the Question to a Witness, When the court determines that a juror's question may be asked, the question must be read to the witness by the court, not by the juror.

Reporter's Note on the text:

There are a few procedural safeguards listed in the cases that are not on the list. This comment explains the rationale behind the omissions.

1. *The judge must consider the possible value of allowing questions against the risk of possible abuse.* This is a factor that goes to whether juror questioning should be allowed at all, and not to procedural safeguards that are to apply when the court allows the practice. Moreover, presumably that balancing of risk and reward is made by the court throughout the trial on dozens of issues. At any rate, to the extent the point must be made, it is made in the draft Committee Note.

2. *The court must allow the parties an opportunity to be heard in opposition to the practice.* Allowing the parties to be heard in opposition to the practice also goes to whether to allow the practice at all, not to the procedural safeguards when questioning occurs.

3. *Notice must be provided at the earliest possible opportunity.* Presumably the parties will be notified, at the latest, when the court gives an instruction at the outset of the case, as is required by the rule. So adding this requirement seems unnecessary.

4. *Questions must be limited to important points.* That is hard to write into the text of a rule. When is a question "important"? Perhaps the Committee could consider some text that would cover the point, if it is found to be necessary to include.

5. *Questions should be factual and not argumentative or opinionated.* This requirement seems unnecessary to put in the text. If the question is argumentative or opinionated, the court can just refuse to have it read to the witness. A jury instruction to the effect that questions should not be argumentative or opinionated might be useful to the court in avoiding having to even receive such questions, but it doesn't seem to be a very helpful concept in the text of an Evidence Rule.

6. *Counsel should be allowed to re-examine witnesses after a juror's question is answered by the witness*. Whether a witness should be re-examined, in general, is within the court's discretion under Rule 611(a). So it may well be confusing to add the requirement to new subdivision (d). Moreover, the courts have held that this is a "should" safeguard, not a must. (Nor is it a good idea to be made mandatory, as the judge might

well find in a particular situation that re-examination is unwarranted). A "should" factor doesn't coexist very well in a rule full of musts. Nor is it clear what would happen if the court doesn't allow what "should" be allowed.

If the Committee determines that any of the above factors, or any other factors, should be included to the list of safeguards, those changes will be made for the next meeting.

Draft Committee Note

New subdivision (d) sets forth procedural safeguards that are necessary when a court decides to allow jurors to ask questions of witnesses at trial. Trial judges currently enjoy discretion to allow jurors to ask questions of witnesses. Although the question of whether and when to allow juror questions has been controversial, courts agree that trial judges should weigh the benefits of allowing juror questions in a particular case against the potential harm that it might cause. Allowing jurors to pose non-argumentative, factual questions has been found appropriate mostly in complex cases.

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

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

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

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to 801(d)(2) for Statements Made by a Predecessor in Interest
Date: October 1, 2021

At the last meeting, the Committee decided to consider whether to amend Rule 801(d)(2) to resolve a circuit split on whether a statement made by a declarant can be offered against a party-opponent, if that party's cause of action or defense is derived directly from the declarant.

Rule 801(d)(2) currently provides a hearsay exemption for the following statements:

> **(2)** ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:
>
> **(A)** was made by the party in an individual or representative capacity;
> **(B)** is one the party manifested that it adopted or believed to be true;
> **(C)** was made by a person whom the party authorized to make a statement on the subject;
> **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> **(E)** was made by the party's co-conspirator during and in furtherance of the conspiracy.
>
> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

The courts are split on how this exemption operates in what might be broadly called "representative actions" --- where the party against whom the statements is offered is relying on rights and claims that were initially held by the declarant. The most common example in federal court is a civil rights action brought by the estate of a decedent whose rights were allegedly violated. Assume Jim is arrested by Officers Smith and Peters. Jim alleges that he was beaten by the officers after he was placed under arrest. Jim brings a section 1983 action against both officers. Officer Smith seeks to admit a statement that Jim made to his mom while he was in the hospital --- the statement was, "Officer Smith had nothing to do with my injury." Jim objects that it is

hearsay. That objection is overruled in the action brought by Jim, because the statement is admissible against him as a party-opponent statement, under Rule 801(d)(2)(A). But if Jim has died by the time of trial --- and it is irrelevant whether or not the death is related to the injury --- some courts would find that Jim's hearsay statement is not admissible against Jim's estate. Other courts disagree and find the statement admissible against the estate.

The Advisory Committee has often acted to propose an amendment to rectify circuit splits. The rationale is obvious --- the whole idea of having the Federal Rules of Evidence was to promote uniformity of result throughout the federal courts. While of course it is not realistic to think that there will be no variances among federal courts in applying the Evidence Rules, when a circuit split does arise, the Advisory Committee has often moved to resolve it.[1]

This memorandum is divided into three parts. Part One discusses the conflicting case law on whether a party-opponent statement is admissible against a successor-in-interest of the declarant who made it. Part Two evaluates the arguments in favor of and against admitting the declarant's statement against the party-opponent; it concludes that generally the statements should be admissible if they would have been admissible against the declarant. Part Three sets forth a draft amendment --- with a discussion of what terminology is optimal in defining the necessary relationship between the declarant and the party-opponent.

Throughout the memo, the terms "successor" and "predecessor" are used to refer to the party and the declarant respectively. These seem easy enough to understand for purposes of the memo. But in the final section of the memo, there will be a discussion of whether the terminology of "predecessor-in-interest" is workable for a textual change to the rule.

It should be noted that the possible amendment is not an action item this meeting. If the Committee decides to proceed further, a proposal will be developed in light of the discussion at this meeting, and an action item will be presented at the Spring, 2022 meeting.

[1] Examples include the 2006 amendments to Rule 408, rectifying three separate circuit splits concerning the application of that rule; the current proposal to amend Rule 106; the 2010 amendment to Rule 804(b)(3), that resolved a conflict over whether the government was required to provide corroborating circumstances when offering a declaration against penal interest; and all three rules that are now out for public comment.

Presumably the Committee would not act to resolve a conflict if there was a likelihood that the Supreme Court would do so. But the Supreme Court has only taken a handful of cases on the proper interpretation of the Federal Rules of Evidence. And it is extremely unlikely that it would seek to resolve whether a decedent's hearsay statements are admissible against the estate under Rule 801(d)(2).

I. The Division in the Case Law on the Admissibility of a Hearsay Statement Against a Successor Party

Rule 801(d)(2) provides that a hearsay statement is admissible over a hearsay objection if the statement is "offered against an opposing party." Where the statement has been made by a declarant who is not a party at the time it is offered, but rather it is offered against a party who derives its claim or defense from the declarant, the text of the rule does not clearly mandate the statement's admissibility. The statement was not really made by "the opposing party" because it was made by someone who is not formally a party to the case. Nor was the statement clearly made by an agent of the party because, at the time of the statement, there was no principal-agent relationship. On the other hand, the language of the rule does not explicitly *prohibit* admitting a declarant's statement against a successor-in-interest. Where the party stands in the shoes of the declarant, it is at reasonable to conclude that the declarant is effectively the same as the party-opponent.

Cases Rejecting Admissibility of Predecessor Hearsay

The vague wording of Rule 801(d)(2) has led several courts to hold that a declarant's hearsay statements cannot be admitted against the successor party under Rule 801(d)(2)(A). The leading case rejecting admissibility is *Huff v. White Motor Corp.,* 609 F.2d 286 (7th Cir. 1979), where, in a product liability action, the decedent made a statement that would have been admissible against him as a party-opponent statement had he lived. But the action was brought by his estate, and the court found that the statement was not admissible against the estate. *Huff* and the courts following it reason that if the declarant's statement is to bind the successor, the only justification would be that the declarant and the successor are in "privity." And these courts conclude that Rule 801(d)(2) does not, by its terms, allow admission on grounds of privity/successor-in-interest. These courts observe that the common law did provide for admissibility of privity-based admissions, and they posit that by not specifically including the term "privity" within the text of Rule 801(d)(2), the Advisory Committee was deciding to reject this common-law ground of admissibility.[2]

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[2] For other cases rejecting admissibility of predecessors under Rule 801(d)(2), *see, e.g., 401 Oak Grove, LLC v. Louis Dreyfus Co. Cotton Storage, LLC*, 2019 WL 12285182, at *9 (N.D. Ga.) (hearsay statement of employee of the company that assigned rights under the lease to the plaintiff was not admissible against the plaintiff); *Wharf, Inc. v. D.C. Wharf Horizontal Reit Leaseholder LLC,* 2021 WL 1198143, at *22 (D.D.C. Mar. 30, 2021) (while "an assignee takes the rights of the assignor, no more and no less, this is a principle of substantive law, not one of evidence" and such privity of interest "does not render his statements admissions"); *Ponzini v. Monroe Cty.*, 2016 WL 4494173, at *2–3 (M.D. Pa.) ("Notably, Rule 801(d)(2)(A) provides for several types of party-opponent admissions—such as adoptive admissions, or statements made by an agent—but does not include any provision concerning privity-based admissions."); *In re Cornfield*, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004) (noting that "[w]hile some courts have admitted decedents' statements as party-opponent admissions of the decedent's estate," Rule 801(d)(2) does not apply because the rule does not incorporate the common-law privity rule); *Gonzalez v. City of Chicago*, 2015 WL 5159945, at *1 (N.D. Ill.) (decedent's texts not admissible against the estate: "The drafters of the Federal Rules of Evidence allowed certain adoptive, attributive and privity-based admissions under Federal Rule of Evidence 801(d)(2) but they did not permit a decedent's statement to be admitted against the decedent's estate.").

See also 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:63 (4th ed.) ("The admissions doctrine of Rule 801(d)(2) makes no provision for statements by persons in 'privity' of estate, interest, or obligation with a party, and no other provision reaches such statements.").

Assuming all this is true (and the Advisory Committee Note says nothing about privity one way or the other) the result in *Huff* is completely based on rules construction --- which is not a bad thing, but which clearly doesn't control the result if the rule is amended. Put another way, the court in *Huff* is right that Rule 801(d)(2) is ambiguous about whether the common-law successor/privity rule is maintained. But all that means is that the solution would be to amend the rule to resolve the ambiguity.

The only real policy argument for the *Huff* position, made in some of the cases, is that there is a risk that a witness relating the declarant's statement in court may misstate it --- or create it out of whole cloth --- and the declarant by definition is not around to challenge the witness's account. But that concern applies to the hearsay statements of *any* unavailable declarant, which are admitted if they fit under some other hearsay exception --- like a dying declaration, or a state of mind statement of a deceased victim. There is no reason to single out statements under Rule 801(d)(2) for any different treatment. In all cases of hearsay declarants, the concern about the *witness's* account is handled by the fact that the witness to the statement is testifying under oath and subject to cross-examination --- which is designed to elicit any suspect motivations of the witness. In essence the risk of in-court witnesses lying about hearsay statements is not a hearsay problem --- as was recognized by this Committee in the Committee Note to the 2019 amendment to Rule 807:

> In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. [3]

Cases Allowing Admissibility of Predecessors' Statements

Cases on the other side essentially consider the declarant (or the declarant's principal if the statement is by an agent under Rule 801(d)(2)(D)) to be a "party" within the meaning of Rule 801(d)(2). These courts take a "functional approach" to the term "party." *See, e.g., Estate of Shafer v. Comm'r*, 749 F.2d 1216, 1219–20 (6th Cir. 1984) ("a decedent, through his estate, is a party to [an] action" and the decedent's statements "are a classic example of an admission"). As a matter of rule interpretation, the *Shafer* court reasoned that predecessors were considered parties under common law, and "[s]ince the purpose of Rule 801(d)(2) is to increase the admissibility of representative admissions, see Fed.R.Evid. 801(d)(2) advisory committee note (calling for 'generous treatment of this avenue to admissibility'), a decedent should be considered a 'party' within the Rule." Accord 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 801(d)(2)(A)[01]. Another textual and statutory intent argument is provided by the Third Circuit:

[3] In any event, the concern about witness untrustworthiness is not applicable to written or recorded statements of the declarant. And presumably the *Huff* rule prohibits admission of the decedent's written and recorded statements as well.

> [T]he Advisory Committee called for "generous treatment to this avenue of admissibility." Id. Moreover, the Advisory Committee Notes to Fed.R.Evid. 804(b)(3) suggest that a deceased party's statement will be admissible under Fed.R.Evid. 801(d)(2), as the Notes state that, "[i]f the statement is that of a party, offered by his opponent, it comes in as an admission [under Rule 801(d)(2)] and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents." Since unavailability of the declarant is a prerequisite to admissibility under Rule 804, it follows that the Advisory Committee must have contemplated cases in which a party is no longer available.
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> *Savarese v. Agriss*, 883 F.2d 1194, 1199-1201 (3d Cir. 1989).

Courts allowing admissibility often talk about the contrary rule as elevating form over substance. For example, the court in *Abelmann v. SmartLease USA, LLC*, 437 F. Supp. 3d 736, 737–40 (D.N.D. 2020), reasoned as follows:

> Here, * * * the claims being asserted here are "survival claims" under North Dakota law. That is, they belonged to Leanne Abelmann [the declarant] prior to her death and the personal representative now is simply pursuing them on behalf of Leanne Abelmann's estate. * * * In this situation, the * * * decedent and the decedent's estate [are] essentially the same "party" for purposes of Rule 801(d)(2). . . . To conclude that admissions by Leanne Abelmann are not now admissible as admissions by a party opponent as to her claims—even though they would have been admissible had she not met her untimely death—would exalt form over substance and be an overly mechanistic application of the term "party" in Rule 801(d)(2).[4]

[4] For other cases holding that a hearsay statement of a declarant is admissible against the party who stands in the declarant's shoes, *see, e.g., Phillips v. Grady Cty. Bd. of Cty. Comm'rs*, 92 Fed.Appx. 692, 696 (10th Cir. 2004) (holding that the decedent's statements were admissible under Rule 801(d)(2)(A) in a case brought by the decedent's estate); *Mills v. Damson Oil Corp*., 691 F.2d 715, 716–717 (5th Cir. 1982) (approving use against plaintiff of statements by his "agent to acquire the property," invoking discussion of exception for statements by persons in privity with party); *Wolff v. Padia, Inc.,* 2016 WL 258635, at *1 (D. Or.) ("[B]ecause this action is brought on Mrs. Wolffs behalf by her estate, the Court finds [Mrs. Wolff's] statement to be admissible as an admission by a party opponent."), *N.W. v. City of Long Beach,* 2016 WL 9021966, at *5 (C.D. Cal.) ("Decedent's statements are party admissions under Rule 801(d)(2) of the Federal Rules of Evidence."); *Schroeder v. de Bertolo*, 942 F. Supp. 72, 78 (D.P.R. 1996) ("In the case at bar, Rosita was deceased at the time of the trial. Nevertheless, she was a party to this action through her estate. If plaintiffs had succeeded in obtaining a verdict against defendants, Rosita's estate would have received a monetary award. Therefore, the fact that Rosita was dead does not diminish the interpretation that her estate, in representation of Rosita, was a party to the present cause of action. Therefore, Rosita's statements were admissible against Rosita's estate as a party admission pursuant to Fed.R.Evid. 801(d)(2)(A)."); *Lavoho, LLC v. Apple, Inc.,* 232 F. Supp. 3d 513, 529 n.19 (S.D.N.Y. 2016) (statements by the founder of the plaintiff's predecessor in interest --- admissible against the predecessor as agent-statements under Rule 801(d)(2)(D) --- were admissible against the plaintiff); *Tracinda Corp. v. DaimlerChrysler AG,* 362 F. Supp. 2d 487 (D. Del. 2005) (statement of an employee of a company that merged into the defendant corporation was properly admitted against the merged corporation under Rule 801(d)(2)(D); *Sherif v. AstraZeneca*, 2002 WL 32350023 (E.D. Pa.) (same).

Courts finding admissibility are often hit with the argument that they are admitting unreliable hearsay. But that argument is easily defeated. Thus, in *Savarese v. Agriss*, 883 F.2d 1194, 1199-1201 (3d Cir. 1989), the defendants argued that admission of hearsay statements of a predecessor "is not supported by the theory underlying the admission into evidence of admissions, namely, their inherent reliability." But the court responded that the Advisory Committee Note states that "[n]o guarantee of trustworthiness is required in the case of an admission." Party-opponent statements are not admitted because they are reliable: "their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[5]

II. Policy Arguments

An important question, then, is which position is better grounded in policy. As stated above, the only policy justification for the *Huff* limitation on Rule 801(d)(2) is the misguided one of a risk of witnesses lying about the statement. Another argument sometimes expressed is that there is no need to admit the statement as a party-opponent statement because, if it is reliable, it can be admitted as a declaration against interest or under the residual exception. But once again, this misses the point that party-opponent statements are not grounded in reliability, but rather in accountability within the adversary system. So, many such statements would be an ill fit with the residual exception; and it is far from clear that all such statements would be disserving to the declarant's interest (nor would it always be the case that the declarant is unavailable). In any event, it makes no sense to require the opponent expend the resources and argument to try to satisfy the detailed requirements of Rule 804(b)(3) or Rule 807, because the statement should be admissible simply because the predecessor made it.

In contrast, a rule providing that statements of a declarant are admissible against a party who is carrying the declarant's cause of action or defense is supported by solid policy grounds:

> 1. When the party's claim or defense is directly derived from the claim or defense of the declarant, the declarant is essentially a real party in interest. It is the declarant's actions that are in dispute, not the successor's. Successors are usually bound by judgments against the predecessor under the doctrines of claim and issue preclusion. So it makes little sense to *bind* the successor to things the predecessor has done, yet prohibit mere admission of his statements.
>
> 2. The rationale for admitting party-opponent statements is that it is consistent with the adversary system: you can't complain about statements you made that are now being offered against you. That adversarial interest is also applicable when there has been a substitution of parties. The successor should not be able to complain about statements offered against it that are made by the very person whose injuries (or defense) the successor is proving at trial.

[5] Advisory Committee Note to Rule 802(d).

3. Another take on the rationale of party-opponent statements is this: the hearsay rule is intended to protect parties from unreliable declarants whom the party does not control --- as Sir Walter Raleigh put it, the declarant might be some "Wild Jesuit who should not be allowed to speak against me" without being produced for cross-examination. But with party-opponent statements, there is no uncontrollable wild Jesuit --- the party has made the statement, or it is properly attributed to the party. So it is absurd to argue that "my statement should not be admitted against me because it is unreliable." Likewise, in the successor-predecessor situation, the successor can hardly claim that the declarant is some kind of unreliable individual, when the successor is standing in the shoes of the declarant and pressing the declarant's claim or defense. It is inconsistent and unfair for a successor to argue that the declarant's statement is unreliable hearsay when it is pursuing the claim or defense of that same declarant.

4. The contrary rule, that a statement of a declarant is not admissible against a successor, gives rise to arbitrary and random application. Take two cases involving allegations of police brutality, both happening on the same day, both tried on the same day, and the victim in each case made a statement that his injuries weren't very severe. Victim 1 is alive at the time of trial --- so his statement is easily admitted against him under Rule 801(d)(2)(A). But assume Victim 2 is run over by a car and killed a month before trial. Under the *Huff* rule, Victim 2's statement, identical in all respects to that of Victim 1, is inadmissible hearsay. This makes no sense.

5. Given the breadth and number of successorship interests --- merger, assignment, estates, etc. --- the *Huff* view can have a substantial negative impact on federal litigation. [6]

[6] It should also be noted that at least two states specifically provide that statements of a declarant are admissible against a successor-in-interest as party-opponent statements. See California Evidence Code § 1224:

> When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

See also Hawaii Rules of Evidence § 803(4)–(5):

> (4) Admission by predecessor in interest. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.
> (5) Admission by predecessor in litigation. When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

For the above reasons, assuming the Committee determines that an amendment is warranted, the equities are in favor of admissibility of a declarant's statement against a party whose claim or defense is directly derived from the claim or defense of the declarant.

C. Should All Predecessor-Successor Interests be Treated the Same?

As discussed above, there are a pretty large number of legal relationships that could come into play when a declarant's statement is offered against a party-opponent whose claim or defense is derived from the declarant. To take just a few: 1. Decedent-estate; 2. Beneficiary-trustee; 3. Constituent corporation --- merged corporation; 4. Assignor-assignee.

There does not appear to be a way to --- or a need to --- meaningfully distinguish these and other relationships in terms of admissibility, so long as the basic criterion is met: that the party-opponent's claim or defense is derived directly from the declarant's (or the declarant's principal for purposes of agency-admission) claim or defense. To put it colloquially, the justification for admissibility is that the party-opponent stands in the shoes of the declarant. Where that is so, it should not matter that the relationship has been formed by contract or operation of law; nor should the label placed on the relationship matter.

It seems clear that an amendment that covers, for example, only decedents and estates will lead to inconsistent and unjustified distinctions. Why should a deceased declarant's statement be admissible against the estate, but not the statement made by the CEO of a predecessor corporation?

What about a Bankruptcy Trustee?

There is perhaps one predecessor-successor relationship that merits a special inquiry --- one that has been raised in a law review article: what should the rule be if a bankruptcy trustee is bringing an adversary proceeding, and the debtor has made a statement that would be admissible against the debtor if the debtor were a party-opponent? Should the statement be admissible against the trustee as well? Several courts have held that the debtor's statements cannot be admissible as party-opponent statements against the trustee in an adversary proceeding. As with other courts following *Huff,* these courts basically rely on a textual argument --- that the Federal Rule does not appear to incorporate the privity concepts that existed under the common law. *See Calhoun v. Baylor,* 646 F.2d 1158, 1158–62 (6th Cir. 1981) (reasoning that Rule 801(d)(2) represented a departure from common law and did not permit statements by predecessors-in-interest to be admissible against sucessors); *Anaconda-Ericsson, Inc. v. Hessen (In re Teltronics Servs., Inc.)*, 29 B.R. 139, 143–44, 165 (Bankr. E.D.N.Y. 1983) (statements of officers for the debtor not admissible against the trustee, because the basis for admissibility would be privity, and Rule 801(d)(2) does not specify privity as a ground of admissibility); *Jubber v. Sleater (In re Bedrock Mktg., LLC),* 404 B.R. 929, 933, 935–36 (Bankr. D. Utah 2009) (trustee takes over debtor's action to recover on promissory notes; statements by debtors officers not admissible against the trustee; while the trustee and the debtor are in "privity", Rule 801(d)(2) does not support admissibility on privity grounds).

Other courts have held that a statement of the debtor is admissible against the trustee in an adversary proceeding. For example in *Wilen v. Bayonne/Omni Dev., LLC (In re Bayonne Med.*

Ctr, 2011 WL 5900960 *1, *3-11 (Bankr. D.N.J. Nov. 1, 2011), the liquidating trustee brought suit against various defendants under New Jersey law, seeking to enforce pledge agreements made by the various defendants in favor of the debtor. The defendants sought to introduce hearsay statements of the chairman of the board of the debtor to refute certain allegations made by the trustee --- which would be admissible against the board under Rule 801(d)(2)(D). The court ruled that the statements were admissible against the trustee, because the trustee stood in the stead of the debtor. Because the cause of action derived directly from the debtor, the trustee could not avoid statements that would have been admissible against the debtor under Rule 801(d)(2). Another case finding admissibility is *Jansen v. Grossman (In re Hadlick)*, Ch. 7 Case No. 8:09-bk-22442-MGW, Adv. No. 8:10-ap-01423-MGW, slip op. at 1, 3–8, 17–21 (Bankr. M.D. Fla. Jan. 19, 2012). The court concluded that when a cause of action derives directly from the debtor and not from the Bankruptcy Code, statements made by the debtor are admissible against the trustee under Rule 801(d)(2). The trustee had brought suit to collect the amounts purportedly owed the debtors on a promissory note, and the court admitted statements by the debtor that refuted the trustee's assertions. The court noted that if the action were commenced by the debtor, all of the statements made by the debtor would be admissible under Rule 801(d)(2)(D). Further, the court stated that a trustee, as a representative of a debtor's estate, succeeds to the rights of a debtor and obtains standing to bring any suit that a debtor could have brought outside of bankruptcy. Additionally, the court stated that the trustee takes property subject to any and all restrictions that exist at the commencement of a bankruptcy case. Thus the chapter 7 trustee could not avoid the statements, as she stood in the shoes of the debtor and the action derived directly from the debtor.

In a law review article evaluating these bankruptcy cases,[7] the author advocates that statements of debtors should not be admissible against trustees under Rule 801(d)(2) in adversary proceedings. One argument is a frequent refrain --- Rule 801(d)(2) does not specifically incorporate the common-law rule on privity. That argument, as stated above, is easily handled by amending the rule. A second argument is that "a privity analysis offers no standards for testing credibility and trustworthiness of statements, and thus, should have no role in the determination of the admissibility of evidence." Again, this argument misses the point of party-opponent statements, which are not based on reliability.

The author's third argument warrants more discussion. She contends that if the debtor knows that its statements could be admitted against the trustee in a subsequent adversary proceeding, then it could strategically make statements designed to undermine the trustee's position in that proceeding. The author gives as an example an action for a constructive fraudulent transfer, which occurs when a debtor does not receive reasonably equivalent value in a pre-bankruptcy transaction. As to that factual situation, the author expresses the following concern:

> A debtor, knowing that what it says will be admissible as an admission of a bankruptcy trustee, can ensure that a trustee will not be able to maintain a cause of action by making statements regarding the value received in exchange for the transfers, making statements about its solvency at the time of the transfer, and/or making statements regarding obligations that it never intended to incur or believed would be beyond its ability to pay.

[7] Tiffany A. Dilorio, *The Debtor Said What?!*, 1 Stetson J. Advoc. & L. 47 (2014).

If it is true that a debtor could intentionally and strategically undermine the trustee's actions, then it would be inappropriate to find the debtor's statement to be admissible against the trustee under Rule 801(d)(2). The unity of interest which logically supports admissibility would not be present. If the author is right, the debtor/trustee relationship would be in contrast to other predecessor-successor situations previously discussed, in which there seems no possibility of strategic, undermining statements. For example, a person with a cause of action has no incentive (and probably no ability) to deliberately undermine the position of his estate.

Frankly, I know nothing about bankruptcy, and I am not in a position to evaluate the likelihood of the scenario painted in the law review article. Luckily, the Rules Committee has people who know a whole lot about bankruptcy. So I asked Elizabeth Gibson, the Reporter to the Bankruptcy Rules Committee, for her opinion on the risk that a debtor will try to undermine the trustee's position by making statements that would be admissible under Rule 801(d)(2). Here is her email response:

> I am very skeptical about the likelihood of the strategic planning that some fear. I can't think when a debtor in advance of bankruptcy would say she was at fault or make another statement that undermines an otherwise valid claim just because she thought she might (or even planned to) file for bankruptcy. Why would she do this – because she hates her creditors and hopes they don't get anything in the bankruptcy? That doesn't seem likely to me. Because under sec. 541 of the Code, the estate succeeds to the debtor's interests in property, including causes of action, I think the statement should be admissible against the trustee (if the rule is changed). The trustee should have no greater right to recovery than the debtor would. This situation, however, should be distinguished from the trustee's pursuit of independent causes of action conferred by the Code, such as preference or fraudulent conveyance actions. Here the trustee is not stepping into the debtor's shoes and does have a greater right of recovery.

So there is obviously a fair argument that the debtor-trustee position, at least in adversary proceedings, is no different from any other relationship in which the party is standing in the declarant's shoes. So long as the party's claim or defense is directly derived from the declarant, the declarant's statements should be admissible against that party.

One qualification that Elizabeth makes in her email is that the incentive to subterfuge is about zero when the statement is made "in advance of bankruptcy." An issue that is not discussed in any case I am aware of is what should happen if the declarant makes the statement after the claim or defense is transferred, either by operation of law or by agreement? It's not surprising that this issue has not been discussed. Most of the cases are about estates bringing an action on behalf of a decedent, so it will just never happen that the declarant will make a statement after the transfer of the action. But it could happen in an assignor-assignee situation, or a debtor-trustee in bankruptcy situation. It should probably be the case that statements after the transfer are not admissible. After all, the idea of admissibility is that the successor has taken the claim or defense from the declarant. Once that has happened, the declarant essentially has no role in the matter, and it is hard to conceive of such a declarant as being a party-opponent.[8] In the next section, this question is addressed in the draft Committee Note.

[8] Hawaii treats the post-transfer problem as follows:

III. Draft Amendment

Let's assume, based on the discussion above, that Rule 801(d)(2) could be usefully amended to provide that if a party's claim or defense is directly derived from the hearsay declarant, then the declarant's statements should be admissible as party-opponent statements. It turns out that it is tricky to draft language to cover the relationship that is required for admissibility to be justified. Surely you don't want to add a clause such as "including statements by a decedent when offered against the decedent's estate." The language has to be more general than that --- especially since the goal would be to cover any situation in which a statement is offered against a successor on the ground that it would have been admissible against the predecessor. If the amendment treats only the deceased-estate situation, it is highly probable that cases involving assignees and receivers will arise; and the argument will be: "the statement is not admissible because the amendment dealt only with decedents and estates, thus indicating an intent to reject admissibility in any other predecessor-successor situation."

So there needs to be language that covers a variety of predecessor-successor relationships. Here are some possibilities that might be considered:

1. The declarant and the party are in "privity." Using the term "privity" could be useful because it would signal a return to the common-law rule. But "privity" is actually a fuzzy term. Cathie Struve, the Reporter to the Standing Committee, had this to say (in an email to me) about using the term "privity" in Rule 801(d)(2):

> I think we might not be able to refer simply to "privity" and expect that everyone will understand what we mean. I believe that the traditional understanding of privity is the one sketched by the Restatement 2d commentary a to Section 62:
>
> > "[A] person standing in one of a variety of pre-existing legal relationships with a party may be bound by a judgment affecting that party. These relationships are often referred to as involving 'privity.' The circumstances under which such relationships result in preclusion are the subject of specific rules such as those governing bailee and bailor, see § 52; predecessor and successor as owner of interests in property, see §§ 43- 44; and indemnitor and indemnitee, see §§ 57- 58." Restatement (Second) of Judgments § 62 (1982)
>
> But more recently some authorities use the term in a looser way. As Ed Cooper has explained, "Older definitions of privity were very narrow. As the preclusive effects of judgments have expanded to include nonparties in more and more situations, however, it

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"evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest."

> has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper." 18A Fed. Prac. & Proc. Juris. § 4449 (3d ed.). The Supreme Court, taking its cues from Ed, has eschewed the use of the term privity: "The substantive legal relationships justifying preclusion are sometimes collectively referred to as 'privity.' See, e.g., Richards v. Jefferson County, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996); 2 Restatement § 62, Comment a. The term 'privity,' however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. See 18A Wright & Miller § 4449, at 351–353, and n. 33 (collecting cases). To ward off confusion, we avoid using the term 'privity' in this opinion." *Taylor v. Sturgell,* 553 U.S. 880, 894 n.8 (2008).
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> ---

In other words, privity is a label that you put on once you determine that binding a party is appropriate. Rule text that uses the term is thus unlikely to be helpful --- the amendment will have to go through the Supreme Court, and the Court itself has called the term confusing.

2. *The declarant is the party's "predecessor-in-interest."*

That is the language I used in the memo submitted for the last Committee meeting. One reason I thought that "predecessor-in-interest" would be a solution is that the term is already used in the Evidence Rules. Rule 804(b)(1) provides that prior testimony is admissible against a party in a civil case if that party's "predecessor-in-interest" had a motive to develop the testimony that is similar to what the party would have in the instant proceeding if the declarant could be produced. But the problem is that the predecessor-in-interest language in Rule 804(b)(1) has been very loosely interpreted. Under the case law, a party to an earlier matter can be a predecessor-in-interest to a later party even though their claims and defenses are completely independent and they have no legal relationship whatsoever. *See, e.g., Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179 (3rd Cir. 1978) (testimony given against the Coast Guard at a prior proceeding was admissible against a seaman in a later proceeding under Rule 804(b)(1); the Coast Guard was a predecessor in interest of the seaman, not because they had a legal relationship but because the Coast Guard had a motive to develop the testimony that was similar to what the seaman would have if able to cross-examine the declarant at the later proceeding). Essentially the courts are construing "predecessor-in-interest" out of Rule 804(b)(1), and finding admissibility when two different parties share a similar motive in developing the declarant's testimony. See also *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.,* 71 F.3d 119 (4th Cir. 1995) (privity is not the gravamen of the predecessor-in-interest requirement of Rule 804(b)(1); rather, the issue is whether the party who cross-examined the witness had a motive similar to that of the party against whom the testimony is offered).

There is a good explanation for a broad (indeed dismissive) application of the predecessor-in-interest requirement of Rule 804(b)(1). That hearsay exception is grounded in two factors guaranteeing reliability: 1) the declarant was under oath; and 2. the declarant was subject to cross-examination. On the cross-examination factor, it shouldn't matter whether the prior party is legally related to the party against whom the evidence was offered. Rather what should matter is that the prior party had a similar motive to develop the testimony as the current party would have if the

witness were available. In contrast, a legal relationship is definitely required to justify admitting a statement against a party under Rule 801(d)(2) --- which, as stated before, is not about reliability but rather about accountability. The party is accountable for its own statements, and that accountability logically and fairly extends to the statements of a declarant whose cause of action or defense is now being pursued by that party.

So the problem with using the term "predecessor-in-interest" in Rule 801(d)(2) is that users of the rules could think that it is intended to track the identical language in Rule 804(b)(1), when that should not be the result. It would certainly be odd for the rules to require two completely different interpretations for what is a pretty specific legal concept. Accordingly, there is a need to search for different language to describe the necessary relationship for admissibility under Rule 801(d)(2).

3. *Describing the necessary relationship without using a legal label:* It would appear that the use of legal labels like "privity" or "predecessor-in-interest" is not the solution for amending the rule, if the rule is to be amended. Probably the best possibility is to *describe* the necessary relationship between the declarant (or, in an agency situation, the entity that the declarant represents) and the party against whom the statement is offered. That can be coupled with a Committee Note that would specify some examples that qualify --- decedent/estate, assignor/assignee, etc.

The description of the necessary connection between the declarant and the party that is the easiest to understand is that the successor party "stands in the shoes" of the declarant (or the declarant's principal). But this colloquialism, while accurate and descriptive, is not the stuff of rules language. In terms of rules language, a phrase used in court opinions might be promising. Courts have described the necessary connection as: the party's claim or defense is "directly derived from" the claim or defense of (or the rights and obligations of) the declarant.

The draft amendment, beginning on the next page, uses the "directly derived" terminology:

Text of Draft Amendment

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

If a statement would be admissible under this rule if the declarant or the declarant's principal were a party, it is admissible when offered against a party whose claim or defense is directly derived from the rights or obligations of the declarant or the declarant's principal.

Reporter's Notes:

1. Why is the amendment placed at the end of the rule? Why not put it in Rule 801(d)(2)(A)? Because there is a possibility that the statement offered against the successor might not have been made by the predecessor himself, but rather was adopted by the predecessor, or made by the predecessor's agents. If the predecessor's own statements are admissible against the successor, it would be crazy to have other Rule 801(d)(2) statements *not* admissible against the successor. Indeed many of the cases discussed in this memo have found statements admissible against a party when they were made by a predecessor's agent.

2. Why is "the declarant's principal" included? Because in many of the cases, the statement is made by a declarant and admissible against the predecessor party under Rule 801(2)(C) and (D). So the successor is not standing in the shoes of the declarant, but of the principal. If the rule only referred to "the declarant" then it would not cover the many cases in which the statement is made

by a declarant-agent --- because the successor is standing in the shoes of the principal, not the agent.

3. Stylists hate hanging paragraphs, and this fix acerbates their problem because there are two paragraphs. It is possible that the rule could be completely reconfigured, with multiple subparts. But Rule 801(d)(2) is a frequently used rule, and everyone knows how it is structured. Changing the structure raises significant transaction costs that are probably not justified by the narrow scope of the amendment. Back when the Rule was restyled, the Committee voted unanimously to retain the hanging paragraph rather than to restructure the rule.

I have consulted the restylists, and they told me this: once the abomination of hanging paragraphs is chosen, it make no difference how many there are.

Draft Committee Note

The rule has been amended to clarify that if a hearsay statement would be admissible against a declarant or the declarant's principal were a party, then that statement is admissible against a party whose claim or defense is directly derived from the declarant or the principal. For example, if an estate is bringing a claim for damages suffered by the decedent, any statement that would have been admitted against the decedent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because it the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay that the declarant or the principal would have been. If a party derives its interest from a declarant or principal, and is subject to all the substantive limitations applicable to them, the same result should for the evidence rules. Of course this rationale of attribution would not apply if the declarant makes the statement after the rights or obligations have been transferred to the party by contract or operation of law.

TAB 7

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 804(b)(3): Corroborating Circumstances Requirement
Date: October 1, 2021

The Committee is considering whether to propose an amendment to Rule 804(b)(3) – the hearsay exception for "statements against interest" -- to address a conflict in the courts regarding the meaning of the "corroborating circumstances" requirement that appears in the existing provision. Most federal courts hold that a trial judge should consider evidence, if any, corroborating the accuracy of the hearsay statement at issue in applying the exception. Some circuits hold, however, that trial judges may consider only the inherent guarantees of trustworthiness surrounding the statement and *may not* consider corroborative evidence in determining admissibility. The latter holdings are not only in conflict with the holdings of sister circuits, they are inconsistent with the 2019 amendment to the residual exception found in Rule 807, that expressly authorizes the use of "evidence, if any, corroborating the statement" in determining admissibility.

The question for the Committee is whether to pursue a proposal to amend Rule 804(b)(3) to authorize the use of corroborating evidence to create symmetry between Rules 804(b)(3) and 807. Rule 804(b)(3) is not an action item for this meeting. Should the Committee wish to pursue a potential amendment, draft amendment and Advisory Committee note language will be prepared for the Spring 2022 meeting.

This memorandum proceeds in four parts. Part I will explain the origins of the corroborating circumstances requirement in Rule 804(b)(3) and the reason that some courts limit inquiry into inherent guarantees of trustworthiness and eschew corroborating evidence in applying the Rule. Part II will describe the cases on both sides of the existing circuit split. Part III will examine the rationale for amending Rule 804(b)(3) to resolve the split of authority and will explain the Committee's reasons for rejecting such an add-on amendment when it approved the 2010 amendment to Rule 804(b)(3). Finally, Part IV offers a preliminary drafting option for an amendment should the Committee wish to pursue a Rule 804(b)(3) proposal.

I. Origins of the Corroborating Circumstances Requirement and the Emphasis on "Inherent Guarantees of Trustworthiness"

Rule 804(b)(3) sets forth the hearsay exception for statements against interest. As a Rule 804 exception, it admits only hearsay statements made by a now-unavailable declarant.[1] The Rule assumes that statements that are contrary to a declarant's own interests are inherently reliable because a person is unlikely to say something that damages his own interests unless it is true. At common law, the exception admitted only statements that were contrary to a declarant's financial, proprietary, or pecuniary interests. The common law exception did not admit statements that were contrary to a declarant's penal or criminal interests. Although courts recognized that no statement is as against interest as one that might subject the declarant to criminal culpability, courts rejected statements against penal interest due to concerns about manufactured false confessions. When statements against penal interest are recognized, a criminal defendant might testify that Bob (who is now conveniently deceased) admitted to the crime for which the defendant is being tried shortly before Bob's death. With an unavailable declarant, it would be difficult for the government to disprove the defendant's assertion and to identify phony confessions manufactured by the defense:

> [O]ne senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant.[2]

When Rule 804(b)(3) was enacted, it permitted statements against a declarant's penal interests to be admitted through the exception.[3] But, to protect against the risk of phony confessions exculpating criminal defendants, the drafters included a requirement that a criminal defendant offering such a statement in a criminal case show "corroborating circumstances" that clearly indicate the trustworthiness of the statement:

> The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.[4]

This extra showing was required of criminal defendants only (and was not applicable to prosecutors using the same exception) due to the drafters' concerns about phony confessions being

[1] Fed. R. Evid. 804(a) (requiring unavailability for all Rule 804(b) hearsay exceptions).

[2] Advisory Committee's note to Rule 804(b)(3) as enacted in 1975.

[3] *See* Advisory Committee's note to Rule 804(b)(3) (noting that the Rule would remove "common law limits" and expand the exception "to its full logical limits" and that the "refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic").

[4] *See* Advisory Committee's note to Rule 804(b)(3).

offered to exculpate defendants.[5] As prosecution use of Rule 804(b)(3) to offer dual inculpatory statements (ones that implicate *both* the declarant and the defendant) increased, courts began to recognize the fundamental unfairness of the lopsided protection that applied against criminal defendants and not against the government.[6] The Advisory Committee proposed a successful amendment to Rule 804(b)(3) in 2010, making the "corroborating circumstances" requirement equally applicable to prosecutors and defendants offering statements against penal interest in criminal cases.[7]

The current conflict with respect to the meaning of the corroborating circumstances requirement in Rule 804(b)(3) actually stems from Sixth Amendment confrontation clause precedent that has since been overruled. Under the defunct *Ohio v. Roberts* confrontation regime, hearsay statements could be admitted over a Sixth Amendment objection if they satisfied what the Court characterized as "firmly rooted" hearsay exceptions.[8] Even if a statement did not fall within a firmly rooted exception, it still could be admitted if a court found that the statement possessed "particularized guarantees of trustworthiness."[9] In *Idaho v. Wright*, the Court held that the Sixth Amendment standard of particularized guarantees of trustworthiness required reliability that was *inherent to the statement*; thus trial judges were to look only at circumstantial guarantees of reliability in assessing the admissibility of the statement for purposes of the Sixth Amendment.[10] Inherent circumstantial guarantees of reliability surrounding the statement include the motivations of the speaker at the time of the statement, the timing of the statement in relation to underlying events described, the spontaneity of the statement, etc. For purposes of assessing particularized guarantees of trustworthiness, therefore, courts were to disregard independent evidence suggesting that a statement was likely true (such as fingerprint evidence suggesting the accuracy of the hearsay statement) and to rely solely upon the guarantees of trustworthiness surrounding the making of the statement itself.

While the *Roberts* regime was in place, federal courts imported these Sixth Amendment limitations into hearsay doctrine. First, the requirement of inherent guarantees of reliability was imported into the residual exception to the hearsay rule. Because the principal requirement for admissibility under the residual exception is "circumstantial guarantees of trustworthiness," it is understandable that courts imported the then-existing Sixth Amendment meaning of

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[5] *See* Rule 804(b)(3), as enacted in 1975 ("A statement tending to expose the declarant to criminal liability and offered to *exculpate the accused* is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.") (emphasis added).

[6] *See United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against penal-interest statements offered by the government).

[7] Fed. R. Evid. 804(b)(3)(B) (requiring that the statement "is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.").

[8] *Ohio v. Roberts*, 448 U.S. 56 (1980).

[9] *Id.*

[10] 497 U.S. 805 (1990).

"particularized guarantees of trustworthiness" into their analysis of the residual exception. Thus, many courts eschewed independent evidence corroborating the accuracy of a statement offered under the residual exception, demanding that the statement itself enjoy inherent reliability. The existing conflict in the courts concerning Rule 804(b)(3) stems from courts importing the same standard into the "corroborating circumstances requirement," as explained in Part II below.[11] Some federal courts today insist that judges look only to inherent circumstantial guarantees of reliability in evaluating Rule 804(b)(3)'s "corroborating circumstances" requirement and reject inquiry into independent corroborating evidence suggesting that a statement is likely accurate.

II. A Difference of Opinion Regarding "Corroborating Circumstances"

To fully understand the conflict in the courts concerning Rule 804(b)(3), an illustration may be helpful. Suppose a defendant is tried for the murder of Joe. The defendant offers a statement by a now-deceased declarant stating: "I'm the one who killed Joe." That statement is not admissible on the defendant's behalf through Rule 804(b)(3) unless it "is supported by corroborating circumstances that clearly indicate its trustworthiness." A court looking only to inherent guarantees of trustworthiness in evaluating that standard would focus on things such as whether 1) the declarant made the statement spontaneously, 2) to a person he trusted, 3) not long after the murder. Now assume that the defendant can show that the declarant's fingerprints are on the murder weapon, or that a witness saw the declarant in the vicinity of the murder just before it occurred. These facts corroborate the declarant's account, and help to establish that the declarant is telling the truth. However, they are not circumstantial guarantees of trustworthiness in the making of the statement. Courts that insist on circumstantial guarantees of trustworthiness would disregard important corroborative evidence like the fingerprints and the eyewitness in evaluating admissibility under Rule 804(b)(3). Other federal courts would look to *both* the circumstances surrounding the statement, as well as independent corroborative evidence in determining whether the declarant's statement is supported by corroborating circumstances.

A minority of courts hold that independent evidence (or the lack of it) must be treated as irrelevant to the requirement of corroborating circumstances, and that the court must focus only on the circumstances under which the statement was made. For example, in *United States v. Barone*, the First Circuit found that the defendant misconstrued the "corroborating circumstances" requirement when he argued that there was a lack of evidence corroborating the events described by the declarant in the statement at issue:

> The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that

[11] *See United States v. Barone*, 114 F.3d 1284, 1299–300 (1st Cir. 1997) ("[W]e will consider Barone's "corroborating circumstances" and Confrontation Clause challenges together, deeming that which satisfies the Confrontation Clause to be sufficient to satisfy Rule 804(b)(3)'s corroboration requirement as well. *Cf. Wright,* 497 U.S. at 821, 110 S.Ct. at 3149.").

> clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.[12]

Similarly, the Eight Circuit, in *United States v. Bobo*, described five factors which aid in determining the trustworthiness of a hearsay statement that is against the penal interests of the declarant — none of which concern corroborating evidence:

> 1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, 2) the general character of the speaker, 3) whether other people heard the out-of-court statement, 4) whether the statement was made spontaneously, and 5) the timing of the declaration and the relationship between the speaker and the witness.[13]

Although the Eight Circuit frequently cites to this list of factors that omits corroborative evidence, some circuit opinions have referenced corroborating evidence, creating confusion at the very least about the role of corroborative evidence.[14]

In *United States v. Franklin*, the Sixth Circuit also rejected consideration of corroborating evidence in applying Rule 804(b)(3):

> To determine whether a statement is sufficiently trustworthy for admission under Rule 804(b)(3), the court is not to focus on whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself.[15]

As in the Eighth Circuit, there is some authority in the Sixth Circuit that points in the other direction. In *United States v. Price*, the defendant appealed the exclusion of a statement offered

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[12] *United States v. Barone*, 114 F.3d 1284, 1299–300 (1st Cir. 1997); *see also United States v. Taylor*, 848 F.3d 476, 486 (1st Cir. 2017) ("To establish "meaningful corroboration," "[i]t is not necessary that the corroboration consist of 'independent evidence supporting the truth of the matter asserted by the hearsay statements.'…. a statement may be corroborated by the circumstances in which the statement was made if it is "directly against the declarant's penal interest," made to a close associate or family member, or there is no indication that the speaker had motive to lie.") (citations omitted); *United States v. Ocasio-Ruiz*, 779 F.3d 43, 46 (1st Cir. 2015) ("Such corroboration "is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.").

[13] 994 F.2d 524, 528 (8th Cir. 1993). *See also Noland v. United States*, 21 F.3d 432 (8th Cir. 1994) (citing factors undermining inherent trustworthiness of hearsay statement in rejecting admissibility through Rule 804(b)(3)).

[14] *See, e.g., United States v. Keltner*, 147 F.3d 662, 670 (8th Cir. 1998) *(*"Billy Keltner's description of the robbery or extortion of a Tulsa bank being planned matches almost exactly the manner in which the crime was actually committed just four months after Billy Keltner gave his statement to the FBI.").

[15] 415 F.3d 537, 547 (6th Cir. 2005). *See also United States v. Jackson*, 454 F. App'x 435, 447–48 (6th Cir. 2011) ("The trustworthiness analysis concerns "not ... 'whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself.' ") (citations omitted).

under Rule 804(b)(3) after he was convicted of a narcotics offense. [16] The court held that it was error to exclude post-custodial statements from a person involved in the drug transaction, which indicated that the money for the drugs belonged only to the declarant, and that the defendant was not a substantial participant in the transaction. The court found corroborating circumstances to support admission based upon a combination of circumstantial guarantees of trustworthiness and corroborative evidence. The court noted that: the declarant and the defendant did not have a close relationship; the statement was made after the declarant was advised of his Miranda rights; and *independent evidence was consistent with the declarant's assertion*.[17]

In defining "corroborating circumstances," most courts consider whether independent evidence supports or contradicts the declarant's statement, however. In *United States v. Desena*, for example, the Second Circuit found the corroborating circumstances requirement to be satisfied with respect to a statement by a declarant identifying himself and the defendant as perpetrators of an arson.[18] The court found that corroborating circumstances clearly indicated trustworthiness, in part, because an eyewitness's description of the scene of the arson the day of the crime matched the declarant's description of the defendant's actions. In *United States v. Mines*, the Fourth Circuit held that the corroborating circumstances requirement was *not met* because other evidence in the case contradicted the declarant's statement.[19] Similarly, in *United States v. Butler*, the Seventh Circuit concluded that the declarant's comments exculpating the defendant were not admissible, in part, because there was no direct evidence to corroborate them.[20]

In *United States v. Paguio*, the Ninth Circuit found corroborating circumstances for purposes of Rule 804(b)(3) due to the fact that independent evidence supported the declarant's account of the fraud.[21] In that case, the declarant was the defendant's father, who asserted that he was solely responsible for the bank fraud at issue and that his son, the defendant, had "nothing to do with it." The Ninth Circuit upheld the district court's finding that corroborating circumstances supported the trustworthiness of the father's statement that the defendant had "nothing to do with it" because the loan officers and bank employees and documents involved in the loan transaction all corroborated the father's leadership role in the fraud and the son's absence from the transaction. Thus, independent evidence was sufficient to support the corroborating circumstances requirement for purposes of Rule 804(b)(3).

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[16] 134 F.3d 340 (6th Cir. 1998).

[17] *Id.*

[18] 260 F.3d 150 (2d Cir. 2001).

[19] 894 F.2d 403 (4th Cir. 1990).

[20] 71 F.3d 243, 253 (7th Cir. 1995); *see also United States v. Hamilton*, 19 F.3d 350, 357 (7th Cir. 1994) (finding corroborating circumstances largely because the declarant's account was corroborated by other witnesses).

[21] 114 F.3d 928 (9th Cir. 1997).

Similarly, in *United States v. Westry*, the Eleventh Circuit found that corroborating circumstances clearly supported the trustworthiness of the declarant's statement that he was waiting to buy cocaine because testimony by other trial witnesses – independent evidence – confirmed the declarant's drug use and his use of the location in question to obtain drugs.[22] Thus, the majority of federal courts look to independent corroborating evidence, in addition to the inherent circumstantial guarantees of trustworthiness surrounding a statement, in evaluating admissibility under Rule 804(b)(3).

III. Reasons to Amend Rule 804(b)(3)

Amending Rule 804(b)(3) to accept the meaning of "corroborating circumstances" adopted by the majority of federal courts and to allow consideration of independent corroborative evidence may be advisable for several reasons.

First, as explained above, the courts that limit their inquiry to the inherent circumstantial guarantees of reliability surrounding the making of the statement are relying upon Sixth Amendment precedent that no longer applies.[23] *Crawford v. Washington* eliminated any Sixth Amendment inquiry into reliability in favor of a constitutional standard driven by the "testimonial" nature of a hearsay statement and the defendant's opportunity to cross-examine the declarant.[24] Whatever deference courts once owed to the interpretation of the *Roberts* reliability standard in *Idaho v. Wright* is no longer necessary after the overruling of that Sixth Amendment standard. And, of course, the constitutional standard was never controlling with respect to the interpretation of the Rules.

Second, as a fundamental matter, evidence from other sources corroborating the accuracy of an against-interest statement logically adds to the reliability of the statement. The statement is more likely to be trustworthy and deserving of admissibility if it is corroborated by evidence apart from the statement itself. It makes little sense to *disregard* information that is so helpful in making the requisite reliability determination.

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[22] 524 F.3d 1198 (11th Cir. 2008). *See also United States v. Kelley*, 2007 WL 704003 (S.D. Tex. March 2, 2007) (statement by defendant's brother claiming ownership of guns and drugs admissible as an exculpatory declaration against interest; corroborating circumstances found in part because the declarant actually had drugs on his person when arrested, and because drugs and guns were later found where declarant said they would be).

[23] *See, e.g.*, *United States v. Lubell*, 301 F.Supp.2d 88, 91 (D.Mass. 2007) ("In this context, corroboration does not refer to * * * whether the witness' testimony conforms with other evidence in the case. Rather, corroborating circumstances refers to 'only those that surround the making of the statement and that render the declarant particularly worthy of belief.' Idaho v. Wright, 497 U.S. 805, 819 (1990)"); *United States v. Johnson*, 2007 U.S. Dist. Lexis 62035 (E.D. Mich.) (relying on the overruled Supreme Court case of *Ohio v. Roberts* to conclude that corroborating evidence is irrelevant to corroborating circumstances under Rule 804(b)(3)).

[24] *Crawford v. Washington*, 541 U.S. 36 (2004).

For that very reason, Rule 807 has been amended to direct courts to consider "the totality of circumstances" under which a hearsay statement was made, *as well as* "evidence, if any, corroborating the statement" in assessing trustworthiness for purposes of the residual exception. In so doing, the Committee recognized the important role that corroboration can play in determining the reliability of a hearsay statement.[25] As explained in the Advisory Committee's note to amended Rule 807:

> The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

After the amendment to Rule 807, there is a good argument that there is an inconsistency between Rules 804(b)(3) and 807, in those courts that reject the relevance of corroborating evidence in assessing "corroborating circumstances" under Rule 804(b)(3). [26] Expressly allowing corroborative evidence to be considered in the Rule 804(b)(3) inquiry would thus create sensible symmetry between the hearsay exceptions in Rule 804(b)(3) and Rule 807, as well as uniformity across federal circuits.

Third, even if it once made sense to demand inquiry only into inherent circumstantial guarantees of trustworthiness surrounding the statement itself under the residual exception, that limitation never made any sense when applied to the statements against interest exception. The residual exception contains *no specific limitations* designed to ensure inherent reliability. That is what makes it the residual exception – it can apply, in theory, to any statement whatsoever. Therefore, a court's focus in applying the residual exception is on whether there is something about the statement that makes it particularly reliable. While corroborating evidence is relevant (as provided by the 2019 amendment), a court has to determine that something about the statement makes it inherently trustworthy. Hence, the historic focus on circumstantial guarantees of trustworthiness is understandable in the context of the residual exception.

Rule 804(b)(3), by contrast, is an enumerated hearsay exception that already contains guarantees of necessity and reliability within its specific requirements. [27] First, it applies only to

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[25] In specifically adding the consideration of corroborating evidence as part of the trustworthiness requirement in Rule 807, the Committee was reacting to case law in the Eighth Circuit holding that corroboration was irrelevant under Rule 807, and relying on *Idaho v. Wright* for that proposition. See *United States v. Stoney End of Horn*, 829 F.3d 681 (8th Cir. 2016) (holding that corroboration has no place in the Rule 807 trustworthiness enquiry and citing *Wright*).

[26] It can be pointed out that the case law rejecting corroboration under Rule 804(b)(3) is not only inconsistent with Rule 807 as amended ---it is also inconsistent with the co-conspirator exception, see *Bourjaily v. United States*, 483 U.S. 171 (1987) (considering corroborating evidence on the question of whether the declarant is a coconspirator).

[27] There are definitely important parallels between Rule 807 and the Rule 804(b)(3) corroborating circumstances requirement. When the Committee was working on Rule 807, the Reporter digested all of the case law, and found

the statements of unavailable declarants, ensuring that a resort to hearsay at all is necessary. Second, and most importantly, the exception only applies if a hearsay statement is so contrary to the declarant's penal interest that a reasonable person in the declarant's position would not make the statement unless it were true. The specific against-interest limitation in the Rule provides circumstantial guarantees of trustworthiness. The Rule adds a corroborating circumstances requirement to ensure circumstances beyond (or in addition to) the inherent reliability secured by the foundational against-interest requirement.[28] Thus, it makes sense that the corroborating circumstances requirement is about *more than inherent reliability* and contemplates independent corroborating evidence.

Further, the original concern that led to the corroborating circumstances protection in Rule 804(b)(3) was about manufactured confessions and the difficulty faced by the government in challenging an inculpatory statement by a now-unavailable declarant taking credit for the defendant's crime. The corroborating circumstances requirement was designed as a supplement to the inherent reliability provided by an against-interest statement. Independent evidence suggesting that an against-interest statement is accurate does just that. In fact, independent evidence corroborating an against-interest statement may be *more* likely than circumstantial guarantees surrounding the statement to guard against the manufactured confessions the original drafters were concerned about. For example, if our hypothetical defendant testifies that the declarant "spontaneously" told him that he murdered Joe "shortly after" the murder, that would add to the circumstantial trustworthiness of the declarant's statement. But it does nothing to help show that the defendant isn't just pinning the murder on the conveniently unavailable declarant. The declarant's fingerprints on the murder weapon do. Thus, interpreting the corroborating circumstances requirement in Rule 804(b)(3) to demand a myopic focus on inherent reliability of a statement alone, without resort to independent evidence, makes little sense when placed in historical context.

In addition, the terminology employed by Rule 804(b)(3) supports the use of independent evidence suggesting that a statement is accurate. The Rule requires *corroborating* circumstances. Further, the original Advisory Committee note to Rule 804(b)(3) explained the need for "corroboration":

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that courts had recognized that the Rule 804(b)(3) corroborating circumstances requirement and the trustworthiness requirement of Rule 807 serve similar functions. If you met one, you met the other. And if you failed one, you failed the other. See, e.g., *United States v. Benko*, 2013 WL 2467675 (D.Va.) (The defendant argued that a declarant's statement was admissible as a declaration against penal interest, and alternatively as residual hearsay. The court found that Rule 804(b)(3) was inapplicable, because of lack of corroborating circumstances indicating trustworthiness, noting that the statement was "fatally uncorroborated." Turning to the residual exception, the court held that the statement failed to meet the trustworthiness requirement for the same reasons it failed to meet the Rule 804(b)(3) corroborating circumstances requirement.).

[28] Indeed, courts that focus solely on inherent circumstantial guarantees of trustworthiness in assessing the corroborating circumstances requirement often engage in a duplicative analysis of the foundational against-interest inquiry in determining corroborating circumstances. *See United States v. Taylor*, 848 F.3d 476, 486 (1st Cir. 2017) ("[A] statement may be corroborated by the circumstances in which the statement was made if it is "directly against the declarant's penal interest," made to a close associate or family member, or there is no indication that the speaker had motive to lie.").

> The requirement of *corroboration* should be construed in such a manner as to effectuate its purpose of circumventing fabrication.[29]

"Corroborate" is defined in the Merriam-Webster dictionary as "to support with evidence or authority," suggesting a resort to outside information to verify accuracy. The dictionary further reveals that synonyms for "corroborate" include: confirm, verify, substantiate, and validate, noting that substantiate "implies the offering of evidence that sustains the contention." All of these definitions and synonyms suggest a reliance on additional, independent information or evidence. Thus, the choice of terminology for Rule 804(b)(3) also indicates that independent evidence indicating the accuracy of the information contained in an against-interest statement should be considered.

Finally, it may be time to amend Rule 804(b)(3) given that the federal courts have not corrected course and uniformly accepted independent evidence of accuracy as relevant to the corroborating circumstances requirement since the Committee decided to forgeo an amendment to Rule 804(b)(3) when it last examined the Rule. In 2009 the Committee considered proposing an amendment that would require a court applying the Rule 804(b)(3) corroborating circumstances requirement to consider the presence or absence of corroborating evidence. (This would have been an add-on to the amendment that extended the requirement to the government in criminal cases). The Committee decided not to address the conflict in the courts on the corroboration question, even though it was proposing an amendment to the Rule on other grounds. Here is the account of the Committee's decision from the 2009 minutes:

> Members noted that the disagreement in the courts about the meaning of "corroborating circumstances" did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the irrelevance of the abrogated Confrontation cases is directly addressed by those courts. The vast majority of courts consider corroborating evidence as relevant to the corroborating circumstances inquiry. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

In 2009, the Committee was essentially predicting that the courts on the wrong side of the issue would see the error of their ways. But courts have not corrected course in the years since 2009. The circuits rejecting corroborating evidence are the First, Sixth and Eighth. The First Circuit has held fast to its position.[30] The Eighth Circuit has a case in the intervening years that seems to work at cross-purposes. In *United States v. Henley*, the court held that a confession made

[29] *See* Advisory Committee's note to Rule 804(b)(3) (emphasis added).

[30] *United States v. Ocasio-Ruiz*, 779 F.3d 43, 46 (1st Cir. 2015) ("Such corroboration "is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made."); *also United States v. Taylor*, 848 F.3d 476, 486 (1st Cir. 2017) ("To establish "meaningful corroboration," "[i]t is not necessary that the corroboration consist of 'independent evidence supporting the truth of the matter asserted by the hearsay statements.'").

by another was inadmissible as a declaration against penal interest.[31] The court noted that, even if the statement were against penal interest, it was "still inadmissible if it lacked indicia of trustworthiness" -- a reference to circumstantial guarantees. But in finding the statement lacking, the court noted that there were many witnesses who disputed the declarant's account. That is a reference to corroborating evidence. As to the Sixth Circuit, there is nothing in the interim to indicate that it has altered its view.[32] Moreover, the Committee's assessment in 2009 that the conflict does "not run very deep" could be revisited. There is case law in three circuits that rejects corroborating evidence in the corroborating circumstances inquiry. This Committee could view three circuits as a not-insignificant conflict. And, of course, the amendment to Rule 807 that specifically embraces consideration of corroborating evidence is an intervening development that could change the calculus.

For all of these reasons, amending Rule 804(b)(3) to accept the meaning of "corroborating circumstances" adopted by the majority of federal courts and to allow consideration of independent corroborative evidence may be advisable.

IV. Preliminary Draft

If the Committee wishes to proceed with an amendment to Rule 804(b)(3) to require consideration of the presence or absence of corroboration, the change and accompanying Advisory Committee's note might look like this:

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

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

[31] 766 F.3d 893 (8th Cir. 2014).

[32] *See United States v. Jackson*, 454 F. App'x 435, 447–48 (6th Cir. 2011) ("The trustworthiness analysis concerns "not ... 'whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself.' ") (citations omitted).

Draft Committee Note

Rule 804(b)(3)(B) has been amended to require the court to consider corroborating evidence in evaluating whether a statement is supported by "corroborating circumstances that clearly indicate trustworthiness." Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement that tends to expose the declarant to criminal liability should be admissible under this exception when offered in a criminal case. The amendment is consistent with the 2019 amendment to Rule 807 that also requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision.

Comment: Part III above contains several policy reasons for this amendment that are not specifically discussed in the draft note. This draft note is consistent with the discussion of corroboration in the Rule 807 note. The Rule 807 note did not get into the overruled 6th Amendment cases etc. One question for the Committee if it wishes to pursue Rule 804(b)(3) into the spring is whether to include more policy and historical discussion in the note or whether to keep it brief and consistent with Rule 807.

TAB 8

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Evidence Rule 806
Date: October 1, 2021

The "circuit splits" memo prepared for the last Committee meeting raised an issue of conflict arising in Rule 806, the Rule permitting impeachment of hearsay declarants under certain conditions. The Committee voted to consider a possible amendment to Rule 806 that would resolve that circuit split.

Rule 806 currently reads as follows:

Rule 806. Attacking and Supporting the Declarant's Credibility.

> When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross examination.

Rule 806 thus provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent as a general rule may impeach the hearsay declarant to the same extent and in the same manner as if the declarant were testifying in court. The policy behind the Rule is that an adverse party should have the same impeachment weapons to attack a hearsay declarant that she would have if the declarant testified. Hearsay declarants, whose statements are treated as testimony at trial, should not be treated better than witnesses who actually testify. If they were treated better, a party might be incentivized to proffer a declarant's hearsay statement rather than

produce the declarant to testify.

But the courts are in dispute about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts that are probative of the declarant's character for untruthfulness. Under Rule 608(b), witnesses can be asked about bad acts in their past that bear upon their character for untruthfulness --- but if the witness denies the act, the cross-examiner cannot introduce extrinsic evidence to prove the bad act. So, a witness might be asked, "Isn't it true that you lied on a government form last year?" --- but if the witness denies it, proof of that lie is not allowed.

Rule 608(b) raises difficulties when applied to hearsay declarants. A hearsay declarant is ordinarily not at trial to be asked about the bad act; and if the bar on extrinsic evidence applies, the jury will never hear about the bad act (except, perhaps, in the random event that a witness who heard the hearsay statement is produced, and knows about the hearsay declarant's bad act).[1]

Rule 806 does not explicitly say anything about its relationship with Rule 608(b). The result of this inspecificity in the Rule has led some courts to prohibit bad acts impeachment of hearsay declarants, while others permit it.

A second problem with the Rule is that under certain specific conditions a criminal defendant can be impeached even though he never takes the stand. This problem can arise in a multi-defendant case, where one defendant's hearsay statement is offered under a hearsay exception to implicate a co-defendant, and the co-defendant responds with evidence impeaching the hearsay declarant - defendant's credibility.

This memorandum is divided into five parts. Part One sets forth general commentary about the Rule. Part Two discusses the conflict in the case law over whether a hearsay declarant may be impeached with extrinsic evidence of bad acts. Part Three discusses the problem of impeaching non-testifying criminal defendants. Part Four discusses the possible benefits and disadvantages of an amendment. Part Five sets forth models for amending the Rule.

Rule 806 is not an action item for this meeting. But if there is support for an amendment, the proposal can be further developed and presented as an action item for the next meeting.

[1.] There is not a problem with prior convictions admissible under Rule 609, because that rule allows proof of the conviction to be entered into evidence.

I. Rule Background

The Advisory Committee Note to Rule 806 notes that "the declarant of a hearsay statement which is admitted in evidence is in effect a witness." Therefore, the declarant "should in fairness be subject to impeachment and support as though he had in fact testified." The Committee noted, though, that adjustments would have to be made with respect to impeaching hearsay declarants with *their inconsistent statements*. For one, the statements to be admissible for impeachment would not have to be prior to the hearsay statement that is offered for its truth. The "prior" requirement would always be met with respect to in-court testimony, but with a hearsay declarant, the timing of the inconsistent statement could either be before or after the statement offered for its truth --- that should not matter for purposes of impeachment, because the only relevant point is that they are inconsistent. Also, the Rule 613(b) requirement of providing the witness with a chance to affirm, explain, or deny an inconsistent statement cannot work when the statement was made by a hearsay declarant who is not at trial. The Advisory Committee, in recognition of the differences posed by prior inconsistent statements made by hearsay declarants, expressly provided in the rule for these differences:

> The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

But the only impeachment differences recognized in the rule are those affecting prior inconsistent statements. There is a similar problem with impeachment with prior bad acts under Rule 608. Impeachment under that rule is dependent on the presence of the witness who is being impeached. Where that witness is a hearsay declarant, some adjustments must be made, or impeachment will not happen. It seems fair to state that Rule 806, as drafted, has not done a very good job of making all of the necessary adjustments.[2]

II. Impeachment With Prior Bad Acts and the Extrinsic Evidence Limitation

Rule 608(b) restricts character impeachment with bad acts to questions addressed to a witness while testifying, and the rule limits the examiner to the witness's answers; extrinsic evidence of specific acts offered to impeach the witness's character for truthfulness is completely barred by the rule. It can therefore be argued that using extrinsic evidence of a specific act of a hearsay declarant who is not present to testify is equally impermissible. In one sense, this would mean that impeaching hearsay declarants would be subject to the same bar as is applied to impeaching trial witnesses. On closer inspection, however, there is no equality of impeachment if

[2] In some ways the problematic selective treatment in Rule 806 is like the deficit in the original Rule 801(d)(1)(B), which provided a hearsay exception for prior consistent statements that rebutted a charge of bad motive or recent fabrication, but said nothing about other prior consistent statements that could be used to rehabilitate a witness. In 2014 the Committee rectified this deficit. Now the rule provides that any prior consistent statement that is admissible to rehabilitate is also admissible for its truth.

the Rule 608(b) limitation on extrinsic evidence applies to impeachment of hearsay declarants. If the witness were testifying, the attacking party would at least be allowed to *ask* the witness about the prior bad act (subject to the court's assessment that the probative value of the act as to the witness's character for truthfulness is not substantially outweighed by the risk of unfair prejudice). The adverse party would have to take the witness's answer, but at least she could ask, and the jury would hear the question. In contrast, with a hearsay statement, there is ordinarily nobody who can be asked about the witness's prior act of misconduct. The attacking party may luck out if there is a witness who testifies to the hearsay statement and that witness also happens to know something about the alleged bad act. But this would be only by chance. See *United States v. Washington,* 263 F.Supp.2d 413, 423 n.5 (D.Conn. 2003) ("Although . . . the tension between Rules 806 and 608(b) is somewhat alleviated where defense counsel can cross-examine the witness to the hearsay statement about the declarant's misconduct as it bears on the declarant's character for truthfulness or untruthfulness, no such consolation prize exists for defendants such as Washington, against whom hearsay statements are admitted into evidence through a witness who has never had any contact with or any knowledge of the declarant — here, an administrator who oversaw the 911 system in the city of New Haven.").

Professor Margaret Cordray points out another problem with imposing an extrinsic evidence limitation on impeachment of hearsay declarants: it could give rise to abusive practice. *See* Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995):

> If Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. … These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a nontestifying declarant with specific instances of conduct showing untruthfulness.

Conflict in the Courts

Rule 806 does not explicitly state whether the Rule 608 extrinsic evidence limitation is applicable to impeachment of a hearsay declarant's character for truthfulness. The courts are in conflict on the question.

The Second Circuit has taken the view that a hearsay declarant may be impeached with extrinsic evidence of bad acts, so long as the declarant could have been asked about the bad acts on cross-examination had he testified. In *United States v. Friedman,* 854 F.2d 535 (2d Cir. 1988), the defendant was on trial for racketeering, resulting from kickbacks in the New York City Parking

Bureau. The court admitted numerous hearsay declarations of Donald Manes, a co-conspirator. The defendant in response offered evidence that Manes had lied to hospital personnel and pretended that he had been assaulted when he had actually attempted suicide. The extrinsic evidence was a videotape of Manes's own account of his attempted suicide and fabrication of an assault. The trial judge excluded the evidence. The court on appeal observed that the extrinsic evidence offered by the defendant would not have been barred by Rule 608(b) and Rule 806, because Manes was unavailable and could not be cross-examined. In such cases, "resort to extrinsic evidence may be the only means of presenting such evidence to the jury." In this case, however, the Court found no error because the excluded evidence was not very probative of Manes's truthfulness, and it would have injected evidence of Manes' subsequent suicide into the case. As such, the extrinsic evidence was properly excluded under Rule 403. Thus, the *Friedman* Court took the position that the absolute exclusion of extrinsic evidence found in Rule 608(b) is not applicable when an adversary proffers bad act evidence to impeach a hearsay declarant's character for truthfulness. Rather, admissibility is controlled by Rule 403.[3]

The D.C. Circuit in *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997), came to a different result. In *White*, an undercover officer testified about a deceased declarant's hearsay statements. The defendant sought to ask the officer whether the declarant had ever made false statements on an employment application or had ever violated court orders. The trial court precluded the cross-examination, and the Court of Appeals affirmed. The Court declared that the extrinsic evidence limitation of Rule 608(b) applied to impeachment of hearsay declarants with prior bad acts under Rule 806. The court reasoned that because the witness did not know anything about the declarant's bad acts, the defendants would have had to present extrinsic evidence for the impeachment to be probative. The Court found no abuse of discretion in the ruling that cross-examination under these circumstances would be of little utility.

The *White* Court's ruling – that the Rule 608(b) preclusion of extrinsic evidence applied to bad acts offered to impeach a hearsay declarant – was not heavy on analysis. But the Third Circuit, in *United States v. Saada*, 212 F.3d 210, 221-22 (3d Cir. 2000), engaged in an extensive analysis of the Rule to conclude that extrinsic evidence may never be admitted to prove a bad act offered to impeach a hearsay declarant's character for truthfulness. In *Saada* the government impeached a hearsay declarant whose statement was offered by the defense. The hearsay was admitted on the defendant's behalf under the excited utterance exception, and it appeared to indicate that a warehouse was flooded by accident rather than as an attempt to defraud an insurance company.

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[3] *See also United States v. Washington,* 263 F.Supp.2d 413 (D.Conn. 2003) (treating *Friedman* as a holding, and ruling that extrinsic evidence of a hearsay declarant's prior bad act should have been admitted); *United States v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D.N.Y. 2008) ("Evidence of prior dishonest acts of the declarants, including participation in an armed robbery and fabrication of a story to explain the robbery, were admissible so that the jury could weigh it in considering whether the exclamations of the alleged victims heard on the tape were in part or whole a fabrication.").

A district court in the Eleventh Circuit has followed the *Friedman* approach and allowed extrinsic proof of bad acts to impeach a hearsay declarant. *See Mitchell v. Mod. Woodmen of Am.,* 2015 WL 13637160, at *9 (N.D. Ala. June 8, 2015).

The declarant was a judge. To attack the declarant's credibility, the government asked the court to take judicial notice of two New Jersey Supreme Court decisions ordering the declarant's removal from the bench and disbarment for unethical conduct, as well as the factual details supporting those decisions, which reflected his unethical conduct. The defendant objected, arguing that a hearsay declarant could not be impeached with extrinsic evidence of bad acts. The trial judge took judicial notice of the bad acts.

The *Saada* Court found this to be error, reasoning that the language and structure of Rule 806 do not grant an exception to the preclusion of extrinsic evidence established in Rule 608(b). The Court's analysis is as follows:

> Appellants argue that if Yaccarino had testified, Rule 608(b) would have prevented the government from introducing extrinsic evidence of his unethical conduct, and would have limited the government to questioning him about that conduct on cross-examination. Thus, appellants argue, judicial notice of the evidence constituted improper impeachment of a hearsay declarant. The government correctly avers that it would have been allowed to inquire into Yaccarino's misconduct on cross-examination if he had testified at trial because Rule 806 allows a party against whom a hearsay statement is admitted to call the declarant as a witness and "to examine the declarant on the statement as if under cross-examination." Because Yaccarino's death foreclosed eliciting the facts of his misconduct in this manner, the government argues that it was entitled to introduce extrinsic evidence of his misconduct. In effect, the government argues that, read in concert, Rules 806 and 608(b) permit the introduction of extrinsic evidence of misconduct when a hearsay declarant is unavailable to testify.
>
> At the outset, we note that the issue of whether Rule 806 modifies Rule 608(b)'s ban on extrinsic evidence is a matter of first impression in this circuit, and a matter which the majority of our sister courts likewise has not yet addressed. Indeed, there are only two circuit court opinions construing the effect of Rule 806's intersection with Rule 608(b). [The court discusses the facts and holdings in *Friedman* and *White,* both discussed *supra.*] Thus, in contrast to the Second Circuit in *Friedman*, the D.C. Circuit in *White* took the position that the ban on extrinsic evidence of misconduct applies in the context of hearsay declarants, even when those declarants are unavailable to testify.
>
> We agree with the approach taken by the court in *White*, and conclude that Rule 806 does not modify Rule 608(b)'s ban on extrinsic evidence of prior bad acts in the context of hearsay declarants, even when those declarants are unavailable to testify. We perceive our holding to be dictated by the plain — albeit imperfectly meshed — language of Rules 806 and 608(b). As discussed, Rule 806 allows impeachment of a hearsay declarant only to the extent that impeachment would be permissible had the declarant testified as a witness, which, in the case of specific instances of misconduct, is limited to cross-examination under Rule 608(b). The asserted basis for declining to adhere to the clear thrust of these rules is that the only avenue for using information of prior bad acts to impeach the credibility of a witness — cross-examination — is closed if the hearsay declarant cannot

be called to testify. We are unpersuaded by this rationale. First, the unavailability of the declarant will not always foreclose using prior misconduct as an impeachment tool because the witness testifying to the hearsay statement may be questioned about the declarant's misconduct — without reference to extrinsic evidence thereof — on cross-examination concerning knowledge of the declarant's character for truthfulness or untruthfulness. And, even if a hearsay declarant's credibility may not be impeached with evidence of prior misconduct, other avenues for impeaching the hearsay statement remain open. For example, the credibility of the hearsay declarant — and indeed that of the witness testifying to the hearsay statement — may be impeached with opinion and reputation evidence of character under Rule 608(a), evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613. The unavailability of one form of impeachment, under a specific set of circumstances, does not justify overriding the plain language of the Rules of Evidence.

The *Saada* Court relied on the special treatment given in Rule 806 to inconsistent statement impeachment, as creating an inference of the drafters' refusal to give similar dispensation to bad act impeachment:

> We also read the language of Rule 806 implicitly to reject the asserted rationale for lifting the ban on extrinsic evidence. Rule 806 makes no allowance for the unavailability of a hearsay declarant in the context of impeachment by specific instances of misconduct, but makes such an allowance in the context of impeachment by prior inconsistent statements. Rule 613 requires that a witness be given the opportunity to admit or deny a prior inconsistent statement before extrinsic evidence of that statement may be introduced. If a hearsay declarant does not testify, however, this requirement will not usually be met. Rule 806 cures any problem over the admissibility of a non-testifying declarant's prior inconsistent statement by providing that evidence of the statement "is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." See generally Fed. R. Evid. 806 advisory committee's notes. The fact that Rule 806 does not provide a comparable allowance for the unavailability of a hearsay declarant in the context of Rule 608(b)'s ban on extrinsic evidence indicates that the latter's ban on extrinsic evidence applies with equal force in the context of hearsay declarants.

The *Saada* Court noted the negative consequences of its construction of Rule 806:

> In reaching this conclusion, we are mindful of its consequences. Upholding the ban on extrinsic evidence in the case of a hearsay declarant may require the party against whom the hearsay statement was admitted to call the declarant to testify, even though it was the party's adversary who adduced the statement requiring impeachment in the first place. And, as here, where the declarant is unavailable to testify, the ban prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct. . . . Nevertheless, these possible drawbacks

> may not override the language of Rules 806 and 608(b), and do not outweigh the reason for Rule 608(b)'s ban on extrinsic evidence in the first place, which is "to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury . . . and to prevent unfair surprise arising from false allegations of improper conduct." *Carter v. Hewitt,* 617 F.2d 961, 971 (3d Cir. 1980).[4]

The arguable problem with the reasoning in *Saada* is that it is inconsistent with the *intent* of Rule 806, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. The opponent could at least raise the bad acts on cross-examination if the declarant were to testify, whereas if the statement is introduced as hearsay it is unlikely that the jury will hear about the hearsay declarant's bad acts.

In sum, there is a conflict in the courts as to the relationship between Rules 806 and 608(b). Two circuits hold that Rule 608(b) governs impeachment of hearsay declarants as well as trial witnesses, while one circuit finds an implicit exception in Rule 806 to the extrinsic evidence requirement of Rule 608(b). Essentially this conflict is between the text of the rule and the underlying policy of the rule. The policy of the rule is not to put the adverse party at a disadvantage, impeachment-wise, with respect to hearsay declarants. The text of the rule, though, is fairly read to bar impeachment with bad acts. The *Saada* court's reliance on *expression unius* is sound: the drafters made exceptions to the standards for impeachment by prior inconsistent statement. If they wanted to make exceptions for Rule 608(b) impeachment, they could have done so, but did not.

It is difficult to divine why Rule 806 contains an accommodation for Rule 613(b) but not Rule 608(b).[5] Both involve a situation where another other rule of impeachment as written (613(b) and 608(b)) does not comfortably apply to a nontestifying declarant. It also seems unwise to leave Rules 806 and 608(b) in tension with each other so that courts have to choose which one to follow.[6]

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[4] District courts in the Ninth Circuit have followed the rationale of *Saada* to find that extrinsic evidence of bad acts cannot be admitted under Rule 806. *See United States v. Shayota,* 2016 WL 6093237, at *6–7 (N.D. Cal. Oct. 19, 2016), aff'd on other grounds, 784 F. App'x 986 (9th Cir. 2019) (district court finds *Saada* to be persuasive, and concludes that Rule 608(b) bars parties from introducing extrinsic evidence for impeachment of hearsay declarants); *United States v. Little, 2012 WL 2563796, at *3 (N.D. Cal.)* ("[T]he Court is persuaded by the reasoning in *White* and *Saada* and finds that Rule 806 does not modify Rule 608(b), and that under Rule 608(b), Defendant cannot rely on extrinsic evidence to impeach [hearsay] statements.").

[5] Nothing in any of the Advisory Committee materials signals any discussion of the apparent inconsistency between special treatment of prior inconsistent statement impeachment, but not bad act impeachment.

[6] C. Mueller & L. Kirkpatrick, 5 Federal Evidence § 8:138 (4th ed 2014) ("the wiser reading of [Rules 608(b) and 806) leads to the conclusion that impeachment of this sort should be allowed, even though normally such impeachment can proceed only on cross-examination.").

As with other conflicts discussed in the agenda book, it is not a heavy lift to address case law that relies solely on the text and not at all on policy ---- you change the text to accord with the policy. Whether it is worth the effort in respect to Rule 806 is a matter that is discussed in Part IV, below.

III. Impeachment of Non-Testifying Criminal Defendants

The admissibility of extrinsic evidence of bad acts is the major problem that the Committee considered in its decision to direct the Reporter to write a memo on the advisability of amending Rule 806. However, another problem has been raised in the application of the Rule: the possibility, as discussed in Professor Cordray's article, *supra*, that a non-testifying criminal defendant in a multi-defendant case could have his credibility impeached even though he never testifies.

The problem is illustrated by what happened to the defendant Finch in *United States v. Bovain,* 708 F.2d 606, 613-4 (11th Cir. 1983). Seven defendants were tried jointly for conspiracy. A witness testified about hearsay statements that Finch, a codefendant, had made about Rickett, another codefendant. These statements were admissible under the coconspirator exemption from the hearsay rule, Rule 801(d)(2)(E). Rickett then impeached Finch's credibility as a hearsay declarant by introducing Finch's prior convictions for theft and narcotics. Finch was thus impeached even though he never testified at trial. The Court of Appeals found this permissible. It noted as follows:

> [T]he result reached by the district court is straightforward and logical. Because Finch is a hearsay declarant, his testimony may be treated like that of a witness (Rule 806), and as a witness, he can be impeached (Rules 608, 609). Therefore, the certified records of Finch's prior convictions were admissible for impeachment purposes (Rule 609).
>
> The district court was careful to instruct the jury that evidence of Finch's convictions could be used to discredit the accuracy of his out-of-court statements, but that the prior crimes could not be considered as evidence of Finch's guilt on the charges contained in the indictment. In a conspiracy case, the trial judge has the difficult task of balancing the countervailing interests of all the codefendants. Decisions on the admissibility of evidence are committed to the sound discretion of the district court, and will not be overturned on appeal absent a clear abuse of that discretion. This situation was unusual in that both Rickett and Finch were defendants, but neither testified, and one sought to impeach the other during cross-examination of a third party. The trial judge evaluated the rights and interests at stake from many perspectives and ruled that the probative value of the evidence outweighed the risk of prejudice to Finch. Based on the applicable policy considerations and rules, the admission of the prior crimes evidence did not constitute an abuse of the court's discretion.

Professor Cordray considers the result in *Bovain* to be problematic because "the defendant who has done nothing to place his credibility in issue – indeed, has actively sought to keep it from becoming an issue – loses the protection that silence normally affords him." She argues that this result is contrary to the policy of Rule 609, which is based on the principle that a criminal defendant should receive protection from prior convictions unless he "opens the door" by testifying and possibly trying to mislead the jury that he has led a "blameless life." She concludes as follows:

> For these reasons, Rule 806 should be amended to prevent introduction of a criminal defendant's prior convictions in these circumstances. More specifically, Rule 806 should be amended to provide that, if the declarant is the accused, then the declarant may be impeached with prior convictions only if he has affirmatively placed his credibility in issue.

With reference to placing credibility "in issue", Professor Cordray contrasts *Bovain* (where that did not occur), with *United States v. Lawson,* 608 F.2d 1129 (6th Cir. 1979). Lawson was charged with counterfeiting. Defense counsel cross-examined a government witness, who was a secret service agent, to bring out the fact that Lawson had consistently denied any involvement; counsel also introduced a written statement in which Lawson denied all complicity in the counterfeit activities. In response, the government introduced Lawson's conviction that would have been admissible under Rule 609 had he testified. The Court found no error: "By putting these hearsay statements before the jury his counsel made Lawson's credibility an issue in the case the same as if Lawson had made the statements from the witness stand." Therefore Rule 806 was applicable, and Lawson could be impeached as if he testified. Thus, by using the limitation– "only if he has affirmatively placed his credibility in issue"– Professor Cordray would distinguish cases like *Bovain*, where impeachment of the defendant/hearsay declarant would not be permitted, from cases like *Lawson* where under Rule 806 the defendant could be impeached as if he testified.

It is for the Committee to determine whether the problem raised by Professor Cordray is serious enough to be addressed in an amendment. *Bovain* appears to be the only reported case in which a defendant was impeached under Rule 806 even though he never testified and never tried to bring in any of his own exculpatory statements. In other cases, such as *Lawson* and *United States v. Noble,* 754 F.2d 1324 (7th Cir. 1985), the defendant's hearsay statements were admitted in the course of defense counsel's cross-examination of a government witness --- thus the door was opened --- and so the defendant was properly impeached as if he had testified at trial.

In *United States v. Robinson,* 783 F.2d 64, 67-8 (7th Cir. 1986), a situation arose similar to *Bovain*, but the trial court chose to solve it by refusing to allow the defendant to impeach the credibility of the codefendant whose hearsay statement was admitted against him. The Court of Appeals found no error, holding that the trial court has discretion to use "the *Bovain* solution" or to refuse impeachment entirely. The amendment proposed by Professor Cordray would in effect preclude the *Bovain* solution and would mandate the result in *Robinson*, i.e., impeachment of the codefendant hearsay declarant would not be permitted where the declarant did nothing to introduce the statement.

It is apparent that the rights of *two* defendants are involved when the hearsay statement of one codefendant is admitted against another. The hearsay declarant has a complaint that he should not be impeached because he never chose to testify and did nothing to interject his credibility into the trial. But the defendant against whom the hearsay is admitted also has a complaint that if he is not permitted to impeach the declarant's credibility, he is deprived of evidence that is important to his defense. There is a constitutional underpinning to the rights of both defendants. The impeachment of the hearsay declarant/defendant is in some tension with the defendant's constitutional right to refuse to testify. On the other hand, the preclusion of impeachment is in tension with the other defendant's constitutional right to confront the witnesses against him. See, e.g., *United States v. Burton*, 937 F.2d 324, 329 (7th Cir. 1991) (declaring that the Confrontation Clause can be violated if the defendant is prohibited from impeaching a hearsay declarant, but finding no plain error in prohibiting impeachment in this case). Perhaps in this situation the best result is not a rule change, but rather allowing the trial judge the discretion to balance interests. One possibility could be that the court in its discretion would allow the impeached defendant to take the stand after all, given that his dirty laundry is now out of the bag.

IV. Benefits and Disadvantages of an Amendment to Rule 806

It seems clear that if Rule 806 is to be amended, that amendment should allow impeachment of a hearsay declarant with bad acts, in some manner or other. That would be consistent with the policy of the rule. So the discussion of benefits and costs should be read in that light.

Benefits

The major benefit to amending Rule 806 would be to resolve a conflict in the circuits over whether a hearsay declarant who is not testifying at trial may be impeached with bad acts. This conflict has arisen because a literal interpretation of the Rule is in conflict with the intent of the Rule. Given the importance and value attached to impeachment of hearsay declarants (see, e.g., *United States v. Inadi,* 475 U.S. 387 (1986) (noting the importance of impeachment of hearsay declarants whose statements are offered against a criminal defendant, citing Rule 806)) the deficiency in the literal text of the Rule, ignoring the problem of impeachment with bad acts, seems unjustified. Thus, an amendment to Rule 806 allowing impeachment with bad acts would not only resolve a conflict, it would also promote the spirit and intent of the Rule.[7]

[7] It should also be noted that clarification from the Supreme Court is unlikely, as the conflict is over a narrow evidence question. Though, on the other hand, the conflict is not a widespread one. It is one circuit against two, with a few district court opinions thrown in on either side.

With respect to the impeachment of non-testifying criminal defendants — the benefit of an amendment would arguably be to lead to a fair result protecting the criminal defendant's right to refuse to testify. It is arguably unfair to introduce prejudicial impeachment evidence against a defendant who has done nothing at trial to warrant such impeachment --- though, as stated above, the equities don't point only one way, when the impeaching party is a criminal defendant as well.

Disadvantages

In addition to the costs that are attendant to every rules amendment, there are a few special considerations that might be taken into account in deciding whether to propose an amendment to Rule 806.

First, it could be argued that the problems addressed here with respect to Rule 806 are narrow; they seem to arise rarely, and in fact Rule 806 itself is rarely invoked, at least in reported decisions. The contrary argument is that if an Evidence Rule is problematic — especially if it is subject to conflicting interpretations — the Evidence Rules Committee should be addressing it as part of its obligations to assure that all the Evidence Rules are working uniformly.

Second, the drafting solution allowing impeachment with bad acts problem has some pitfalls. These will be discussed in the next section, on drafting alternatives. But the bottom line is that it is difficult to come up with an amendment that will treat trial witnesses and hearsay declarants the same when it comes to bad act impeachment, for the very reason that the person to be impeached is not present when the hearsay statement is offered.

Third, and specifically with respect to impeachment of non-testifying defendants, an argument against an amendment is that there is no reason for a rule to prefer the rights of the impeached defendant over those of the impeaching defendant. Thus, the resolution of the question of impeachment of non-testifying defendants is not self-evident, as it involves competing interests and countervailing constitutional considerations.

As discussed, there are two court opinions addressing this problem. The *Bovain* court reads the Rule literally and allows A to impeach B. The *Robinson* court does not disagree with the *Bovain* result, but reads *Bovain* as only one solution to this complex problem; both courts seem to agree that treatment of impeachment of non-testifying co-defendants should be left to the discretion of district court judges. In *Robinson*, the Court prohibited A from impeaching B, and the Court of Appeals found no abuse of discretion.

Given the complex balance of interests involved, it is probably appropriate to leave the treatment of impeachment of non-testifying defendants to the discretion of the district court --- because after all, the court has discretion in determining at least whether non-crimen falsi convictions would be admissible in the first place. No amendment is necessary to implement any

judicial discretion in the matter, as the courts in *Bovain* and *Robinson* found ample discretion without any language to that effect in the Rule.

V. Models for a Proposed Amendment to Rule 806

It turns out that a textual solution to impeachment of a hearsay declarant with bad acts is complicated. One possibility is to add language that a hearsay declarant may be impeached with extrinsic evidence of an act that the declarant could have been cross-examined about as a trial witness. But simply allowing extrinsic evidence does not make impeachment of hearsay declarants and trial witnesses the same. As to a trial witness, extrinsic evidence will not be admissible. So, arguably, the adverse party will have a comparative *benefit* with respect to a hearsay declarant that she would not have with a trial witness. To some extent, that solution runs counter to the goal of equating impeachment of hearsay declarants and impeachment of trial witnesses.

On the other hand, if extrinsic evidence is allowed the adverse party is simultaneously at a disadvantage because, in order to impeach the hearsay declarant, she obviously will have to have admissible evidence proving that the act occurred. In contrast, as to trial witnesses, the adverse party need only have a good faith indication that the bad act occurred --- and that indication need not be supported by admissible evidence (because, of course, extrinsic evidence is not allowed). *See United States v. Brugui*er, 161 F.3d 1145 (8th Cir. 1998) (cross-examiner must have only a "reasonable, good-faith basis" for asking about the bad act). Thus, the "extrinsic evidence is admissible" solution does not really make the impeachment of a hearsay declarant the same as impeachment of a trial witness.

Finally, allowing proof of specific acts may promote the policy of Rule 806, but it simultaneously undermines the policy of Rule 608(b) --- which is to avoid minitrials on issues that go only to a witness's character for truthfulness.

One possible solution that would more approximate what happens when a trial witness is impeached with bad acts would be to allow the adverse party to simply inform the jury about the bad act (or to have the court do so). Of course, the party would have to have the same good faith proof that would be needed to raise the bad act to a trial witness, and as with character impeachment at trial, the act must pass the 403 test. But if those requirements are met, then simply raising the specific act to the jury most approximates what would happen with a trial witness. To the complaint that raising the bad act to the jury "is not evidence" the response could be, "neither is the lawyer's question to the trial witness about the bad act."

One model below employs the extrinsic evidence solution. The other employs the "raise it to the jury" solution. The third model and fourth models add language to address the problem of criminal defendants being impeached without testifying. The models begin on the next page.

Model One: Permitting Extrinsic Evidence of Bad Acts to Impeach a Hearsay Declarant

Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement - or a statement described in Rule 801(d)(2)(C), (D), or (E) - has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. And the court may admit extrinsic evidence of specific instances of the declarant's conduct if they are probative of the declarant's character for truthfulness or untruthfulness.[8] If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Possible Committee Note

The amendment allows a party to impeach a hearsay declarant with extrinsic evidence of specific acts when offered to prove the declarant's character for truthfulness, subject to the balancing test of Rule 403 (as is also the case for impeachment with bad acts under Rule 608). This change is consistent with the intent of Rule 806, which is to provide a party with all the methods of impeachment that the party would have if the declarant were to testify. If the witness testifies at trial, the adverse party is allowed to ask the witness about bad acts probative of the witness's character for truthfulness, subject to Rule 403. In contrast, an out-of-court declarant cannot be asked about an act of misconduct. Therefore, extrinsic evidence of the hearsay declarant's act is usually the best way that the act can be presented to the jury --- and it is permitted under the amendment unless its probative value as to character for truthfulness is substantially outweighed by the factors set forth in Rule 403.

The contrary result reached by some courts was based on the fact that Rule 806 did not by its terms give special consideration to impeaching declarants with bad acts, while it specifically gave such consideration to impeaching declarants with inconsistent statements. That discrepancy in the text of Rule 806 has been rectified by this amendment.

8 This language is taken directly from Rule 608(b).

Reporter's note: Would it be a good idea to specifically reference Rule 403 in the text? The answer is probably no. For one thing, Rule 403 is not referenced in Rule 608(b) --- it rides beneath that rule to regulate what bad acts can be raised in cross-examination. Because this amendment is designed to try to replicate Rule 608 for impeaching hearsay declarants, it would seem odd to add Rule 403 to the text here. Moreover, it would create a negative inference for many other rules in which Rule 403 has been held applicable as an underlying protection, even though not in the text of the rule. Examples include Rules 404(b), 407, and 413-15. Moreover, it is fairly common knowledge that if the word "may" is used in the rule, then there is an underlying Rule 403 balance. And "may" is used in the draft amendment above.

Rule 403 is specifically referred to in Rule 609, governing impeachment with prior convictions. But it is in the text there because Rule 609 employs at least four separate balancing tests, depending on the nature of the conviction, the age of the conviction, and the person being impeached. The Rule 403 test specifically applies to some convictions but not others; it does not operate underneath Rule 609. Therefore it made sense to state specifically when and how the Rule 403 balancing test would apply to impeachment with some prior convictions and not others. There is no such complicating factor in Rule 608.

Model Two: Permitting Disclosure of Bad Acts to Impeach a Hearsay Declarant

Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement - or a statement described in Rule 801(d)(2)(C), (D), or (E) - has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. And the court may allow disclosure to the jury of specific instances of the declarant's conduct, if they are probative of the declarant's character for truthfulness or untruthfulness. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Possible Committee Note

The amendment allows a party to impeach a hearsay declarant with specific acts bearing on the declarant's truthfulness, in essentially the same way that the declarant would be impeached as a trial witness. Under Rule 608, a witness can be asked about specific acts of misconduct that are probative of the witness's character for truthfulness (subject to Rule 403) but extrinsic evidence is not allowed. The amendment adheres to the Rule 608(b) bar on extrinsic act evidence, thus avoiding minitrials on acts that are not central to the dispute. But the amendment provides a party with a means to impeach the declarant as if the declarant were at trial. Instead of asking the witness about the acts during testimony (which is ordinarily not possible with a hearsay declarant) the jury will be made aware of the acts through the court's permitted disclosure --- so long as the probative value of the specific acts is not substantially outweighed by the factors set forth in Rule 403. As with impeachment of trial witnesses under Rule 608, specific acts may not be disclosed unless the party provides to the court a reasonable, good-faith basis for believing that the act occurred.

The trial court has discretion to determine how disclosure of a specific act will be made. If a witness who has testified to the hearsay statement happens to know about the act, then it could be raised to that witness on cross-examination. If not, then the trial judge could simply disclose the act to the jury or have the party do so. If the parties dispute whether the act occurred, that would be a consideration for the court in determining whether the probative value of proving the act is substantially outweighed by the risks of unfair prejudice, confusion, and undue delay.

Some case law has held that the jury could not hear about specific acts of a hearsay declarant, because Rule 806 did not by its terms give special consideration to impeaching declarants with bad acts --- while it specifically gave such consideration to impeaching declarants with inconsistent statements. That discrepancy in the text of Rule 806 has been rectified by this amendment.

Model Three: Permitting Extrinsic Evidence of Bad Acts to Impeach a Hearsay Declarant, and Prohibiting Impeachment of a Non-testifying Criminal Defendant Who Does Not Affirmatively Place Character for Truthfulness in Dispute.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. And the court may admit extrinsic evidence of specific instances of the declarant's conduct if they are probative of the declarant's character for truthfulness or untruthfulness. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination. If the declarant is a criminal defendant in the case, that defendant's character for truthfulness may be attacked only if the defendant has affirmatively placed it before the factfinder.

Possible Committee Note to Model Three

The amendment makes two changes to the Rule.

First, the amendment allows a party to impeach a hearsay declarant with extrinsic evidence of specific acts when offered to prove the declarant's character for truthfulness, subject to the balancing test of Rule 403 (as is also the case for impeachment with bad acts under Rule 608). This change is consistent with the intent of Rule 806, which is to provide a party with all the methods of impeachment that the party would have if the declarant were to testify. If the witness testifies at trial, the adverse party is allowed to ask the witness about bad acts probative of the witness's character for truthfulness, subject to Rule 403. In contrast, an out-of-court declarant cannot be asked about an act of misconduct. Therefore, extrinsic evidence of the hearsay declarant's act is usually the best way that the act can be presented to the jury --- and it is permitted under the amendment unless its probative value as to character for truthfulness is substantially outweighed by the factors set forth in Rule 403.

The contrary result reached by some courts was based on the fact that Rule 806 did not by its terms give special consideration to impeaching declarants with bad acts, while it specifically gave such consideration to impeaching declarants with inconsistent statements. That discrepancy in the text of Rule 806 has been rectified by this amendment.

The second change to the Rule prohibits a party from impeaching a criminal defendant's character for truthfulness when the defendant's hearsay statements (or statements defined as not hearsay under Rule 801(d)(2)(C)(D), or (E)) are offered against that party and the defendant has not affirmatively placed character for truthfulness before the factfinder. For example, in a conspiracy prosecution of multiple defendants, one defendant's out-of-court statement is potentially admissible against other defendants under Rule 801(d)(2)(E). If the defendants against whom the statements are offered are allowed to impeach the defendant/hearsay declarant with bad acts or convictions, the jury may well be prejudiced against that defendant, even though that defendant has done nothing to inject character into the case and may have decided not to testify for fear of impeachment. A rule prohibiting impeachment of the defendant-declarant's character for truthfulness will protect that defendant's right to refuse to testify.

Model Four: Permitting Disclosure of Bad Acts to Impeach a Hearsay Declarant, and Prohibiting Impeachment of a Non-testifying Criminal Defendant Who Does Not Affirmatively Place Character for Truthfulness in Dispute.

Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement - or a statement described in Rule 801(d)(2)(C), (D), or (E) - has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. And the court may allow disclosure to the jury of specific instances of the declarant's conduct if they are probative of the declarant's character for truthfulness or untruthfulness. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination. If the declarant is a criminal defendant in the case, that defendant's character for truthfulness may be attacked only if the defendant has affirmatively placed it before the factfinder.

Possible Committee Note to Model Four

The amendment makes two changes to the Rule.

First, the amendment allows a party to impeach a hearsay declarant with specific acts bearing on the declarant's truthfulness, in essentially the same way that the declarant would be impeached as a trial witness. Under Rule 608, a witness can be asked about specific acts of misconduct that are probative of the witness's character for truthfulness (subject to Rule 403) but extrinsic evidence is not allowed. The amendment adheres to the Rule 608(b) bar on extrinsic act evidence, thus avoiding minitrials on acts that are not central to the dispute. But the amendment provides a party with a means to impeach the declarant as if the declarant were at trial. Instead of asking the witness about the acts during testimony (which is ordinarily not possible with a hearsay declarant) the jury will be made aware of the acts through the court's permitted disclosure --- so long as the probative value of the specific acts is not substantially outweighed by the factors set forth in Rule 403. As with impeachment of trial witnesses under Rule 608, specific acts may not be disclosed unless the party provides to the court a reasonable, good-faith basis for believing that the act occurred.

The trial court has discretion to determine how disclosure of a specific act will be made. If a witness who has testified to the hearsay statement happens to know about the act, then it could be raised to that witness on cross-examination. If not, then the trial judge could simply disclose the act to the jury or have the party do so. If the parties dispute whether the act occurred, that would be a consideration for the court in determining whether the probative value of proving the act is substantially outweighed by the risks of unfair prejudice, confusion, and undue delay.

Some case law has held that the jury could not hear about specific acts of a hearsay declarant, because Rule 806 did not by its terms give special consideration to impeaching declarants with bad acts --- while it specifically gave such consideration to impeaching declarants with inconsistent statements. That discrepancy in the text of Rule 806 has been rectified by this amendment.

The second change to the Rule prohibits a party from impeaching a criminal defendant's character for truthfulness when the defendant's hearsay statements (or statements defined as not hearsay under Rule 801(d)(2)(C)(D), or (E)) are offered against that party and the defendant has not affirmatively placed character for truthfulness before the factfinder. For example, in a conspiracy prosecution of multiple defendants, one defendant's out-of-court statement is potentially admissible against other defendants under Rule 801(d)(2)(E). If the defendants against whom the statements are offered are allowed to impeach the defendant/hearsay declarant with convictions or bad acts, the jury may well be prejudiced against that defendant, even though that defendant has done nothing to inject character into the case and may have decided not to testify for fear of impeachment. A rule prohibiting impeachment of the defendant-declarant's character for truthfulness will protect that defendant's right to refuse to testify.

TAB 9

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Rule 613(b): Laying a Foundation for Extrinsic Evidence of a Witness's Prior Inconsistent Statement
Date: October 1, 2021

The Committee is considering a potential amendment to Rule 613(b) governing extrinsic evidence of a witness's prior inconsistent statement. Although the Rule promises the witness an opportunity to explain or deny the prior inconsistency at some point in time during the trial (unless the trial judge decides to dispense with such an opportunity in the interests of justice), the Rule does not specify *when* the witness must get the opportunity. Although an impeaching party might confront the witness on cross-examination with a prior inconsistent statement and provide the requisite opportunity *prior* to offering extrinsic evidence of the statement, she is not required to do so. Because there is no timing requirement in Rule 613(b), a party might offer extrinsic evidence of a prior inconsistent statement first, and offer the witness an opportunity to explain or deny thereafter. Despite the clear intent of the Rule to offer flexibility in the timing of the witness's opportunity, several federal courts have held that a witness must receive an opportunity to explain a prior inconsistent statement *before* extrinsic evidence is offered. Others acknowledge the flexible timing afforded by Rule 613(b) itself, but find that a trial judge retains discretion through Rule 611(a) to insist upon an opportunity for the witness to explain or deny a prior inconsistent statement on cross-examination *before* extrinsic evidence of it is offered in a particular case.

The question for the Committee is whether to amend Rule 613(b) either to clarify the flexible timing it affords -- and to reject the federal cases requiring a prior opportunity for the witness to explain or deny – or to modify the Rule to impose a timing requirement to bring the Rule into alignment with the cases (with discretion preserved to dispense with the prior opportunity in appropriate circumstances). Rule 613(b) is not an action item for this meeting. Should the Committee wish to pursue a potential amendment, draft amendment and Advisory Committee note language will be prepared for the Spring 2022 meeting.

This memorandum proceeds in four parts. Part I will briefly describe the common law with respect to impeachment by prior inconsistent statement and the changes made to the common law by Rule 613. Part II will examine the federal cases concerning Rule 613(b) and the conflict in the courts regarding the timing for a witness's opportunity to explain or deny a prior inconsistent statement when extrinsic evidence is offered. Part III will offer various amendment options and explore the pros and cons of each approach. Finally, Part IV will offer preliminary drafting options for an amendment to Rule 613(b), as well as draft Committee note language.

I. Rule 613: Origins and Operation

At common law, a party seeking to impeach a witness with a prior inconsistent statement was required to lay a foundation for the statement before introducing it. This was referred to as "the rule in Queen Caroline's case." That rule required the cross-examining party to disclose the contents of a prior inconsistent statement to the witness before impeaching him with it on cross-examination. In essence, this required the impeaching party to confront the witness directly on cross-examination with the inconsistent statement.[1] Thus, the witness would have an opportunity to admit, explain, repudiate, or deny the statement *during cross-examination* and *before* any extrinsic evidence of the prior statement could be introduced to impeach the witness's testimony.[2]

Rule 613(a) expressly rejects this common law requirement as a "useless impediment to cross-examination," providing that when a witness is examined concerning a prior statement, the cross-examiner need not show the statement to the witness or disclose its contents to the witness before impeaching him with it.[3] One treatise describes the rationale for abolishing the rule in Queen Caroline's case as follows:

> The required procedure increased the difficulties of the cross-examiner by forewarning the witness, who got a chance to explain the statement away even before its contents were made known to the trier of fact, depriving the questioner of the chance to make a convincing display of vacillation.[4]

Although Rule 613(a) no longer dictates the manner in which a witness may be confronted with a prior inconsistency during cross-examination, Rule 613(b) preserves the witness's opportunity to explain or deny a prior inconsistent statement by providing that extrinsic evidence of the statement may not be introduced unless the witness is given some opportunity, *at some point in the trial*, to explain, repudiate, or deny the statement.[5] Putting these two subsections of Rule

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[1] *See* Advisory Committee's note to 1975 enactment of Rule 613 ("The *Queen's Case*, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820) laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness.").

[2] *See Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521 (11th Cir. 1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement.").

[3] Fed. R. Evid. 613(a) ("When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness.").

[4] Mueller, et.al., *Evidence* § 6.40, p. 564 (6th Ed. 2018).

[5] See, e.g., *United States v. McCall*, 85 F.3d 1193 (6th Cir. 1996) (no error when the government in rebuttal introduced extrinsic evidence of a defense witness's prior inconsistent statement; while the prosecution did not confront the witness with the prior statement, the defense could have recalled the witness and did not, choosing instead to argue that the government's impeachment attempt was a failure); *United States v. Hudson*, 970 F.2d 948 (1st Cir. 1992) (foundation for admitting extrinsic evidence of a prior inconsistent statement does not require that the witness have an opportunity to explain or deny the statement before it is introduced; all that is required is that the witness at least be available for recall during the course of the trial; a trial court can exercise its discretion to require a prior confrontation, but here the court labored under a misapprehension of law that a prior confrontation was

613 together, a witness must have an opportunity to explain or deny a prior inconsistent statement if extrinsic evidence of the statement is admitted, but that opportunity need not happen on cross-examination *before* the extrinsic evidence of the statement is introduced. The Advisory Committee note to the original enactment explained that the rule imposed "no specification of any particular time or sequence" for providing the witness with an opportunity to explain the inconsistency and suggested that flexibility in the timing of the opportunity could be important to allow "several collusive witnesses" to be "examined before disclosure of a joint prior inconsistent statement."[6] Assuming such an opportunity is provided at some point, extrinsic evidence of the statement is admissible subject to Rule 403.[7]

Allowing admission of extrinsic evidence of a prior inconsistent statement prior to giving the witness the requisite opportunity to explain or deny the statement – as contemplated by Rule 613(b) -- can prove problematic. The witness might have been excused from the trial or even have become unavailable by the time the extrinsic evidence is offered. This creates the possibility that extrinsic evidence of a prior inconsistent statement is admitted, but that the witness's promised opportunity to explain or deny the statement cannot be had.[8] The original Advisory Committee dealt with these possibilities by affording discretion for the trial judge to allow extrinsic evidence of a prior inconsistent statement without affording the witness the usual opportunity to explain or deny the statement "if justice so requires."[9] The Advisory Committee note to the original Rule suggested that justice might permit extrinsic evidence of a prior inconsistent statement without the usual opportunity for the witness to explain or deny when the witness becomes unavailable by the time the statement is *discovered* by the opposing party.[10] As explained below, courts rarely permit extrinsic evidence of a prior inconsistent statement without affording the witness an opportunity

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always required; therefore it was reversible error to exclude a prior inconsistent statement of a government witness on the ground that the witness was not confronted with the statement before it was proffered).

[6] Advisory Committee's note to 1975 enactment of Rule 613.

[7] See, e.g., *United States v. Watkins*, 591 F.3d 780 (5th Cir. 2009) (after a witness denies making a statement during cross-examination, evidence may be introduced to prove the statement was made, subject to Rule 403); *United States v. Meza*, 701 F.3d 411, 426 (5th Cir. 2012) (no error in allowing the prosecution to introduce extrinsic evidence of a prior inconsistent statement where the witness conceded making the statement but attempted to explain it away: Rule 613(b) "makes no exception for prior inconsistent statements that are explained instead of denied").

[8] This poses additional questions as to which party must recall the witness to afford the subsequent opportunity to explain or deny. *See* 3 J. Weinstein & M. Berger, Weinstein's Evidence, § 623[04], at 613–24 (1985) ("The rule does not indicate that the party introducing evidence of the inconsistent statement must afford the witness an opportunity to explain. It merely indicates that the witness must be afforded that opportunity. Thus neither side has the burden of recalling the witness; normally the impeaching party will not wish to do so.").

[9] Fed. R. Evid. 613(b).

[10] *See* Advisory Committee's note to 1975 version of Rule 613 ("In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge.").

to explain or deny it when the impeaching party was aware of the statement and chose not to confront the witness with it during cross-examination.[11]

II. *Federal Courts Conflict*

Many federal cases recognize that Rule 613(b) authorizes flexible timing for a witness's opportunity to explain or deny a prior inconsistent statement. For example, the Ninth Circuit, in *United States v. Jones* explained:

> The district court did not abuse its discretion by admitting Medina's grand jury testimony. 'We have expressly recognized that the foundational prerequisites of [Federal Rule of Evidence] 613(b) require only that the witness be permitted-*at some point*-to explain or deny the prior inconsistent statement.' … Jones had the opportunity to cross examine Medina on the statements *after* the introduction of the grand jury testimony and did so. This was sufficient and the district court did not abuse its discretion by allowing Medina's grand jury testimony to be admitted.[12]

Likewise, the Eleventh Circuit in *Wammock v. Celotex Corp.* explained that extrinsic evidence should be admitted under Rule 613(b) whenever a witness is or might be available for recall. According to the court, the opponent's ability to recall the witness after the admission of extrinsic evidence qualifies as a sufficient *opportunity* to explain.[13] The Sixth Circuit echoed these holdings in *United States v. Farber*, when it explained that: "Extrinsic evidence is admissible to establish a prior inconsistent statement of a witness if the impeached party is given an opportunity to explain or deny the statement. Although the party being impeached does not have to be given a *prior* opportunity to explain or deny the statement, some opportunity to explain or deny the statement is still required."[14]

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[11] *See, e.g., United States v. Schnapp*, 322 F.3d 564 (8th Cir. 2003) (no error in prohibiting the defendant from introducing an inconsistent statement from a prosecution witness; counsel had not asked the witness about the statement on cross-examination, and it was well within the judge's discretion not to permit deviation from the traditional procedure of providing a witness an opportunity to explain or deny the statement).

[12] 739 F. App'x 376, 379 (9th Cir. 2018) (citations omitted); *see also United States v. Young*, 86 F.3d 944 (9th Cir. 1996) (rejecting the argument that an inconsistent statement was inadmissible because no foundation was laid on cross-examination; all that is required is that the witness have an opportunity to explain or deny the statement at some point, and such an opportunity can be provided by recalling the witness: "[E]ven absent Drake's flat denial of the statement on cross-examination, Delfs's testimony concerning Drake's prior inconsistent statement would not have been barred. The government would have been free to re-call Drake as a witness and give him an additional opportunity to explain or deny the statement attributed to him.").

[13] 793 F.2d 1518, 1522–23 (11th Cir. 1986).

[14] 762 F.2d 1012 (6th Cir. 1985) (citations omitted); s*ee also United States v. McGuire*, 744 F.2d 1197 (6th Cir. 1984) (where the defendants had the opportunity to call surrebuttal witnesses and would have made arrangements to recall the witness after his release had the matter been of "great importance," the court found no "reversible error" in admitting the extrinsic evidence of the witness's prior inconsistent statement"); *United States v. McCall*, 85 F.3d 1193, 1196–97 (6th Cir. 1996) ("According to McCall, the government's failure to present the evidence when

Even courts that read Rule 613(b) as dispensing with a prior foundation requirement nonetheless recognize that a trial court has the power to control the order of proof under Rule 611(a), and that this power can be exercised on a case-by-case basis to require a prior foundation *before* admitting extrinsic evidence of an inconsistent statement. In essence, these courts recognize a trial judge's authority under Rule 611(a) to impose the timing requirement rejected by Rule 613(b). As the First Circuit stated in *United States v. Hudson*: "Rule 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law prior foundation requirement when such an approach seems fit."[15] The *Hudson* court concluded that Rule 613 "was not intended to eliminate trial judge discretion to manage the trial in a way designed to promote accuracy and fairness."[16]

Despite the language of the Rule and the apparent intent of the drafters to allow timing flexibility, many other federal courts have held that Rule 613(b) does not abolish the traditional common-law requirement of laying a foundation with the witness *prior to* the introduction of extrinsic evidence of a prior inconsistent statement.[17] In an unpublished opinion in *United States*

Phillips first testified during the case in chief or to confront [her] on cross-examination denied [her] the 'opportunity to explain or deny the same.' We addressed a similar claim in *United States v. McGuire,* where we noted that 'the prosecution should have confronted the [non-party] witness' with the alleged prior inconsistent statement on cross-examination, but we ultimately held that the district court's procedure was not reversible error because the defense could have recalled its witness as a surrebuttal witness. This is consistent with the advisory committee notes to Rule 613(b), which explain: 'The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time or sequence.'") (citations omitted); *Rush v. Illinois Cent. R. Co.*, 399 F.3d 705, 723 (6th Cir. 2005) (noting that "while it was advisable for the impeaching party to confront the witness with the purported inconsistency during cross-examination, a sufficient opportunity to explain or deny under Rule 613 existed where the impeached witness could be called on rebuttal.").

[15] 970 F.2d 948, 956 n.2 (1st Cir. 1992).

[16] *Id. See also United States v. Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987) ("while it would be wrong for a judge to say, 'In my court we apply the common law rule, not Rule 613(a),' he is entitled to conclude the older approach should be used in order to avoid confusing witnesses and jurors").

[17] The following cases are among those that retain the common-law rule: *United States v. DiNapoli*, 557 F.2d 962 (2d Cir. 1977); *United States v. Sutton*, 41 F.3d 1257 (8th Cir. 1994) (the trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while on the witness stand); *United States v. Schnapp*, 322 F.3d 564 (8th Cir. 2003) (no error in prohibiting the defendant from introducing an inconsistent statement from a prosecution witness because counsel did not ask the witness about the statement on cross-examination, and it was well within the judge's discretion not to permit deviation from the traditional procedure of first providing a witness an opportunity to explain or deny the statement);*United States v. Cutler*, 676 F.2d 1245 (9th Cir. 1982); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989) ("before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same"). There is even some intra-circuit conflict on this score. *Compare United States v. McCall*, 85 F.3d 1193, 1196–97 (6th Cir. 1996) (ability to call surrebuttal witness after extrinsic evidence sufficient) *with United States v. Johnson*, 837 F. App'x 373, 382 (6th Cir. 2020), *cert. denied*, 209 L. Ed. 2d 563 (Apr. 19, 2021) ("Because Johnson failed to question Stevenson about his statements to Cisneros, the district court did not err by cutting off this line of questioning."); *United States v. Lundergan*, No. 518CR00106GFVTMAS, 2019 WL 4061667, at *3 (E.D. Ky. Aug. 28, 2019)("It is well established law that before counsel can introduce evidence of a prior inconsistent statement, counsel must first lay a foundation for that impeachment."); *United States v. Beverly*, 369 F.3d 516, 542 (6th Cir. 2004)("Federal Rule of Evidence

v. Blackthorne, the Fifth Circuit explained: "In construing this Rule [613(b)], our court has held: 'Proof of [a prior inconsistent] statement may be elicited by extrinsic evidence *only* if the witness on cross-examination *denies* having made the statement.'"[18] In *United States v. Schnapp*, the Eighth Circuit also noted that "impeachment of a witness by a prior inconsistent statement is *normally* allowed only when the witness is first provided an opportunity to explain or deny the statement."[19] In *United States v. Hudson*, the First Circuit observed this trend toward insisting on a prior opportunity for the witness to explain or deny: "the Fifth, Ninth, and Tenth Circuits have upheld the refusal to admit proof through extrinsic evidence of prior inconsistent statements unless the witness has first been afforded the opportunity to deny or explain those statements."[20]

Thus, there is some conflict in the courts over the proper timing of a witness's opportunity to explain or deny a prior inconsistent statement. Some courts recognize the flexible timing authorized by Rule 613(b). Some permit a trial judge to impose the prior foundation requirement rejected by Rule 613(b) through Rule 611(a). Finally, some courts demand the traditional confrontation of the witness on cross-examination prior to the introduction of extrinsic evidence of a prior inconsistency.

III. *Amendment Alternatives for Rule 613(b)*

It would seem suboptimal to have a Federal Rule of Evidence that is expressly rejected by the many federal courts that impose the very timing requirement eliminated by Rule 613(b). Perpetuating such a disconnect between the Rules and practice undermines the efficacy and integrity of the Rules, creating a hidden practice not reflected in rule text. Indeed, having a rule that tells lawyers they may hold off on asking a witness about a prior inconsistency on cross and still hope to admit extrinsic evidence of it later creates a trap for the unwary. By the time the extrinsic evidence is proffered and the trial judge rules that the witness should have had an opportunity to explain or deny during cross, the moment is gone.

There are two competing amendments that could be proposed to deal with the conflict in the courts over Rule 613(b) (as well as the conflict between the language of Rule 613(b) and some federal decisions). One possibility would be to add language to the Rule clarifying the timing flexibility intended by the original drafters and rejecting the federal decisions that authorize trial judges to mandate a witness's opportunity to explain or deny a prior inconsistent statement on cross-examination prior to the proffer of extrinsic evidence. Alternatively, a proposed amendment might bring the *Rule* into alignment with the federal cases and impose a timing requirement (with

613(b) states that extrinsic evidence of a prior inconsistent statement by a witness is not admissible if the witness has not had an opportunity to explain the prior inconsistency.").

[18] 37 F. App'x 88 (5th Cir. 2002); *see also United States v. Greer,* 806 F.2d 556, 559 (5th Cir.1986).

[19] 322 F.3d 564 n.6 (8th Cir. 2003).

[20] 970 F.2d 948, 955 (1st Cir. 1992) (citing *United States v. Greer,* 806 F.2d 556, 559 (5th Cir.1986); *United States v. Cutler,* 676 F.2d 1245, 1249 (9th Cir.1982); *United States v. Bonnett,* 877 F.2d 1450, 1462 (10th Cir.1989)).

a discretionary escape valve) to require a witness to have an opportunity to explain or deny a prior inconsistent statement *before* extrinsic evidence of the statement may be offered. Although amendment proposals often take the former approach (seeking to correct misapplication of a provision by the courts), for the reasons discussed below, the latter approach that modifies Rule 613(b) to reflect the considered judgment of the majority of federal courts may be the superior alternative.[21]

The Committee could consider amending Rule 613(b) to expressly maintain flexible timing and to preserve an impeaching party's *right* to offer extrinsic evidence of a prior inconsistent statement before affording the witness an opportunity to explain or deny. On the merits, the more flexible foundation requirements established by the text of Rule 613(b) were a good faith attempt to deal with some legitimate problems. The common-law rule can itself be a trap for the unwary in some cases: (1) extrinsic evidence of a prior inconsistent statement might be excluded due to an inadvertent failure to lay a foundation at the time the witness testified, even though such an opportunity might be afforded thereafter; (2) problems are presented when inconsistent statements are first discovered only after the witness testifies; and (3) there is the danger under the common-law rule of prematurely alerting collusive witnesses to the evidence available for impeachment. Therefore, the Committee could consider an amendment to clarify and solidify the flexible timing requirement embodied in Rule 613(b) to retain the preference of the original drafters and to account for these potential concerns.

However, these potential problems could also be resolved by an amendment codifying the common-law requirement of an opportunity for the witness to explain or deny a prior inconsistent statement *prior* to the admission of extrinsic evidence, with the textual proviso that the trial court has discretion to dispense with the traditional foundation requirement when that is necessary in the interests of justice. If there were an inadvertent failure to lay a foundation with a still-available witness, the trial judge would possess the authority to dispense with the timing requirement. Similarly, a trial judge could forgive a failure to first lay a foundation with a testifying witness in circumstances where the statement did not come to light until after the witness's testimony. But the Rule would require a prior foundation in the usual case, giving parties clear direction in rule text as to the proper timing and methodology for prior inconsistent statement impeachment.

A baseline prior foundation requirement has its virtues. First, as a practical matter, in most cases of prior inconsistent statement impeachment, the foundation will be developed in the same manner as it is in the traditional common-law jurisdiction. That is because laying the foundation while the witness is on the stand testifying will usually prove to be the most efficient and safest way of proceeding. For one thing, presenting the statement to the witness may be needed to satisfy authentication concerns. And it may be risky to dispense with a prior foundation, because the

[21] The recent proposal to amend Rule 702, for example, seeks to bring practice into alignment with the Rule. Similarly, any amendment to Rule 1006 (as discussed in the Rule 1006 Agenda Memo) would also seek to bring practice into conformity with the intent of the Rule. Conversely, amending Rule 613(b) to add a timing restriction would bring the Rule into alignment with the cases. This wouldn't be an outlier. The 2010 amendment to 804(b)(3) changed the rule to come into line with the cases that required the government to provide corroborating circumstances. And the 2006 amendment to 606(b) codified the exception that several courts had found for clerical errors.

witness could become unavailable before extrinsic evidence of the statement is proffered. If that occurs, the admissibility of the extrinsic evidence is subject to the discretion of the court; and that discretion is rarely exercised in favor of a party who had a chance to confront the witness with the statement and did not do so.[22] This means that parties typically confront a witness with a prior inconsistent statement during cross-examination *before* offering extrinsic evidence of the statement under the existing Rule. So, an amendment to make the common and preferred manner of proceeding the required one would cause little disruption to existing practice.

The Eleventh Circuit noted the prudence of adhering to the common-law procedure as a practical matter in *Wammock v. Celotex Corp.*:

> Rule 613(b) does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction as the preferred method of proceeding. In fact, where the proponent of the testimony fails to do so, and the witness subsequently becomes unavailable, the proponent runs the risk that the court will properly exercise its discretion to not allow the admission of the prior statement. For this reason, most courts consider the touchstone of admissibility under rule 613(b) to be the continued availability of the witness for recall to explain the inconsistent statements.[23]

Further, requiring the witness to be confronted with a prior inconsistent statement before offering extrinsic evidence of the statement can avoid the cost and delay of providing extrinsic evidence at all where the witness, when confronted with the statement, admits having made it. As noted above, extrinsic evidence of a prior inconsistent statement is subject to Rule 403. When a witness admits having made a prior inconsistent statement, the probative value of extrinsic evidence of the very same statement may be substantially outweighed by concerns over wasting time and needlessly presenting cumulative evidence. Requiring prior cross-examination regarding a prior inconsistency as a baseline, therefore, has the virtue of conserving resources consumed by unnecessary extrinsic proof.

Requiring that a witness be confronted with a prior inconsistency before the admission of extrinsic evidence in the usual case also avoids a certain type of trial-by-ambush. Judge Selya, concurring in *United States v. Hudson*, has summarized the virtues of the common-law approach as follows:

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[22] *See, e.g., In re Nautilus Motor Tanker Co*., 862 F. Supp. 1251 (D.N.J. 1994) (inconsistent statements are not admissible where the plaintiff did not try to offer them until the end of the trial, and at that point there was no opportunity to recall the witnesses; the court chose not to exercise its discretion to dispense with the witness's explanation or denial); *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1523 (11th Cir. 1986)("Judge Weinstein suggests that the trial court's discretion to dispense with the witness's opportunity to explain away the contradiction should rarely be exercised. The one 'clear' situation to the contrary exists when 'the statement came to counsel's attention after the witness testified and the witness, through no fault of counsel is not available to be recalled.'") (citing 3 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 623[04], at 613–22 to –23 (1985)).

[23] 793 F.2d 1518, 1522 (11th Cir. 1986); *see also Rush v. Illinois Cent. R. Co.*, 399 F.3d 705, 723 (6th Cir. 2005) (noting that it is advisable for the impeaching party to confront the witness with the purported inconsistency during cross-examination even though a sufficient opportunity to explain or deny under Rule 613 still exists where the impeached witness can be called on rebuttal.).

> [The common-law rule] works to avoid unfair surprise, gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency, facilitates judges' efforts to conduct trials in an orderly manner, and conserves scarce judicial resources. At the same time, insistence upon a prior foundational requirement, subject, of course, to relaxation in the presider's discretion if the interests of justice otherwise require, does not impose an undue burden on the proponent of the evidence.[24]

Therefore, an amendment that accedes to the judgment of federal district court judges trying cases regularly may be the optimal solution.

This textual solution would also create symmetry between Rule 613(b) and the scope of direct rule found in Rule 611(b). The common law contained similar rigidity with respect to the proper scope of cross-examination, requiring that it remain within the subject matter of the direct examination.[25] When Rule 611 was originally drafted, rulemakers considered dispensing with that common-law limitation in favor of wide-open, flexible cross-examination. This proposal generated a great deal of controversy, with trial lawyers concerned over ceding their order of proof to opponents who could take up any subject with a witness during cross-examination.[26] Rule 611(b) ultimately retained the common law scope of direct limitation, while affording the trial judge discretion to "allow inquiry into additional matters as if on direct examination."[27] With this provision, parties can depend upon the common-law scope of direct limitation in the usual case with flexibility afforded in appropriate cases. The drafters' decision to ultimately retain the common law limitation with a discretionary escape clause has worked well in operation. There is no tension between Rule 611(b) and practice apparent in the federal cases.[28] Amending Rule 613(b) to require a prior foundation in the usual case, with retained trial judge discretion to dispense with that foundation in appropriate circumstances, would bring Rule 611(b) and Rule 613(b) into alignment with both Rules reflecting similar philosophies.

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[24] 970 F.2d 948, 959 (1st Cir. 1992).

[25] *See* House Judiciary Committee Report on Rule 611 (noting that the scope of direct limitation "prevail[ed] in the federal courts and thirty-nine State jurisdictions" prior to enactment of the Federal Rules).

[26] *See* Friedman & Deahl, *Federal Rules of Evidence: Text and History*, p. 249 (2015) ("The Reporter's First Draft stated a wide-open rule. The Second Draft chose the standard that still applies: cross is limited to the subject matter of direct examination and matters affecting credibility, but the court has discretion to allow the opposing party to examine on other matters as if on direct. The Revised Draft then articulated an approach that was presumptively wide-open, but leaving the court discretion to confine the scope of cross. The House reverted to the formula introduced by the Reporter's Second Draft, and so the subsection was enacted.").

[27] Fed. R. Evid. 611(b).

[28] *See, e.g.*, *United States v. Jeri*, 869 F.3d 1247, 1262 (11th Cir. 2017) ("The trial court has broad discretion under [Federal Rule of Evidence] 611(b) to determine the permissible scope of cross-examination and will not be reversed except for clear abuse of that discretion.").

IV. *Draft Amendment Options*

Two draft amendments follow for the Committee's consideration. The first draft would revert to the common law timing requirement with discretion built in for the trial judge to forgive a failure to lay a prior foundation in appropriate cases. As noted above, this option would seem to be the superior one because it would address all of the problems created by needless delays in confronting the witness with a prior inconsistent statement, while affording continued flexibility in cases where such a delay is truly justified. The second draft takes the opposite tack and endeavors to clarify and shore up the timing flexibility inherent in existing Rule 613(b).

Draft One: Requiring a Prior Opportunity to Explain or Deny With Trial Judge Discretion to Forgive a Failure to Lay a Prior Foundation

Rule 611

(b) Extrinsic Evidence of a Prior Inconsistent Statement.

Extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ should not be admitted unless the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it before it is introduced, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Draft Committee Note

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *prior* to the introduction of extrinsic evidence of the statement [in the typical case]. The original rule imposed no timing preference or sequence and permitted an impeaching party to introduce extrinsic evidence of a witness's prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness's availability to be recalled, and raises disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny.

Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. Of course, the amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether in the interests of justice.

Draft Two: Maintaining Existing Flexibility as to Timing of a Witness's Opportunity to Explain or Deny a Prior Inconsistent Statement

Rule 611

(b) Extrinsic Evidence of a Prior Inconsistent Statement.

Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it at some point before or after admission of the extrinsic evidence, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Draft Committee Note

Rule 613(b) has been amended to emphasize that the Rule dispenses with the common law requirement that a witness be afforded an opportunity to explain or deny a prior inconsistency before extrinsic evidence of the statement can be introduced. As the amendment provides, a witness may be given the requisite opportunity to explain or deny a prior inconsistent statement before *or after* extrinsic evidence of the statement is offered. Many federal courts decline to allow extrinsic evidence of a prior inconsistent statement whenever the impeaching party fails to ask the witness about it on cross-examination, without considering whether an opportunity to explain or deny may still be had. This amendment rejects such a per se prior foundation requirement for the admission of extrinsic evidence of a prior inconsistent statement. If a witness may be afforded an opportunity to explain or deny a prior inconsistent statement by being recalled to the stand, extrinsic evidence should be allowed, subject to Rule 403. The amendment retains the trial

judge's discretion to dispense with a witness's opportunity to explain or deny a prior inconsistency altogether when the interests of justice so require.