ADVISORY COMMITTEE
ON
EVIDENCE RULES

May 6, 2022

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

May 6, 2022

I. Committee Meeting --- Opening Business

Opening business includes:

- Approval of the minutes of the Fall, 2021 meeting.
- Report on the January, 2022 meeting of the Standing Committee.
- Welcome to new member, Federal Public Defender Rene Valladares.

II. Amendment to Rule 106

The Committee's proposed amendment to Rule 106 was released for public comment. At this meeting the Committee must vote on whether to give final approval to the amendment and recommend to the Standing Committee that it refer the amendment to the Judicial Conference. The Reporter's memorandum on the amendment, including consideration of possible changes due to public comment, is behind Tab II.

III. Amendment to Rule 615

The Committee's proposed amendment to Rule 615 was released for public comment. At this meeting the Committee must vote on whether to give final approval to the amendment and recommend to the Standing Committee that it refer the amendment to the Judicial Conference. The Reporter's memorandum on the amendment, including consideration of possible changes due to public comment, is behind Tab III.

IV. Amendment to Rule 702

The Committee's proposed amendment to Rule 702 was released for public comment, and many comments were received. At this meeting the Committee must vote on whether to give final approval to the amendment and recommend to the Standing Committee that it refer the amendment to the Judicial Conference. The Reporter's memorandum on the amendment, including consideration of possible changes due to public comment, is behind Tab IV.

V. 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 gave tentative approval to 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.

At this meeting the Committee must determine whether to approve these amendments for release for public comment.

The memoranda are behind Tab V.

VI. 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 tentatively approved a proposed amendment that would add a new subdivision to Rule 611, imposing safeguards to be employed when the court decides that jurors will be allowed to ask questions of witnesses. At this meeting, the Committee must determine whether to approve the proposed amendment for release for public comment. The Reporter's memo, behind Tab VI, discusses the possible safeguards, and sets the proposed amendment and Committee Note.

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

At the last meeting the Committee tentatively approved 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. At this meeting, the Committee must decide whether to approve the proposed amendment for release for public comment. The Reporter's memo, analyzing the policy behind the proposal and setting forth the proposed amendment and Committee Note, is behind Tab VII.

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

The Committee has tentatively approved a proposed 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. At this meeting, the Committee must decide whether to approve the proposed amendment for release for public comment. A memorandum prepared by Professor Richter, discussing the split in the courts and providing draft language for an amendment and Committee Note, is behind Tab VIII.

IX. Possible Amendment to Rule 613(b)

At the last meeting, the Committee tentatively approved a proposed amendment to Rule 613(b), which would generally require a party impeaching with extrinsic evidence of a prior inconsistent statement to provide the witness an opportunity to explain or deny the statement before the extrinsic evidence may be admitted. A memorandum prepared by Professor Richter, analyzing the split and providing draft language for an amendment and Committee Note, is behind Tab IX. At this meeting, the Committee must decide whether to approve the proposed amendment for release for public comment.

TAB 1

TAB 1A

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter
Honorable Dennis R. Dow United States Bankruptcy Court Kansas City, MO	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC
	Associate Reporter
	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robert M. Dow, Jr. United States District Court Chicago, IL	Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI
	Associate Reporter
	Professor Richard L. Marcus University of California Hastings College of Law San Francisco, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable Raymond M. Kethledge United States Court of Appeals Ann Arbor, MI	Professor Sara Sun Beale Duke University School of Law Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

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

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	Rene L. Valladares, Esq. Office of the Federal Public Defender Las Vegas, NV

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
Patrick J. Schiltz	D	Minnesota	Member: Chair:	2020 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
Rene L. Valladares	FPD	Nevada		2022	2024
Daniel J. Capra Reporter	ACAD	New York		1996	Open

Principal Staff: Bridget Healy 202-502-1820

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* 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	Hon. Robert J. Conrad, Jr. (*Criminal*) Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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(Civil)

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(Standing)

TAB 1B

Advisory Committee on Evidence Rules
Minutes of the Meeting of November 5, 2021
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 5, 2021 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Committee were present:
Hon. Patrick J. Schiltz, Chair
Hon. James P. Bassett
Hon. Shelly Dick
Hon. Thomas D. Schroeder
Hon. Richard J. Sullivan
Traci L. Lovitt, Esq.
Arun Subramanian, Esq.
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. Robert J. Conrad, Jr., 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 J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Bridget M. Healy, Counsel, Rules Committee Staff
Shelly Cox, Administrative Analyst, Rules Committee
Brittany Bunting, Rules Committee Staff
Burton DeWitt, Rules Clerk

Present Via Microsoft Teams
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Roslynn R. Mauskopf, Director Administrative Office of the Courts
Timothy Lau, Esq., Federal Judicial Center
Reshmina William, Federal Judicial Center
Andrew Goldsmith, Esq., Department of Justice
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
John G. McCarthy, Esq., Federal Bar Association
Susan Steinman, Senior Director of Policy & Sr. Counsel American Association for Justice

Lee Mickus, Esq., Evans Fears & Schuttert LLP
Andrea B. Looney, Executive Director Lawyers for Civil Justice
Mark Cohen, Esq., Cohen & Gresser LLP
John Hawkinson, Freelance Journalist
Angela Olalde, Chair, Texas Committee on the Administration of the Rules of Evidence
Christine Zinner, AAJ
Johnathan Stone, Assistant Attorney General, Texas AG
Joshua B. Nettinga, Lt. Colonel, Judge Advocate General's Group
Madison Alder, Bloomberg Law
Mike Scarcella, Reuters Legal Affairs
Nate Raymond, Reuters Legal Affairs

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting, noting that it was the first in-person meeting in two years. He thanked everyone in the judiciary and at the AO who spent countless hours preparing for the in-person gathering. The Chair asked that all in-person participants keep their masks on throughout the meeting.

The Chair welcomed Judge Conrad who will serve as the liaison from the Criminal Rules Committee. He also noted that Kathy Nester, the former representative from the Federal Defender's Office, had left the Committee and that a replacement would be made for the Committee's spring meeting.

The Chair reported on the June, 2021 Standing Committee meeting, reminding the Committee that it had sought approval to publish proposed amendments to Federal Rules of Evidence 106, 615, and 702. The Chair informed the Committee that all three proposals were unanimously approved by the Standing Committee. He explained that the Committee received no comments on the proposed amendment to Rule 702, but did receive praise for the proposal from the Standing Committee. He noted that there was a bit more discussion of the proposals to amend Rules 106 and 615, and that the Reporter would provide specifics during the discussion of those Rules. He noted that there was unanimous support for both proposals.

The Chair also informed the Committee that it was time for the Committee's self-evaluation that is completed every five years. He explained that he and the Reporter had already filled out a self-evaluation questionnaire for the Evidence Advisory Committee and that drafts had been provided to all Committee members. He asked that each Committee member look over the evaluation and offer feedback, if any, at the conclusion of the meeting.

Finally, Burton DeWitt informed the Committee that the "Justice in Forensic Algorithms Act of 2021" was a piece of pending legislation that could affect the Federal Rules of Evidence. He explained that the bill remained in the legislative committee process and that the Committee would be kept updated concerning its progress.

Approval of Minutes

A motion was made to approve the minutes of the April 30, 2021 Advisory Committee meeting that was held via Microsoft Teams. The motion was seconded and approved by the full Committee.

II. Rules 106, 615 and 702 Published for Comment

The Reporter opened a discussion of the three Rules out for public comment, explaining that the Committee would wait to vote on any changes to the proposed Rules until its spring meeting, following the close of the public comment period.

A. Rule 106

The Reporter reminded the Committee that a proposed amendment to Rule 106 would allow a completing statement to be admitted over a hearsay objection and would expand the Rule to cover unrecorded, oral statements. He explained that at the Standing Committee meeting, Judge Bates had questioned the inclusion of one sentence in the proposed Advisory Committee note, expressing concern that it might be too broad. The sentence provides that "The amendment, as a matter of convenience, covers these questions [of completion] under one rule." The Reporter acknowledged that the sentence might be too broad because Rule 410 and 502 also include completion concepts. Furthermore, he explained that the sentence was unnecessary to explain the proposed amendment. Accordingly, the Reporter recommended deletion of that sentence from the Advisory Committee note and Committee members tentatively agreed.

The Reporter next noted that the proposed amendment to Rule 106 uses the modifiers "written or oral" to describe the statements that may be completed. He reminded the Committee that Judge Schroeder had suggested earlier in the process dropping those modifiers from rule text so that amended Rule 106 would simply cover *all statements*, in whatever form. Because Rule 106 is currently limited to written or recorded statements, the Committee was concerned that lawyers might not recognize that oral statements had been added by the amendment if the amendment language removed all modifiers and failed to signal the addition of oral statements expressly in rule text. But the Reporter noted that including the modifiers "written or oral" could exclude completion of statements made purely through assertive non-verbal conduct (like nodding the head or holding up fingers to communicate a number). Although the completion of such a non-verbal statement would be rare, the Reporter opined that an amended Rule 106 should cover all statements. He explained that this could be done by removing the modifiers from rule text and modifying the Committee note. One Committee member expressed support for this idea, noting that hearing-impaired witnesses make statements via American Sign Language, which could be subject to completion. Judge Bates noted that the Committee would need to determine whether any changes to any of the proposed amendments would require that the Committee send the amendment out for a new round of public comment. The Chair noted that the changes being discussed were not substantive, but that the Committee would keep in mind the possible need to resubmit changes amendments at its spring meeting. The Chair also expressed support for modifying the Committee note with a brief reference to the possibility of assertive conduct, stating that a full sentence devoted to such a rare possibility did not seem necessary.

The Reporter next noted that the proposed Committee Note to Rule 106 contained a number of case citations, which led to a short discussion at the Standing Committee meeting regarding the use of case citations in Committee Notes. He explained that there has been a longstanding debate about the practice, but the Standing Committee has never formally discussed or ruled upon the practice. As to the Rule 106 Note, the Reporter provided a justification for each case citation as part of the agenda materials. He noted that the original Advisory Committee notes were rife with case citations to help lawyers and judges understand the Rules, and invited a discussion of the practice. The Chair opined that case citations shouldn't be banned in Committee notes by any means, but that each citation should be examined to ensure it wouldn't cause trouble if, for example, the case cited was overturned. He suggested that citing a case as an *example* of how a rule should operate would be helpful and run no overruling risk. One Committee member agreed that case citations could be very helpful in certain contexts. Judge Bates asked Professor Coquillette his view. Professor Coquillette agreed with the Reporter's discussion of case citations in the agenda materials, opining that case citations should not be banned and can be helpful when they serve as an example. He noted that Professor Struve had done some research on the use of case citations in Committee notes. Professor Struve explained that she had studied the incidence of case citations in the Federal Rules of Civil Procedure, noting that her research revealed that case citations were frequent in the original notes to the Civil Rules, but that they had declined significantly in recent years.

B. Rule 615

The Reporter reminded the Committee that the proposed amendment to Rule 615 provides that a court's order of exclusion operates only to exclude witnesses physically from the courtroom, but also authorizes the court to enter additional orders prohibiting witnesses from being provided or accessing testimony from outside the courtroom. He informed the Committee that the Standing Committee discussed this proposal at length, offering three comments or questions. First, the Standing Committee queried whether an additional order extending protection beyond the courtroom would have to be in writing. The Reporter noted that courts routinely issue sequestration orders orally on the record and that there would seem to be no good reason for requiring a written order for exclusion --- and therefore it might be odd to require that the order extending outside the courtroom must be written. He further noted that there was no other "written order" requirement in the Rules and that even Rule 502(d) orders are not required to be in writing (though they usually are). One Committee member noted that such orders are directed to third party witnesses who may not be in the courtroom when they are entered. He queried whether a written order was necessary to satisfy the notice and due process rights of those third-party witnesses. The Reporter explained that it would be the obligation of counsel calling the witnesses to notify them of the order and that a writing was not necessary to that process. He also pointed out that it may well happen that most orders will be issued in writing, but requiring that in a rule is a different matter. The Chair further explained that sequestration orders are often entered during a pre-trial conference or from the bench on the first day of trial when the judge and parties are very busy with a million details. He opined that a trial judge should be free to enter a written order but should not be required to. The Reporter suggested that the Committee could await public comment in February to see whether there was any concern about a writing requirement.

The second question raised by the Standing Committee was whether the rule or note should list criteria to be used to determine whether sequestration protection should be extended outside the courtroom. The Reporter explained that such criteria would be difficult to identify and might be underinclusive. He suggested that the better approach might be to leave it to the discretion of the trial judge to decide which factors in a particular case warranted such extra-tribunal protections. No Committee members suggested that criteria should be added to the rule.

The third and final question raised by the Standing Committee was whether the proposed amendment required a trial judge to enter two *separate* orders – one excluding witnesses from the courtroom and a second preventing access to testimony outside the courtroom. The Reporter opined that there was absolutely no reason for a judge to have to enter separate orders and that the amendment is not intended to propose such a requirement, but he queried whether the rule text was clear on that point. He noted that a sentence could be added to the Committee note to clarify that one order could do both. Committee members agreed that one order was sufficient and all thought that the existing text was clear on that point. Committee members also rejected the idea of adding a sentence to the Committee note concerning the number of orders necessary for fear that it would cause needless confusion.

C. Rule 702

The Reporter informed the Committee that some comments had been received on the proposed amendment to Rule 702, including one concerning misapplication of the current rule in the Tenth Circuit, and another with a case digest of numerous recent Rule 702 opinions that were allegedly incorrect. One concrete suggestion from the public comment received thus far was to reinsert "the court determines" into the preponderance standard provided in the text of the amendment. The reference to the "court" making "findings" was removed by the Committee prior to publication of the proposed amendment due to concerns that courts might think they need to make Rule 702 "findings" even in the absence of any objection to expert opinion testimony. But the Reporter pointed out that the problem justifying the proposed amendment is that some courts let juries decide questions of sufficiency of basis and reliable application that are for the *court*. He explained that expressly noting that it is *the court* and not *the jury* that makes these crucial preliminary findings could be important in serving the goal of the amendment. The Reporter suggested that the Rule could provide that the "court determines" instead of "finds" to assuage concerns about the need for findings in the absence of objection.

Some Committee members explained that they would *not* favor reinserting the term "court finds" or "court determines" into the proposed amendment. These Committee members noted that the issue had already been discussed and decided by the Committee and that the concern about findings even in the absence of objection was a valid one.

The Reporter next described commentary seeking to have note language "rejecting" federal cases holding that questions of sufficiency of basis and reliability of application are matters of weight for the jury re-inserted. Such language was deleted from the Committee note before it was published. The Reporter opined that the amendment does "reject" the cases that give such Rule 702 questions to the jury and that it might make sense to reinsert that language into the Committee note. He noted that the Fourth Circuit recently relied upon the proposed amendment and

specifically quoted the language about rejecting incorrect case law on Rule 702. One Committee member stated a preference for adding the "and are rejected" language back into the note. But another member thought the language was unnecessary. Committee members agreed that the language about rejection could be reevaluated in light of the public commentary that will be received.

Finally, the Reporter explained that some commenters also wanted three particular federal cases singled out in the note as improper applications of Rule 702. The Reporter and the Committee members were not inclined to call out particular federal cases, noting that some portions of the cases, and the results in those cases, were not necessarily incorrect.

III. Rule 407

The Reporter reminded the Committee that there are two splits of authority in the federal courts concerning Rule 407, the rule governing subsequent remedial measures. First, some federal courts prohibit evidence of a subsequent measure that would have made the plaintiff's injury less likely, even if the defendant's decision to implement that measure had nothing to do with the plaintiff's injury. For example, these courts might exclude measures that were implemented by the defendant just hours after the plaintiff was injured and before the defendant had even learned of that injury. Other courts require some causative connection between a plaintiff's injury and a subsequent remedial measure in order to further the policy of the Rule to encourage safety measures that might not otherwise be taken for fear of liability to the plaintiff. Second, some federal courts have extended Rule 407 protection to contracts cases when a subsequent change in a contract provision is offered to show the meaning of a predecessor provision. Other courts find Rule 407 wholly inapplicable in contracts disputes.

The question for the Committee is whether to proceed with an amendment proposal that would address these splits of authority. The Reporter suggested that there might be little reason to amend Rule 407 if the Committee were not inclined to impose a causative connection limitation. Broadening an exclusionary rule beyond its policy justification would seem ill-advised. The Chair explained that he thought the agenda materials were high quality and very thorough and that he was interested in many of the proposals on the agenda, but that a Rule 407 amendment was one he was not inclined to pursue. He noted that the policy rationale for the existing Rule was weak and that he would be open to abolishing the Rule, but not to amending it to require more work for judges and lawyers in applying it. The Chair detailed the extensive work involved for a trial judge if a causative connection between a plaintiff's injury and a subsequent measure were to be required, explaining that the judge would need to determine the subjective intent of a corporation in making a change. He noted that there could be dozens of engineers involved in making a single change at different times and that there could be a bundle of changes adopted at once. The Chair cautioned against adding a limitation to Rule 407 that would require three-day minitrials to administer. One Committee member expressed an interest in learning more about the legislative history behind Rule 407 and about whether Congress intended that there be a causation requirement.

Ms. Shapiro also noted that a Rule 407 amendment proposal was the only one in the agenda that drew a strong negative reaction from the Justice Department. She explained that lawyers don't want to expend the significant resources necessary to litigate causation. Furthermore, she

explained that already costly discovery obligations could be multiplied by inserting a causation requirement into Rule 407. Another Committee member noted that questions about the rationale for a particular change and its connection to an injury are often reflected in materials protected by the attorney-client privilege. This would add costly privilege review to the price tag of an amendment requiring a causative connection.

The Reporter inquired whether an amendment proposal addressing the contracts question alone was worth it if the Committee was not inclined to pursue a causative connection amendment. One Committee member opined that it would be simple to restrict Rule 407 protection to torts or criminal cases and to eliminate its use in contract actions. Professor Struve explained that eliminating contract actions could prove problematic given that breach of warranty theories may be used in product liability actions that *are* covered by Rule 407. Another Committee member opined that it would be very difficult to craft language that would preserve protection in breach of warranty, products-type cases, while excluding the contract actions that should not be covered. That Committee member suggested it was not worth it to try to micromanage Rule 407, recommending that the Committee should leave Rule 407 as is or abolish it and allow judges to regulate such evidence through Rules 401 and 403. Multiple Committee members disapproved of abolishing Rule 407, noting that it was a longstanding rule that was of significance to the Bar and that abolition would cause significant disruption. Another Committee member noted that abolition of Rule 407 could have an impact on removal to federal court in cases where the state evidence counterpart to Rule 407 remained. The Reporter noted that the Committee had proposed abolition of the Ancient Documents hearsay exception in 2015 and that the abolition proposal created a firestorm, including letters from Senators in opposition.

The Chair then asked the Committee members to support one of three options for Rule 407: 1) leaving Rule 407 alone; 2) pursuing narrow amendments to deal with splits of authority; or 3) pursuing abolition of Rule 407. All Committee members voted against abolishing Rule 407. All, but one, voted to leave the Rule alone and to revisit Rule 407 in a few years to see how the caselaw developed. One Committee member favored a narrow amendment to reject the application of Rule 407 in breach of contract cases. The Chair observed that there was overwhelming support for leaving Rule 407 as it is and for abandoning any attempt to amend it. He noted that Rule 407 would be dropped from the agenda and could be revisited in future years if the Committee was inclined to revisit it.

IV. Rule 611(a) Illustrative Aids/Rule 1006 Summaries

The Reporter explained that the Committee was also considering whether to propose an amendment to Rule 611 akin to the Maine Evidence Rule that distinguishes illustrative aids used to assist the jury in understanding evidence or argument from demonstrative evidence offered as proof of a fact. He noted that an amendment could also provide requirements for the proper use of illustrative aids. The Reporter explained that some of the confusion surrounding illustrative aids was caused by courts conflating illustrative summaries authorized by Rule 611(a) with summaries offered pursuant to Rule 1006 to prove the content of writings, recordings, and photographs too voluminous to be conveniently examined in court. He explained that Professor Richter would present a companion proposal to amend Rule 1006 to alleviate the confusion in the courts.

A. Illustrative Aids and Rule 611

The Reporter directed the Committee's attention to a draft of a proposed amendment to Rule 611 governing illustrative aids on page 182 of the agenda materials. He noted that an open question in the draft was whether a proposed amendment should prohibit trial judges from sending illustrative aids to the jury room in the absence of consent by both parties, or whether an amendment should give trial judges discretion to send illustrative aids to the jury room for good cause in the absence of consent.

The Chair explained that illustrative aids are used in every trial, that issues surrounding their use come up regularly, and that trial judges really crave clarity about the proper approach to illustrative aids. He queried whether Committee members thought that an amendment proposal concerning illustrative aids was worth pursuing. The Committee unanimously agreed that a proposal to amend Rule 611 to control and clarify the use of illustrative aids would be a worthwhile project.

The Chair then noted that the current draft amendment provided that "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…" He suggested that the use of an illustrative aid might be broader; it may help the jury understand other "evidence," some of which may be testimony, some of which may be documents or recordings or other exhibits. Another Committee member agreed that the draft language should be made broader, suggesting that it might read: "The court may allow a party to present an illustrative aid to assist the factfinder in understanding *evidence or argument*…" Another Committee member queried whether the language should be changed to "previously admitted evidence or argument." But in response to that argument other members noted that litigants often use illustrative aids during opening statements before *any evidence* has been admitted, so that the modifier "previously" would not work. Another Committee member suggested using the term "admissible evidence" to reflect that illustrative aids are not evidence and are only used to illustrate other evidence that is admitted. The Reporter agreed to redraft that language to make it broader along the lines suggested and noted that subsection (1) of the draft would also need to be modified to match any terminology change.

The Chair next noted that subsection (2) of the draft on page 182 of the agenda materials required that "all adverse parties" be notified in advance of the intended use of an illustrative aid. He explained that co-parties would not be considered "adverse" but should also be entitled to advance notice and recommended elimination of the modifier "adverse" from subsection (2). Another Committee member noted that some parties do not want to share their illustrative aids before they are shown at trial and that there might be objection to an advance notice requirement from some segments of the Bar. In response to that comment, several Committee members opined that advance notice is critical in order for the judge to make an informed ruling on an illustrative aid, and that if an improper or prejudicial illustrative aid is shown to the jury before opposing counsel has an opportunity to object, it is impossible to erase it from the jury's mind. Committee members suggested that mandating advance notice would be an important safeguard introduced by an amendment. The Chair agreed, explaining that most trial judges already require advance notice, such that an amendment would be reinforcing existing best practices. Judge Bates inquired whether the advance notice requirement would apply to illustrative aids used during opening

statements. The Chair replied that the advance notice requirement would apply to illustrative aids used during opening statements. He noted that the notice might come shortly before use of the aid, but that the aid would have to be disclosed to other parties prior to its publication to the jury.

The Reporter explained that there was a split of authority concerning whether a trial judge possesses the discretion to send an illustrative aid to the jury room or whether it is prohibited in the absence of consent by all parties. He inquired whether the Committee wished to consider a draft prohibiting transmission to the jury room without consent or one that allowed the judge to do so over objection for "good cause." The Chair suggested that it would be helpful to include the discretionary "good cause" option, at least for a public comment phase to see what input the Committee might receive about that issue. Ms. Shapiro agreed, noting that if an illustrative aid is helpful to the jury in open court, it might be helpful during deliberations. The Reporter noted that the Advisory Committee note should provide that a trial judge who elects to send an illustrative aid to the jury room should provide a limiting instruction informing the jury that such an aid is "not evidence." All Committee members agreed to retain the "good cause" option and the corresponding paragraph in the Committee note, with the addition of a comment about a limiting instruction. The paragraph in the draft Committee note prohibiting the trial judge from sending an illustrative aid to the jury without consent from all parties will be eliminated.

A Committee member called attention to the last paragraph in the draft Committee note regarding which party owns the illustrative aid and about preservation for the record upon request. The Committee member queried whether the proprietary comment was necessary and also opined that an illustrative aid should be preserved for the record even without a request. The Committee ultimately agreed to eliminate the proprietary language from the final paragraph and to include the following language: "Even though the illustrative aid is not evidence, it must be marked as an exhibit and be made part of the record." Committee members, in conclusion, expressed satisfaction about the possibility of an illustrative aid amendment, noting that it would offer really helpful guidance for the Bar. The Chair explained that the amendment proposal would be an action item at the spring meeting.

B. Rule 1006 Summaries

Professor Richter introduced Rule 1006, reminding the Committee that it provides an exception to the Best Evidence rule allowing a summary chart or calculation to prove the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. She explained that federal courts have frequently misapplied Rule 1006 due to confusion concerning the differences between a summary offered as an illustrative aid pursuant to Rule 611(a) and a true Rule 1006 summary. Professor Richter outlined the most common Rule 1006 missteps: 1) requiring limiting instructions cautioning the jury that Rule 1006 summaries are "not evidence" (when they are admissible alternative evidence of the content of the underlying voluminous records); 2) requiring all underlying voluminous materials to be admitted into evidence; 3) refusing to allow resort to a Rule 1006 summary if any underlying materials have been admitted into evidence; 4) allowing Rule 1006 summaries to include argument and inference not contained in the underlying materials; and 5) allowing testifying witnesses to convey oral summaries of evidence and argument not within Rule 1006 requirements. Professor Richter explained that the Committee could consider amendments to Rule 1006 that would address these problems and that

would clarify the distinction between Rule 611(a) illustrative summaries and Rule 1006 summaries. She noted that such an amendment could be a useful companion amendment to the illustrative aid project. Finally, Professor Richter noted that Rule 1006 uses the terminology "in court" in two places and that the Committee might consider modifying that terminology to accommodate the possibility of virtual trials post-pandemic if other amendments were proposed. She directed the Committee's attention to a draft amendment and Committee note on page 208 of the agenda materials.

The Chair first highlighted the draft language changing "in court" to "during court proceedings." He expressed concern that "during court proceedings" could be construed too broadly and recommended leaving the existing "in court" language and adding a sentence to the Committee note emphasizing that the Rule applies similarly in virtual proceedings. The Reporter agreed, noting that the same approach to application in virtual trials (including a reference to virtual trials in the Committee note) was taken in the proposed amendment to Rule 615. The Chair then inquired why the draft added the requirement that a summary be "accurate." Professor Richter explained that Rule 1006 summaries were permitted as substitute evidence of voluminous content and, as such, must accurately summarize that content. They may not draw inferences not in the original materials nor add argument. Still, some federal courts (again confusing Rule 611(a) summaries with Rule 1006 summaries) have allowed such argumentative content. The Chair suggested adding a sentence to the third paragraph of the note explaining that courts have mistakenly allowed argumentative material and that the amendment is designed to correct those holdings. Another Committee member expressed concern about an amendment requiring an "accurate" summary, suggesting that it might require a trial judge to vouch for one side's evidence. The Chair also thought that an accuracy requirement could cause mischief and suggested replacing "accurate" with "non-argumentative" in the rule text.

Another Committee member opined that subsections (b) and (c) of the draft amendment on page 208 of the agenda seemed unusual in that they told the judge what instructions *not to give* to the jury about a Rule 1006 summary and explained that illustrative summaries are *not admissible* through Rule 1006 (but must be admitted through Rule 611(a)). The Committee member expressed support for the draft amendment proposal on page 206 of the agenda materials that did not include such subsections in rule text, but made the same points via Committee note. The Chair agreed that he had the same concern about subsection (b), which would prohibit the judge from instructing the jury that the summary is not evidence. Another Committee member suggested that subsection (c) concerning the interaction between Rule 1006 and Rule 611(a) could go into the note if subsection (b) concerning jury instructions was eliminated. The Reporter responded that having subsections cross-referencing Rule 611(a) and cautioning trial judges not to give limiting instructions with Rule 1006 summaries was important to include in rule text due to the pervasive confusion in the caselaw. Professor Coquillette agreed, explaining that many lawyers do not read Committee notes and that if something is important to the operation of a rule, it should be included in rule text. Another Committee member suggested that if subsection (c) were to remain, it could be redrafted slightly to read: "An illustrative aid that summarizes evidence and argument is governed by Rule 611(d/e)."

Another Committee member also suggested adding the word "substantive" to the rule text in subsection (a) just before "evidence" such that the text would read "The proponent may offer as

substantive evidence." Judge Bates called attention to the fact that the draft amendment would require a "written" summary and inquired whether a definition of "written" to include electronic evidence was necessary. The Reporter noted that the definitions in Rule 101 would cover electronically-stored information, but suggested an addition to the Committee note to emphasize that point.

The Chair concluded the discussion by noting that an amendment to Rule 1006 would be an action item for the spring, 2022 meeting. He explained that the first sentence of subsection (a) would be altered to read: "The court may admit as substantive evidence a non-argumentative written summary……" Subsection (a) would retain the original "in court" language with a Committee note devoted to application in virtual trials. Subsection (b) from page 208 of the agenda materials would be eliminated, with the sentence about limiting instructions included in the Committee note. Subsection (c) would become subsection (b), but would be reworded: "An illustrative aid that summarizes evidence and argument is governed by Rule 611(d/e)." Finally, the Committee note would discuss the cases improperly allowing argumentative summaries, as well as the definition of "written" in Rule 101.

V. Jury Questions: Safeguards and Procedures

The Reporter explained that the practice of allowing jurors to ask questions of witnesses is a controversial one, but that the courts that do allow it impose many safeguards to protect against prejudice. The Committee turned its attention to a draft amendment that would add a new subdivision to Rule 611 to set forth safeguards that must be in place if a judge decides to let jurors pose questions to witnesses. The draft was on page 219 of the agenda book. The Reporter stated that the draft amendment to Rule 611 was designed to remain scrupulously neutral on whether courts should or should not allow juror questions. Still, he emphasized that the draft would collect all the procedures and safeguards scattered throughout the cases and provide trial judges inclined to allow the practice helpful guidance. He noted that the question for the Committee is whether such safeguards belong in the Evidence Rules and, if so, whether the draft captures the safeguards optimally.

One Committee member expressed support for adding the provision, noting that there are rules about lawyers asking questions and the court asking questions and that it would be helpful to address the issue of juror questions in the Rules, especially given the high potential for errors without such safeguards. Another Committee member agreed but opined that adding a provision on jury questions would undoubtedly lead to more judges allowing juror questions, notwithstanding an attempt to keep the rule neutral on that point. He queried whether the Committee was comfortable with that likely effect of adding such a provision. Another member noted that juror questions are used most often in civil cases when all parties consent. She suggested that the safeguards and procedures were helpful but might be better placed in a bench book. Another Committee member thought that judges were more likely to allow the practice of juror questions if a provision governing them were added to the Rules themselves. Ms. Shapiro agreed that juror question procedures and safeguards might be better left to a best practices pamphlet like the one prepared by the Committee on authenticating electronic evidence. But in response, the Reporter noted the distinction between authentication and juror questions --- the Rules already provide baseline provisions for authentication and the manual was designed to offer examples and

training beyond the Rules. Because there is currently *no* provision in the Rules governing jury questions, the Reporter opined that the jury question safeguards were distinct, and argued that an evidence rule would have much greater impact than a best practices manual. Professor Coquillette agreed with the Reporter, suggesting that it would be helpful to add the safeguards to the Rules themselves.

Because all Committee members were willing to move forward with a draft amendment, the Chair suggested looking at the draft on page 219 of the agenda book. The Chair suggested that subsection (d)(1)(B) of the draft should read: "a juror must not disclose a question's content," replacing "its" with "a question's" for clarity. He also proposed that subsection (C) read: "the court may rephrase or decline to ask a question." The Reporter suggested that subsection (d)(1)(D) would also need to be rephrased to read: "if a juror's question is rephrased or not asked, the juror should not draw negative inferences." The Chair also suggested tweaking section (d)(2)(A) to read: "review the question" instead of "review each question." He also noted that section (d)(2)(B) should also read "the question" instead of "a question" and that the reference to objections being made "outside the hearing of the jury" was not necessary because that limitation was included in the section (2) language that applies to (2)(B). The Chair also noted that section (d)(3) could be concluded after "court," such that it would read: "When the court determines that a juror's question may be asked, the question must be read to the witness by the court." The Reporter agreed with all these suggestions and will implement them in the draft amendment that the Committee reviews at the next meeting.

A Committee member inquired about the timing for juror questions, assuming that they would be asked after all lawyer questioning of the witness was concluded. She then queried what would happen if a judge rejected a juror question, but a lawyer then decided to ask it of the witness. All Committee members agreed that a lawyer would not be permitted to ask a juror question rejected by the trial judge, if the rejection was on the ground that the question was not permissible under the rules of evidence. Committee members suggested that something be added to the note to clarify that point. Other Committee members noted that a question that might be inappropriate of one witness could be proper for another and that rejection of a question for one witness should not necessarily preclude an attempt to ask the same question of another witness. All Committee members agreed that a judge might reject a question for a variety of reasons and that the note should so provide without attempting to micromanage judges' decisions regarding particular juror questions.

Judge Bates asked about the lawyers' right to reopen questioning of a witness after a juror question was asked. The Reporter explained that Rule 611 gives the trial judge the discretion to reopen questioning and that a provision regarding juror questions specifically would seem superfluous. Another Committee member noted that it would be a good idea to give lawyers a right to request an opportunity to reopen questioning following a juror question, explaining that there may not be a need for more questioning but that lawyers should be entitled to ask. The Chair suggested that the Committee note might include a sentence about allowing lawyers to request an opportunity to reopen questioning of a witness after a juror question is asked. Judge Bates noted that the draft Committee note was light on substance and did not explain the rationale for each of the safeguards in the Rule. Professor Coquillette suggested that it was good rulemaking practice to avoid simply repeating requirements set forth in rule text and that the brief note was helpful.

Another Committee member suggested that some guidance about the timing of juror questions at the conclusion of a witness's testimony in the note could be helpful. The Reporter also suggested that the note might be even more aggressive about not taking any position on the propriety of juror questions. Another Committee member asked whether the amendment should prohibit the court from revealing *which juror* asked a particular question. Other members suggested that it will often be obvious which juror asked a question because the juror will have handed the question to the court and that all will realize which juror asked it if it is permitted. Still, the Reporter suggested that a prohibition on actively revealing the identity of a juror whose question is asked could be added to the Committee note. The Reporter also recommended that the last sentence of the draft Committee note be slightly modified to read: "Courts are free to impose additional safeguards *or to provide additional instructions*, when necessary …" The Chair concluded the discussion by explaining that the amendment, with the changes discussed, will be an action item for the spring meeting.

VI. Party Opponent Statements Made by Predecessors in Interest

The Reporter directed the Committee's attention to Tab 6 of the agenda materials, explaining that federal courts have split concerning the admissibility of hearsay statements that would have been admissible against a party-opponent, after that party's interest is transferred to another party. He offered the example of statements made by a decedent that would have been admissible against him had he lived and filed suit, but that are instead offered against his estate who sues in his stead. The Reporter noted that some federal courts find the decedent's statement admissible against the estate because the estate stands in the shoes of the decedent for purposes of the lawsuit, while others reject admissibility based upon the absence of "privity" based admissibility language in Rule 801(d)(2). The Reporter explained that fairness concerns point toward admissibility of all statements made by such a predecessor prior to the transfer of his litigation interest. He directed the Committee's attention to a proposed amendment to Rule 801(d)(2) on page 236 of the agenda materials that would make such statements admissible against parties like the estate in the above example, as well as to a draft amendment on page 4 of the supplemental materials supplied to the Committee prior to the meeting.

The Chair first noted that the supplemental draft changed tense to read: "A statement that *is* admissible under this rule." He opined that the tense should be changed back so it would read: "A statement that *would be* admissible…" The Chair also noted the difficulty in characterizing the relationship between the declarant and the party justifying admissibility, explaining that terms like "privity" or "predecessor in interest" can be vague and can cause mischief in application. He expressed support for the functional terminology employed in the draft: "a party whose claim or defense is directly derived from the rights or obligations of the declarant or the declarant's principal." Professor Struve suggested that the language might be tweaked to say that a party's *liability* is derived form the declarant, rather than that its *defense*. The Reporter opined that defenses are also derived from predecessors and that the existing language accurately captures the intended relationship.

Professor Coquillette noted the importance of the timing of the declarant's hearsay statement; it must be made before the transfer of rights to the successor. (This will always be the case in a decedent/estate scenario but may not be in an assignor/assignee situation to which the

amendment would also apply). He inquired whether a timing limitation should be included in the text of an amended rule. The Reporter replied that such a limit was inherent in the provision and was also emphasized in the Committee note in the event that there was any confusion on that score.

The Chair asked Committee members whether they were in favor of proceeding with a proposed amendment to Rule 801(d)(2) to address the predecessor/successor scenario. All favored continuing work on the proposal. The Chair noted that the amendment would be an action item for the spring meeting with draft language reading: "A statement that would be admissible under this rule if the declarant or the declarant's principal were a party, 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." The Reporter noted that the proposal would be reviewed by stylists in advance of the spring meeting.

VII. Declarations Against Interest and the Meaning of "Corroborating Circumstances"

Professor Richter directed the Committee's attention to Tab 7 of the agenda and the issue of the meaning of the "corroborating circumstances" requirement in Rule 804(b)(3) governing declarations against penal interest in criminal cases. She explained that most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest, as well as independent evidence, if any, corroborating the accuracy of the statement in applying the corroborating circumstances requirement. That said, some courts do not permit inquiry into independent evidence and limit judges to consideration of the inherent guarantees of trustworthiness surrounding the statement. Professor Richter explained that, as detailed in the agenda memo, the Committee could consider an amendment to resolve this split of authority in favor of permitting both independent corroborative evidence and inherent guarantees of trustworthiness to be considered under Rule 804(b)(3). She emphasized that the limitation to inherent guarantees of trustworthiness was based on now defunct 6th Amendment precedent in *Idaho v. Wright;* that restricting what trial judges may consider in determining admissibility is at odds with Rule 104(a); and that the residual exception found in Rule 807 was amended in 2019 to permit consideration of corroborating evidence in determining the reliability of hearsay offered under that exception. Thus, an amendment bringing Rule 804(b)(3) and Rule 807 into line could be beneficial. She directed the Committee's attention to a draft amendment on page 249 of the agenda materials, that would require consideration of corroborating evidence, using language that parallels the amended residual exception.

The Chair inquired whether the Committee thought the meaning of "corroborating circumstances" under Rule 804(b)(3) was a problem worth solving. All agreed that it was. The Chair noted that an amendment to Rule 804(b)(3) would also be an action item for the spring meeting.

VIII. Rule 806 and Impeachment of Hearsay Declarants with Prior Dishonest Acts

The Reporter introduced the topic of Rule 806 and the impeachment of hearsay declarants, explaining that hearsay declarants act as witnesses when their statements are introduced for their truth. For this reason, Rule 806 allows the impeachment of hearsay declarants as if they were trial witnesses and seeks to equate hearsay declarant impeachment with traditional impeachment of

witnesses. Rule 806 specifically addresses foundation requirements for impeachment with prior inconsistent statements, providing that a hearsay declarant need not receive an opportunity to explain or deny an inconsistency uttered either before or after the admitted hearsay statement. Rule 806 makes no express provision for Rule 608(b) impeachment, however, in which a trial witness may be asked on cross-examination about her own prior dishonest acts. Rule 608(b) allows a cross-examiner to ask the witness about dishonest past acts, but requires the impeaching party to take the answer of the witness; it prohibits extrinsic evidence proving the dishonest act even in the face of a denial by the witness. A hearsay declarant whose statement is offered into evidence may not be a trial witness at all. If the declarant is not a trial witness, she cannot be asked on cross-examination about her prior dishonest acts, leaving the availability of impeachment through prior dishonest acts in question. The Reporter explained that federal courts have resolved this conundrum differently, with some allowing extrinsic evidence of a hearsay declarant's prior dishonest acts notwithstanding the extrinsic evidence prohibition in Rule 608(b). Others have refused to allow impeachment of hearsay declarants with prior dishonest acts, thus enforcing the Rule 608(b) prohibition on extrinsic evidence and eliminating this method of impeachment for hearsay declarants. The question for the Committee is whether to explore an amendment to Rule 806 to address how to impeach a hearsay declarant with her prior dishonest act.

The Reporter acknowledged difficulty in crafting a solution to this problem, however. He noted that if extrinsic proof of a hearsay declarant's prior dishonest act were permitted, a party impeaching a hearsay declarant would be in a *better position* than a party impeaching a trial witness, instead of in the equal position contemplated by Rule 806. He explained that he had thought of allowing the trial judge simply to "announce" a hearsay declarant's prior dishonest act to try to equate the procedure with a cross question of a witness, but that this was not necessarily a replication of what happens with a trial witness. He noted that the original Advisory Committee may not have provided a procedure for Rule 608(b) impeachment of a hearsay declarant in Rule 806 because of the impossibility of translating the method to absent hearsay declarants. Finally, the Reporter explained that he had discovered another issue with Rule 806 in his research – the possibility that a criminal defendant's conviction could be offered to impeach his admitted hearsay statement through a combination of Rules 609 and 806 even if the defendant chose not to testify. The Reporter noted that this scenario arises very infrequently when the hearsay statement of one co-defendant can be offered against another defendant. In such a case, the confrontation rights of one criminal defendant must be balanced against the other defendant's right not to testify. Given the difficult balancing required and the infrequency with which this scenario arises, the Reporter suggested that the Committee might leave this issue out of an amendment, and to leave the solution to trial judges balancing the competing interests on a case-by-case basis.

The Chair opened the discussion by expressing his preference for leaving Rule 806 alone. He opposed allowing proof of dishonest acts through extrinsic evidence, as that would put the impeaching party in a superior position not an equal one. He also noted efficiency concerns given that allowing extrinsic evidence could open up the need for mini-trials to allow the proponent of the hearsay declarant's statement to disprove the dishonest act. In fact, this was the reason for the ban on extrinsic evidence in Rule 608(b). All Committee members agreed that it was best not to pursue an amendment to Rule 806, and the matter was dropped from the Committee's agenda.

IX. Rule 613(b) and the Timing of a Witness's Opportunity to Explain or Deny a Prior Inconsistency When Extrinsic Evidence is Offered

Professor Richter introduced Rule 613(b) regarding extrinsic evidence of a witness's prior inconsistent statement. She reminded the Committee that Rule 613(b) permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. Although that opportunity had to be offered on cross-examination of the witness *before* extrinsic evidence could be presented at common law, the drafters of Rule 613(b) decided to abandon a *prior* foundation requirement in favor of flexible timing. Rule 613(b) permits a witness's opportunity to explain or deny a prior inconsistent statement to happen before *or even after* extrinsic evidence is admitted. Professor Richter explained that the original Advisory Committee chose to keep the timing flexible in case a prior inconsistent statement was discovered only after a witness had left the stand or in case there were multiple collusive witnesses a party wanted to examine before revealing the prior inconsistent statement of one. She noted, however, that presenting extrinsic evidence of a witness's prior inconsistent statement *before* giving him an opportunity to explain or deny it may cause problems if the witness has been excused or has become unavailable. For these reasons, many federal courts reject the flexible timing afforded by Rule 613(b) and *require* that a witness be given an opportunity to explain or deny *first* during cross-examination before extrinsic evidence of the statement may be offered.

Professor Richter noted that having a disconnect between the Rules and practice can be problematic and can be a trap for the unwary litigator who correctly reads Rule 613(b) to reject a prior foundation requirement only to learn – too late after cross of the witness is over – that the trial judge imposes her own prior foundation requirement outside the Rule. Professor Richter explained that there are two amendment possibilities to remedy this situation. The first would emphasize the flexible timing allowed by Rule 613(b) to bring *courts* into alignment with the Rule. The other would reinstate the prior foundation requirement, while affording discretion for the trial judge to forgive it in appropriate cases, thus bringing the *Rule* into alignment with the courts. Professor Richter suggested that the latter approach would appear optimal for several reasons. First, Rule 613(b) would clearly direct lawyers to give witnesses an opportunity to explain or deny a prior inconsistency on cross *before* offering extrinsic evidence, eliminating any trap for the unwary. Second, a prior foundation requirement would be efficient: if a witness admits a prior inconsistent statement on cross, there may be no need to introduce extrinsic evidence of the statement at all. Third, a prior foundation eliminates pesky issues concerning a witness's availability to be recalled only to explain or deny a prior inconsistent statement. Finally, preserving a trial judge's discretion to forgive the prior foundation requirement would still allow judges to deal with the rare situations identified by the original Advisory Committee. If the prior inconsistent statement was not discovered until after a witness left the stand, a court could allow extrinsic evidence and a later (or no) opportunity for the witness to explain. Professor Richter directed the Committee's attention to a draft amendment on page 283 of the agenda materials along these lines.

The Chair opened the discussion of Rule 613(b) by inquiring of other judges how they handle prior inconsistent statements. The Chair noted that he makes lawyers ask witnesses about their prior inconsistent statements on cross-examination because 90% of the time, witnesses admit their prior inconsistencies, eliminating any need for extrinsic evidence. All judges at the meeting

agreed that their practice was consistent with the Chair's and that requiring a prior foundation was a superior procedure. All Committee members also agreed that the better Rule 613(b) amendment would be to bring the Rule into alignment with the pervasive practice.

The Chair then stated that the draft amendment language provided that extrinsic evidence "should not" be admitted but that it should read "may not." Other Committee members agreed that "may not" would be superior so long as the Rule preserved trial judge discretion by stating "unless the court orders otherwise." The Reporter suggested that the discretionary language from the original provision that allows deviation "if justice so requires" could be clarified and improved by simply stating "unless the court orders otherwise." The Chair agreed and noted that the draft language reading "before it is introduced" should be changed to "before extrinsic evidence is introduced" to add clarity. The Chair also suggested that bracketed language in the draft Committee note – "[in the typical case]" – should be eliminated with the change to "may not" in rule text. The Chair closed the discussion of Rule 613(b) by informing the Committee that they would see the Rule as an action item at the spring meeting.

X. Closing Matters

The Chair raised the issue of the Evidence Advisory Committee's self-evaluation and solicited feedback from the Committee. Judge Bates noted that the self-evaluation suggested that the Committee was "too small" and inquired how big it should be. Both the Chair and the Reporter explained that the Committee is a good size and that they are not in favor of growing it, but that the Evidence Advisory Committee has had a position for an academic member vacant for twenty years. Both the Chair and Reporter advocated for adding one academic member to fill that position. With that addition, both felt that the Committee would be the perfect size. Both also commented on the valuable contributions received from the liaisons from other committees, that helps produce outstanding work product. The Chair promised to send the self-evaluation to the Standing Committee.

The Chair thanked all participants for their valuable contributions and thanked Professor Capra and Professor Richter for the outstanding agenda materials. He extended a warm thanks to all of the AO staff members who were responsible for putting together an in-person meeting. The Chair closed by informing the Committee that the next meeting would be on May 6, 2022, in Washington D.C.

Respectfully Submitted,

Liesa L. Richter
Daniel J. Capra

TAB 1C

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met by videoconference on January 4, 2022. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

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 B. 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 Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Julie Wilson and Scott Myers, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal

* Prior to the lunch break, 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. Deputy Attorney General Monaco represented DOJ after the lunch break. Andrew Goldsmith was also present on behalf of the DOJ.

Judicial Center (FJC); Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He welcomed new Standing Committee members Elizabeth Cabraser and Professor Troy McKenzie. He also noted that Deputy Attorney General Lisa O. Monaco would attend the afternoon session of the meeting and thanked the other Department of Justice (DOJ) representatives for joining. In addition, Judge Bates thanked the members of the public who were in attendance for their interest in the rulemaking process.

Judge Bates next acknowledged Julie Wilson, who would be leaving the Administrative Office of the U.S. Courts (AO) at the end of January. Judge Bates thanked Ms. Wilson for her years of tremendous service to the rules committees. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters. The reporters and Advisory Committee Chairs expanded on these thanks at later points during the meeting.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the June 22, 2021 meeting.**

Bridget Healy 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 56 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2021. It sets out proposed amendments and proposed new rules that were recently approved by the Judicial Conference. Those proposed amendments and new rules were transmitted to the Supreme Court and will go into effect on December 1, 2022, provided they are adopted by the Supreme Court and Congress takes no action to the contrary. The chart also includes proposed amendments and new rules that are at earlier stages of the REA process.

Judge Bates noted that some public comments had been received on proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and that he expected more comments to be received by the close of the public comment period in February. These comments will be reviewed and discussed by the relevant Advisory Committees at their spring meetings.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which concerns the Advisory Committees' consideration of several suggestions regarding electronic filing by "pro se" (or self-represented) litigants. Noting that he had asked Professor Struve to convene the committee reporters in order to

coordinate their consideration of those suggestions, he invited Professor Struve to provide an update on those discussions.

Professor Struve thanked the commenters whose suggestions had brought this item back onto the rules committees' docket. She stated that at the group's first virtual meeting (in December 2021), the Advisory Committee reporters and researchers from the FJC had discussed how to formulate a research agenda on this topic. The goal is to share ideas on research questions, even though the four Advisory Committees in question may not necessarily reach identical views or formulate identical proposals for rule amendments.

Judge Bates highlighted the fact that the FJC researchers were being asked to devote time to this project and asked the Standing Committee if any members had any comments or concerns with utilizing the FJC's assistance. No members expressed any concern. Judge Bates also thanked Judge Kuhl for a thoughtful suggestion concerning terminology. Judge Kuhl reported that the state courts see a very high number of self-represented litigants, and that the courts are trying to phase out the use of Latin phrases (such as "pro se") that can be harder for lay people to understand. Judge Bates observed that the Advisory Committee chairs and reporters would take this point into account.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerns the proposal to amend the rules' definition of "legal holiday" to explicitly list Juneteenth National Independence Day. He noted that three of the four relevant Advisory Committees had already approved proposed amendments to add the new holiday to the list of legal holidays in their respective time-computation rules, and that the fourth Advisory Committee expects to do so at its spring 2022 meeting. Those proposals will come to the Standing Committee for consideration at its June 2022 meeting and will likely constitute technical amendments that can be forwarded for final approval without publication and comment.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met via videoconference on October 7, 2021. The Advisory Committee presented an action item along with multiple information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 100.

Action Item

Publication of Proposed Amendment to Rules 35 and 40, and Conforming Amendments to Rule 32 and the Appendix of Length Limits. In this action item, the Advisory Committee sought approval for publication of a package of proposed amendments that would consolidate the contents of Rule 35 into Rule 40 and that would make conforming changes to Rule 32 and to the Appendix of Length Limits. Judge Bybee explained that the Advisory Committee had been considering comprehensive amendments to Rules 35 and 40 for some time. Rule 35 addresses hearings and rehearings en banc, and Rule 40 addresses panel rehearings. The proposed amendments would

transfer to Rule 40 the contents of Rule 35 so that the provisions regarding panel rehearing and en banc hearing or rehearing could be found in a single rule, Rule 40. Judge Bybee stated that as a result of discussion at the last Standing Committee meeting, the Advisory Committee acted with a freer hand to revise Rule 40 to clarify and simplify the rule. The result is a more linear rule that was unanimously approved by the Advisory Committee. Judge Bybee thanked the style consultants for their work on the proposed amended rule.

Judge Bates asked about the order of the subparts in Rule 40(b)(2). When listing potential reasons for rehearing en banc, would it not make more sense to list, first, instances when the panel decision conflicts with a decision of the Supreme Court, and then, instances when the decision creates a conflict within the circuit, and finally, instances when the decision creates a conflict with another court? Judge Bybee stated that the Advisory Committee considered the order when drafting the rule. The main reason behind the proposed structure is that an initial consideration for a court of appeals is to maintain consistency within its own docket. Hence, the Advisory Committee chose to list intra-circuit inconsistencies first (in 40(b)(2)(A)). Professor Hartnett agreed with Judge Bybee and added that subparagraph 40(b)(2)(A) is different because it addresses a situation that does not provide grounds for the Supreme Court to grant certiorari.

Judge Bates turned the discussion to proposed amended Rule 40(d)(1), which sets the presumptive deadline for filing a rehearing petition but provides for the alteration of that deadline "by order or local rule." He asked whether any circuits have local rules that alter that deadline and he questioned whether such local rulemaking was desirable. Professor Hartnett stated that this feature was carried over from current Rules 35(c) and 40(a)(1). A judge member noted that the 14-day limit to file a petition for rehearing is short, particularly for pro se prisoner litigants. In her circuit, there is a local rule that sets the limit at 21 days. This member recommended against precluding circuits from affording litigants a longer period by local rule.

A practitioner member asked whether the proposed Rule 40(g) should say "[t]he provisions of Rule 40(b)(2)(D) . . ." instead of just "[t]he provisions of Rule 40(b)(2)." As written, Rule 40(b)(2)(A)-(C) all refer to "the panel decision," which would be inapplicable in a petition for initial hearing en banc. Judge Bybee agreed that the wording of Rule 40(b)(2)(A) would not apply literally to a request for initial hearing en banc, but the intent of the Advisory Committee was to allow for an initial hearing en banc when there is an intra-circuit inconsistency. Judge Bybee noted that in his circuit, initial hearings en banc sometimes occur sua sponte when a panel notices two inconsistent opinions of the circuit and refers the inconsistency to the en banc court. The practitioner member agreed that it makes sense to be inclusive if there is a concern about intra-circuit conflict.

The practitioner member asked about Rule 40(b)(2)(C)'s use of the phrase "authoritative decision" when discussing a panel decision's conflict with a decision from another circuit. This phrase is not used elsewhere in the rule. Judge Bybee responded that this phrasing would rule out rehearing requests based on conflicts with unpublished decisions from other circuits. Professor Hartnett agreed that this provision was designed to exclude petitions asserting conflicts merely with unpublished (i.e., nonprecedential) opinions from other circuits. In response to a follow-up question, Judge Bybee acknowledged that the omission of "authoritative" from Rule 40(b)(2)(A) means that that provision can extend to intra-circuit splits involving unpublished decisions.

The same practitioner member pointed out that Rule 40(d)(5) bars oral argument on whether to grant a rehearing petition and asked whether this prohibition should be revised to allow for local rules or orders to the contrary. In his recent experience, a circuit had ordered argument on whether to grant a petition for rehearing – and subsequently issued a decision that both granted the petition for rehearing and reached a different outcome on the merits. Such a process can be useful, this member said, so why remove this flexibility? Judge Bybee explained that the rule is drafted to discourage requests for argument on whether to grant rehearing. Professor Hartnett added that, under Rule 2, the court has authority to suspend the prohibition on oral arguments by order in a case. Based on these responses, the practitioner member stated that he did not see a need to revise proposed Rule 40(d)(5).

A judge member asked a pair of drafting questions. First, he asked why the proposed new title for Rule 40 ("Rehearing; En Banc Determination") used the word "determination." Professor Hartnett explained that "en banc determination" was selected to encompass an initial hearing en banc, which would not be a "rehearing." Second, the judge member noted that the timing provision in current Rule 35(c) says "must be filed" but the timing provision in current Rule 40(a)(1) says "may be filed." He asked why proposed Rule 40(d)(1) used "may be filed" (on lines 105 and 112 of the draft at page 128 of the agenda book). Professor Hartnett responded that one possible reason was to avoid the use of a word ("must") that might lead lay readers to think that the rule was requiring the filing of a rehearing petition. A judge member agreed that pro se litigants might misread "must" as a requirement that they file a petition for a rehearing even if they do not desire a rehearing, while "may" clarifies that they can file a petition, and if they do so, they must do so within fourteen days. The Standing Committee, along with Judge Bybee, Professor Hartnett, and the style consultants, discussed the competing virtues of "may" and "must," as well as a suggestion from the style consultants to change to "any petition … must" (at lines 103-05) rather than "a petition … must." As a result of the discussion, Judge Bybee and Professor Hartnett agreed to change "a" to "any" in line 103 and "may" to "must" in line 105. As to the use of "may" in line 112, further discussion noted that keeping this as "may" would parallel the use of "must" and "may" in, respectively, Rules 4(a)(1)(A) and 4(a)(1)(B). Ultimately the decision was made to retain "may" at line 112.

A practitioner member suggested that the wording of proposed Rule 40(c) seemed (in comparison to the current rule) to liberalize the standard for granting rehearing en banc. New Rule 40(c) says it "[o]rdinarily … will be ordered only if" a specified condition is met, whereas current Rule 35(a) says that it "is not favored and ordinarily will not be ordered unless" a specified condition is met. Saying "will not be ordered unless" would help emphasize that en banc rehearing is not preferred. Relatedly, the same member noted that the phrase "rehearing en banc is not favored" had been moved to proposed Rule 40(a), and he suggested that phrase should appear in Rule 40(c). Professor Hartnett stated that the first of the member's points was a style issue on which the Advisory Committee had deferred to the style consultants. As to the second point, Professor Hartnett explained that the Advisory Committee had moved "rehearing en banc is not favored" up to Rule 40(a) for emphasis. He recalled that an earlier draft may have featured that phrase in both Rule 40(a) and Rule 40(c), and he suggested that the Advisory Committee would prefer to include the phrase in both subparts (even if redundant) rather than simply moving it to Rule 40(c). Judge Bybee agreed with Professor Hartnett but noted he had no objection to including

"rehearing en banc is not favored" in both Rule 40(a) and Rule 40(c). A judge member who had participated in the Advisory Committee discussions voiced support for including the phrase in both places. In response to the practitioner member's first point, Professor Garner suggested changing "ordered" to "allowed" in line 98 ("[o]rdinarily … will be allowed only if"). Such a change would recognize that the court has discretion, but is not required, to order an en banc rehearing if one of the four criteria is met.

A judge member thanked the Advisory Committee and thought the proposed amended rule is more user friendly and clearer. She suggested that reinserting the word "panel" in the title would clarify the rule, particularly for self-represented litigants. Professor Hartnett and Judge Bybee agreed with the suggestion to add "panel" back into the title. Judge Bates voiced his support for adding the word "panel" back into the title as well; he observed that might assist users of the table of contents.

A judge member, stating that adverbs are over-used, questioned the use of "ordinarily" in the phrase about when rehearing en banc will be ordered; this member expressed a preference for "may be allowed." A different judge member disagreed and thought the word "ordinarily" should be retained. In rare cases the court may want to grant rehearing en banc even though none of the stated criteria are met. A practitioner member concurred in the latter view and said that "ordinarily" usefully preserves the court's discretion both in Rule 40(c) and in proposed Rule 40(d)(4), which provides that the court "ordinarily" will not grant rehearing without ordering a response to the petition. Judge Bates agreed that "ordinarily" should be retained.

After further discussion, Judge Bybee requested approval for publication of the proposed transfer of Rule 35's contents to Rule 40, the proposed amendments to Rule 40, and the proposed conforming amendments to Rule 32 and the Appendix of Length Limits. The rule amendments being voted on would include the following changes to Rule 40 compared with the version shown at pages 122-132 in the agenda book: (1) insertion of "Panel" in the title; (2) correction of typographical errors on lines 77, 85, and 86; (3) on lines 97-98, replacing "Ordinarily, rehearing en banc will be ordered" with "Rehearing en banc is not favored and ordinarily will be allowed;" (4) on line 103, changing "a" to "any," and (5) on line 105, changing "may" to "must."

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rules 35 and 40, with the changes as noted above, and conforming amendments to Rule 32 and the Appendix of Length Limits.**

Information Items

Amicus Disclosures. Judge Bybee invited Professor Hartnett to introduce the information item concerning potential amendments to Rule 29's disclosure requirements. Professor Hartnett underscored the Advisory Committee's interest in obtaining the Standing Committee's feedback on this topic. The Advisory Committee began a review of Rule 29 in 2019 following the introduction in both houses of Congress of the Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act). In 2021, Senator Sheldon Whitehouse and Representative

Henry C. "Hank" Johnson, Jr. requested that the Advisory Committee review Rule 29's disclosure requirements for organizations that file amicus briefs.

Professor Hartnett explained that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. Countervailing concerns include First Amendment rights of persons who do not wish to reveal their identity.

Professor Hartnett stated that there are many approaches the Advisory Committee could take in amending Rule 29, depending on how these various issues are resolved. One approach is that the Advisory Committee could move forward with minimal amendments such as adding "drafting" to the current rule's disclosure requirement concerning persons that "contributed money that was intended to fund preparing or submitting the brief" – to foreclose the contention that this disclosure requirement only reaches funding for the costs of printing and filing a brief.

He advised that a more extensive revision to Rule 29 is possible, and he noted three issues that the Advisory Committee is reviewing. First, Rule 29 could be amended to address contributions beyond funds earmarked for a particular brief. However, if the Advisory Committee goes down this road, it raises the question of the contribution threshold that would trigger disclosure requirements. The sketch of a potential rule on page 106 of the agenda book would trigger disclosure if a party (or its counsel) contributed at least 10 percent of the amicus's gross annual revenue. That 10 percent trigger is borrowed from Rule 26.1, which deals with corporate disclosures. The purposes of the two rules are different, but the 10 percent number provides a starting point for the discussion.

Professor Hartnett noted that a second issue is whether any increased disclosure requirements should apply only to relationships between the parties and an amicus, or whether such increased requirements should also encompass disclosures relating to the relationship between non-parties and an amicus. Finally, he stated that the Advisory Committee is also looking at the issue of whether to retain the current rule's exemption from disclosure for nonparty members of an amicus. An exclusion avoids some of the constitutional issues regarding membership lists, but if any disclosure requirement excludes members, it would make it easy to avoid disclosure by converting contributions into membership fees.

Judge Bates noted that this is a particularly important and sensitive subject, and specifically so because it comes through the Supreme Court to the Advisory Committee. Judge Bates asked if members had any comments or suggestions.

A practitioner member stated that the three issues Professor Hartnett noted are important to consider, and the Advisory Committee should try to find middle ground. A broader amendment, particularly with respect to disclosure regarding non-parties, may not be successful.

A judge member believed the Advisory Committee was asking the right questions and was right on point with its conclusions. Another judge member agreed that the Advisory Committee was heading in the right direction. As a judge, he would rather know who was behind a brief, though he noted that the importance of that question does get greatly overstated. He suggested that seeking the "middle ground" might prove to be quite a challenge because actors might structure their transactions to evade the disclosure requirement.

A practitioner member thought the middle ground route would be preferable. The member also noted that there is an uptick in the motions to file amicus briefs in district courts now, particularly in multi-district litigation and other complex litigation, and the district courts have less experience in dealing with amicus filings. Judge Bates noted the absence of any national rule governing amicus filings in the district court and observed that this may be a matter for other Advisory Committees and the Standing Committee to consider in the future. A judge member suggested that it is important for the Civil Rules to address amicus filings in the district courts, particularly to deal with the possibility that an amicus might file a brief for the purpose of triggering a recusal. (Discussion of amicus filings in the district court recurred later in the meeting, during the Civil Rules Advisory Committee's presentation, as noted below.) Another judge member suggested that it would be helpful to know more about the AMICUS Act's prospects of enactment.

A practitioner member noted that amicus filings often face a time crunch and increasing the disclosure requirements risks dissuading amici from undertaking the effort. For an organization with many members – such as a banking association – detailed disclosures could be burdensome.

A judge member suggested that one approach might be to adopt a rule that invites voluntary disclosures – that is, an amicus would either identify its principal members and funders or state that it is choosing not to disclose. This voluntary standard avoids constitutional issues while also allowing parties to disclose the information.

A judge member stated she liked the 10 percent rule. It is a significant trigger for recusal concerns, and it is already in use in the corporate disclosure requirements. Moreover, if the disclosure would require a judge to either recuse herself or to deny leave to file an amicus brief, it seems very "head-in-the-sand" to not require that disclosure.

A practitioner member stressed the importance of the distinction between parties and non-parties. As to parties, he observed that it is very easy to see the concern about a party using an amicus filing as an additional opportunity to make an argument. However, in practice there is a lot of coordination between amici and parties. Parties seek out potential amici whose voices they would like to get before the court. Though it is important to enforce the rule's current requirements, practical experience illustrates the limits of what can be done by rulemaking. As to non-parties, it would be useful for the court to know if there is a dominant, hidden figure lurking behind an amicus. But if the rule were to go beyond that level of detail, one would have to ask what problem the rule is trying to solve. If the court has never heard of the amicus, the court can simply assess the amicus brief on its own merits.

Judge Bybee thanked the Standing Committee members for their comments and stated that he would relay them to the Advisory Committee.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report in the agenda book. There were no further comments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which last met in Washington, DC on November 5, 2021. The Advisory Committee's report presented multiple information items but no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 302.

Information Items

Rules Published for Public Comment in August 2021. Judge Schiltz reminded the Standing Committee that proposed amendments to Rules 106, 615, and 702 had been published for public comment in August 2021. The proposed amendments to Rule 702, which clarify the court's gatekeeping role for admitting expert testimony, will be controversial. The Advisory Committee has received a number of comments on that proposal and expects to hear testimony on it at its upcoming January 2022 hearing. Judge Schiltz stated that courts have frequently misconstrued Rule 702 requirements as going only to the weight, and not the admissibility, of the expert's testimony; those judges will admit the testimony if they think that a reasonable juror could conclude that the requirements are met. The proposed amendments to the rule emphasize that the court must determine that the reliability-based requirements for expert testimony are established by a preponderance of the evidence, and that the trial court must evaluate whether the expert's conclusion is properly derived from the basis and methodology that the expert has employed. The latter aspect of the proposal is designed to address the problem of overstatement by experts.

Judge Schiltz provided some detail concerning the comments received regarding Rule 702. He explained that there is some opposition, particularly from members of the plaintiffs' bar, to the concept of amending the rule. Judge Schiltz said that the Advisory Committee is unlikely to accept this point of view, because it believes that Rule 702 needs clarification. Courts frequently issue decisions interpreting Rule 702 incorrectly. Conversely, comments from the defense bar say that the Advisory Committee has not done enough to clarify the rule, and that the committee note should be more explicit that certain decisions are wrong and are rejected. The Advisory Committee does not think specifically singling out incorrect decisions in the committee note is the correct approach.

When discussing a draft of the proposed amendments, some Advisory Committee members had expressed concern that under the proposal as then formulated ("if the court finds"), some judges might think they need to make formal findings on the record that all the requirements of the rule are met, even if no party objects to the expert testimony. To address this concern, the proposed amendment as published for comment instead uses the phrase "if the proponent has demonstrated." A number of commentators have objected to this change. These comments note

that the very problem the amendment is designed to fix is that often the judge delegates this responsibility to jurors when it should be the judge who determines whether the requirements are met. According to these commentators, because this language does not say who needs to make the determination, it does not in fact provide the clarification that the amended rule is intended to convey. Judge Schiltz asked whether the Standing Committee had comments on the proposed amendments to Rule 702 for the Advisory Committee's consideration at its next meeting.

A practitioner member noted that in mass tort litigation, there are complaints among defense lawyers that courts do not sufficiently screen expert testimony, choosing instead to say that objections go to weight, not admissibility. There are limits to how much can be done to legislate this issue, so the member agrees with the Advisory Committee's decision not to specifically criticize incorrect decisions in the committee note. However, some emphasis on enhancing the judicial role, even if only in situations where the testimony's admissibility is central and contested, would not be too much of an imposition on the court.

Rule 611 – Illustrative Aids. Judge Schiltz introduced this information item as one that the Advisory Committee will likely submit to the Standing Committee in June 2022 with a request for approval to publish for public comment. He explained that illustrative aids are not specifically addressed by any rules. Judges, himself included, often struggle to distinguish demonstrative evidence (offered to prove a fact) from illustrative aids. Additionally, judges have very different rules on whether parties must disclose illustrative aids prior to use at trial, as well as whether (and how) they can go to the jury. Finally, judges have different rules on whether illustrative aids are or can be part of the record. Judge Schiltz noted that there is a companion proposal to amend Rule 1006, which deals with summaries, that is also under consideration by the Advisory Committee.

A judge member applauded the proposed changes to Rule 611 and Rule 1006. He suggested that to the extent that the proposed addition to Rule 611 (as set out on pages 304-05 of the agenda book) sets conditions for the use of an illustrative aid, it seems odd to include items (3) and (4). Those two provisions—the prohibition on providing the aid to the jury over a party's objection unless the court finds good cause; and the requirement that the aid be entered into the record—are not conditions on the use of an illustrative aid but rather regulations of what happens after the use of the illustrative aid. Professor Capra agreed with the judge member that items (3) and (4) should be part of a separate subdivision.

A practitioner member noted that he does not turn over opening or closing slide presentations prior to using them in arguments. Also, during examination of a witness, he will often have an easel where he can write down highlights of the testimony as it is given. He asked whether these types of aids would be covered by the proposed rule. If these are considered illustrative aids, it is important to draft the rule in a way that does not discourage their use. Professor Capra acknowledged the validity of this concern, noted that these questions have been part of the Advisory Committee's discussions, and agreed that it would be important to ensure that the notice requirement would not be unduly rigid as applied to such situations. Judge Schiltz stated that the practitioner members on the Advisory Committee had expressed a similar concern, but the judge members favored requiring advance notice. Without advance notice, judges could have to deal with objections interpolated in the middle of an opening statement. In sum, Judge Schiltz

stated, this is a challenging issue, but the Advisory Committee is very focused on the pros and cons of the notice requirement.

Another practitioner member emphasized that trial practice has moved toward very slick presentations, for openings and closings, with expert witnesses, and even with fact witnesses. He stated that advance disclosure to opposing counsel can be a good idea; otherwise, if counsel shows the jury slides that mischaracterize the evidence, there is a real risk of a mistrial. The member said that judges often impose notice requirements for slides used in opening arguments, although they may be more flexible about closing arguments. Slides have become crucial in trial practice. Something might be lost by disclosing, he said, but disclosure avoids sharp practices. Judge Schiltz stated that he requires attorneys to provide advance disclosure, but the disclosure can be made five minutes beforehand. A judge member concurred; in her view, this is a case management issue on which it is difficult to write a rule. The judge has to know the case and require advance disclosures by the lawyers.

Professor Bartell noted the proposed rule text does not define "illustrative aid." For example, if a lawyer stands 20 feet away from the witness and asks, "can you see my glasses," one might say that is illustrative. She suggested being careful to cabin the rule's scope.

Rule 1006 Summaries. Judge Schiltz introduced this information item as a companion proposal to the proposed amendment to Rule 611. Rule 1006 provides that certain summaries are admissible as evidence if the underlying records are admissible and if they are too voluminous to be conveniently examined at trial. This rule is often misapplied. Some judges erroneously instruct the jury that a summary admitted under Rule 1006 is not evidence. Some judges will not admit a Rule 1006 summary unless all the underlying records have been admitted into evidence, which runs contrary to the purpose of Rule 1006. Other judges do the opposite and will not allow Rule 1006 summaries if any of the underlying records have been admitted into evidence. The confusion over Rule 1006 is closely related to the confusion over illustrative aids, and the Advisory Committee hopes to clarify both topics.

Rule 611 – Safeguards to Apply When Jurors Are Allowed to Pose Questions to Witnesses. Judge Schiltz provided the update on this information item, explaining that the proposed amendment would list the safeguards that a court must use when it allows jurors to ask questions. The proposed rule would not take any position on whether jurors should be allowed to ask questions, but rather would provide a floor of safeguards that must apply if the judge does allow juror questions. These safeguards were taken from caselaw.

A judge member stated that it makes sense to have a rule regarding juror questions because it is an important and perilous area. He noted that there are various possible approaches to juror questions; one is to allow the lawyers to take the juror's question under advisement and allow the lawyers to decide whether they will cover that topic in their own questioning of the witness. This seems like it might often be the prudent course, but proposed Rule 611(d)(3) appears to foreclose it. Professor Capra said he would look into this issue. His understanding was that judges that permit juror questions generally read the questions to the witness, and then allow for follow-up questioning from counsel.

Judge Bates asked whether proposed Rule 611(d)(1)(D) should be a bit broader. He suggested that instead of saying that no "negative inferences" should be drawn, it should say "no inferences" should be drawn. Professor Capra agreed that "negative" should be omitted. Following up on Judge Bates's suggestion, a judge member added that it would be better to be even broader and suggested that Rule 611(d)(1)(D) say that no inference should be drawn from anything the judge does with a juror's question (whether asking, not asking, or rephrasing it). Judge Bates stated his agreement with the judge member's suggestion.

A judge member asked a question about Rule 611(d)(1). As she read the rule, it seems to prohibit juror questions outright unless the judge provides the required instructions "before any witnesses are called." She asked how the rule would handle instances where the issue of juror questioning arises mid-trial; also, she wondered whether this timing requirement should be placed elsewhere in the rule. Professor Capra promised to take this issue into account.

Judge Schiltz referred the Standing Committee to the Advisory Committee's report in the agenda book for information regarding the remainder of the information items, and there were no further comments.

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 September 14, 2021. The Advisory Committee presented one action item and 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 157.

Action Item

Rule 7001. Judge Dow introduced this action item to request approval to publish for public comment an amendment to Rule 7001. The proposed amendment responds to Justice Sotomayor's suggestion in her concurring opinion in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021), that the rulemakers "consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned," because the delay in resolving turnover proceedings can present a problem for a debtor's ability to recover the car that the debtor needs to get to work in order to earn money to fund a Chapter 13 plan. Before the Advisory Committee had a chance to address Justice Sotomayor's comment, a group of law professors submitted a suggestion, which later was generally endorsed by another suggestion submitted by the National Bankruptcy Conference. The law professors recommended a new rule to allow all turnover proceedings to be brought by motion rather than adversary proceeding. The Advisory Committee decided on a narrower approach tailored to the issues raised by Justice Sotomayor and proposed amending Rule 7001 to provide that turnover of tangible personal property of an individual debtor could be sought by motion as opposed to adversary proceeding. The Advisory Committee decided not to adopt a national procedure for these turnover motions, preferring instead to allow them to remain governed by local rules.

An academic member stated that this rule will be a huge improvement over current procedure. He asked what would happen, under the proposal, in a Chapter 7 case when the trustee is seeking turnover of tangible property. The member expressed an expectation that the motion procedure would not apply to the trustee's turnover proceeding, because the proposal only extends to proceedings "by an individual debtor." Judge Dow agreed that under the proposed amendment, the trustee would need to seek turnover by adversary proceeding.

Upon motion, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 7001.**

Information Items

Rule 9006(a)(6) (Legal Holidays). Judge Dow stated that the Advisory Committee has approved a technical amendment to Rule 9006(a)(6) adding Juneteenth National Independence Day to the list of legal holidays. The Advisory Committee is not asking for approval at this time; rather, it will make that request in June 2022 in coordination with the other Advisory Committees' parallel proposals.

Electronic Signatures. Judge Dow introduced this information item, which concerns electronic signatures by debtors and others who do not have a CM/ECF account. Judge Dow noted that this issue connects to the question of electronic filing by self-represented litigants, but he observed that the working group of reporters and FJC researchers is addressing the latter topic, so the Advisory Committee's focus in this information item was on the electronic-signature topic. The Advisory Committee is looking at the practice of requiring the debtor's counsel to retain a wet signature for documents signed by the debtor and filed electronically. Previously, when the Advisory Committee last considered amendments to Rule 5005(a) that would have allowed the filing of debtors' scanned signatures without the retention of the original "wet" signature, the DOJ raised concerns with technologies available for verifying those signatures. The Advisory Committee has asked the DOJ whether its concerns have been alleviated by intervening technical advances. The pandemic has given us some experience with courts relaxing the wet-signature-retention requirement, and the FJC is assisting the Advisory Committee in studying the issue. There is a preliminary draft of a possible amendment to Rule 5005(a) on page 161 of the agenda book.

Professor Gibson stated the Advisory Committee found this to be a challenging problem. With documents that are filed electronically, what constitutes a valid signature for purposes of the rules? Under all rule sets, a CM/ECF account holder's signature is associated with that holder's unique account. A filing made through the account holder's account, and authorized by that person, constitutes the person's signature. But that does not address the common situation in bankruptcy where the *attorney* is filing a document with the *debtor's* signature, as the debtor is not the account holder. (Also, a pro se litigant might be allowed by some courts to submit documents through some electronic means other than CM/ECF—for instance, via email.) The Advisory Committee is not sure where it stands with wet signature requirements, but it is continuing to explore. Professor Gibson also noted that the Advisory Committee needs to learn more about lawyers' views concerning the requirement that the attorney for a represented debtor retain a wet signature.

An academic member noted that the DOJ's concern the last time this issue came before the Advisory Committee was that without a requirement for the retention of a wet signature, the Department's experts in bankruptcy fraud prosecutions would not be able to verify the authenticity of a signature. He asked whether the possible change in approach now would flow from a change in what a handwriting expert was willing to testify to, or whether it would flow from the advent of electronic methods for verifying the signature. Professor Gibson answered that technology has improved since the last time the Advisory Committee addressed this issue, and now there are electronic-signing software programs that offer a means to trace electronic signatures back to the signer. DOJ has told the Advisory Committee that the proposal is no longer dead from the beginning, meaning there does not always have to be a wet signature for its experts to be able to verify the authenticity of the signature. But it depends on the technology. Software that enables verification of electronic signatures may not currently be incorporated into the software that consumer lawyers are using to prepare bankruptcy filings. The technology exists, however. Therefore, the Advisory Committee felt it is worth pursuing the amendment. Judge Dow noted that the Advisory Committee has included the DOJ in the discussions of this item from the outset and has stressed to the DOJ that its input is necessary.

Professor Coquillette applauded Professor Gibson's attention to state ethics requirements and cautioned that the Advisory Committee needs to be careful not to amend the rules in ways that could conflict with state-law professional-responsibility requirements. State-law professional-responsibility requirements may, for example, address the lawyer's retention of a client's "wet" signature.

Deputy Attorney General Monaco said she is hopeful that the Department can work through some of the technology issues that this proposal would raise. The Department has convened an internal working group to review the issue.

A judge member noted that he understands the point that the Advisory Committee does not want to have rules that require adoption of new software, but might the rules incentivize it? What if the rule says that if counsel use software that enables electronic signature verification, then they do not have to retain a wet signature? That could be a good development.

Restyling. Judge Dow introduced the final information item: an update on the restyling project. The project is going well. Parts I and II have gone through the entire process up to (but not including) transmission to the Judicial Conference, which will happen once the remaining parts have also passed through the entire process. Parts III through VI are out for public comment and are on track to go to the Standing Committee at the next meeting. Parts VII, VIII, and IX will come to the Advisory Committee this spring and should be ready for Standing Committee approval for publication this summer.

Professor Bartell added that while the restyling project has been ongoing, some of the restyled rules have been subsequently amended. The Advisory Committee still needs to decide how it wants to handle these amended rules. One possibility will be to request to republish for public comment all the restyled rules that have been subsequently amended.

Professor Kimble stated that the style consultants will conduct one final top-to-bottom review of all the restyled rules for consistency and any other minor issues. They are currently doing so for Parts I and II.

Judge Bates thanked the style consultants for their work on the restyling project.

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 October 5, 2021. The Advisory Committee presented one action item and three information items. The Advisory Committee briefly noted other items on its agenda, one of which elicited discussion. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 184.

Action Item

Publication of Rule 12(a). Judge Dow introduced the only action item, a proposed amendment to Rule 12(a) that the Advisory Committee was requesting approval to publish for public comment. Rule 12(a) sets the time to serve responsive pleadings. Rule 12(a)(1) recognizes that a federal statute setting a different time should govern, but subdivisions 12(a)(2) and (3) do not recognize the possibility of conflicting statutes. However, there are in fact statutes that set times shorter than the time set by Rule 12(a)(2). While not every glitch in the rules requires a fix, this is one that would be an easy fix. The Advisory Committee decided unanimously to request publication for public comment.

Professor Cooper added there is an argument that Rule 12(a)(2) as currently drafted supersedes the statutes that set a shorter response time, and the Advisory Committee never intended such a supersession. In addition to fixing the glitch, the proposed amendment will avoid the potential awkwardness of arguments concerning unintended supersession.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 12(a).**

Information Items

Multi-District Litigation (MDL) Subcommittee. Judge Dow introduced the work of the MDL Subcommittee as the first information item. Two major topics remain on the subcommittee's agenda. First, the subcommittee is looking at the idea of an "initial census" (what used to be known as "early vetting")—that is, methods for the MDL transferee judge to get a handle on the cases that are included in the MDL. There are three current MDLs where some version of this is in use—the *Juul MDL* before Judge Orrick in the Northern District of California, the *3M MDL* before Judge Rodgers in the Northern District of Florida, and the *Zantac MDL* before Judge Rosenberg (who chairs the MDL Subcommittee) in the Southern District of Florida. Second, the subcommittee is reviewing issues concerning the court's role in the appointment and compensation of leadership

counsel. Several meetings ago, the Advisory Committee discussed what it called a "high impact" sketch of a potential new Rule 23.3 that would extensively address court appointment of leadership counsel, establishment of a common benefit fund to compensate lead counsel, and court rulings on attorney fees. More recently, the subcommittee has been considering a sketch of a "lower impact" set of rules amendments that focuses on Rules 16(b) and 26(f). It would deal with both the initial census and issues of appointing, managing, and compensating leadership counsel throughout an MDL proceeding.

The approach taken in the lower impact sketch is similar to what the Advisory Committee did with Rule 23 a few years ago: operate at a high level of generality and not try to prescribe too much, but put prompts in the rules so that lawyers and judges know from day one a lot of the important things that they will encounter over the number of years it will take for an MDL to conclude. The subcommittee is trying to preserve flexibility. Much of what is in the rule sketch will not apply in any single given MDL. The prompts in the rule will guide MDL participants, and the committee note will provide more detail on how the court might apply these prompts. The subcommittee has met with Lawyers for Civil Justice and will meet with American Association for Justice and others in the coming months.

Professor Marcus observed, with respect to the call for rulemaking with respect to matters such as attorney compensation in MDLs, that rulemaking on such topics is challenging. One approach would be to amend Rule 26(f) so as to require the lawyers to address such matters in their proposed discovery plan; this could then inform the judge's consideration of how to address those matters in the Rule 16(b) order. As to oversight of the settlement, Judge Dow noted that the subcommittee initially considered giving the judge oversight of the substance of the settlement, but now is focusing instead on whether to provide for judicial oversight of the process for arriving at the settlement. In current practice, some judges exert indirect influence on the settlement, for example through their orders appointing leadership counsel. But whether to make rules concerning settlement in MDLs is the most controversial issue the subcommittee is considering, and its members do not agree on how best to proceed. Professor Cooper added that the rules do not currently define what obligations, if any, leadership counsel has to plaintiffs other than their own clients.

Judge Bates said he agrees with the Civil Rules Committee report's observation that the absence of any mention of MDLs in the Civil Rules is striking, given that MDLs make up a third or more of the federal civil caseload. He commended the Advisory Committee and subcommittee on their work on these issues.

A judge member suggested that the Advisory Committee consider addressing appointment of special masters. The role that courts have delegated to special masters in some large MDLs is significant. If the Advisory Committee addresses special masters, a rule could deal with whether and when special masters should have *ex parte* communications with counsel. There is the potential for an appearances problem if the special master is viewed as favoring one side or the other. A poor decision concerning the use of a special master can have significant consequences. Professor Marcus noted that Rule 53 requires that the order appointing a special master must address the circumstances, if any, in which the master may engage in *ex parte* communications.

However, the question then is whether Rule 53 is sufficient to address the issue in the MDL context.

A judge member thanked the subcommittee for its work on the MDL rules. He expressed skepticism concerning the desirability of rules specific to MDLs, noting that one size does not fit all as the cases range from quite simple to large and complicated. The current rules are flexible and capacious enough to accommodate the differences. Judge Chhabria's point (in the *Roundup MDL*) concerning the transferee judge's learning curve is well taken, but the judge member questioned whether a rule change could really make that learning curve any easier.

Apart from that big-picture skepticism, this judge member also made some more specific suggestions. First, the question of who should speak for the plaintiffs during the early meet-and-confer is a big one, and whether any rule should address that is a worthy issue that may warrant treatment if the Advisory Committee is going to be addressing MDLs. Second, in some MDLs the court has appointed lead counsel on the defense side, and the judge member queried whether the rules should address that. Third, if the rules will be amended to address table-setting issues that counsel and the court should consider early on, one such issue is whether there will be a master consolidated complaint and what its effect will be (a topic touched on in *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 n.3 (2015)). Fourth, the judge member stressed that the common benefit fund order should be clear as to whether plaintiffs' lawyers will be required to submit to the common benefit fund a portion of their fees arising from the settlement of cases pending in other courts; he expressed doubt, however, as to whether the question of court authority to impose such a requirement is an appropriate topic for rulemaking. Lastly, the member noted that in the current rule sketch of proposed Rule 16(b)(5)(F) provided in the agenda book (at p. 197) it seemed a little odd to require the court in an initial order to provide a method for the court to give notice of its assessment of the fairness of the process that led to any proposed settlement.

A practitioner member stated that the judge member whose comments preceded hers had raised all the issues that she had in mind. She suggested that the Rule 16 approach is particularly well taken. It will cause more lawyers to read Rule 16 earlier and to pay attention to it. Rule 16 is "the Swiss Army knife" for active case management, and it is precisely the right context for adding provisions to deal with MDLs. Right now, judges are innovating in their MDL case-management orders, but that procedural common law is not as well disseminated as it should be amongst the people who need it the most: transferee judges and the lawyers practicing before them. If Rule 16 addresses MDL practice, judges will cite the rule in their orders, and in turn these orders will more likely be published and found in searches. Moreover, the proposed approach will not stifle the flexibility that exists in the absence of a rule. No two MDLs are the same. She noted that she wishes there were a repository of all MDL case-management orders. Getting MDLs into the rules in a very flexible way may confer at least some of that benefit.

Professor Coquillette seconded Professor Cooper's point concerning the significance of conflict-of-interest issues with lead counsel in MDLs. Questions percolate regarding American Bar Association (ABA) Model Rule 1.7. The rulemakers should always be aware that attorney conduct is subject to another regulatory system, which applies broadly because most federal courts adopt by local rule either the ABA Model Rules or the rules of attorney conduct of the State in which they sit. Professor Marcus noted the added complication that the lawyers in an MDL may

be based in many different states. Professor Coquillette observed that the ABA Model Rules do have a choice-of-law provision, but it can be challenging to apply.

An academic member expressed his appreciation for the work of the subcommittee and reporters on this. He echoed the suggestion that, in this area, less is more. With the complexity and variation of MDLs, encasing things in formal rules is probably not a good idea. The goal should be to provide transparency and give some guidance to judges who do not have prior experience in MDLs. However, it would be a mistake to try to make something concrete when it should be plastic. Thus, the Manual for Complex Litigation seems to be the natural place to locate much of the guidance concerning best practices. This member also cautioned against trying to assimilate MDLs to Rule 23 class actions. Class action practice should not be the model for MDLs, because MDLs require flexibility.

Judge Bates acknowledged that the range of MDLs is daunting and that is a reason to question whether rules that apply to all MDLs can be formulated. However, that view is in tension with the Federal Rules of Civil Procedure themselves, which are a set of rules that apply to an even wider variety of cases.

A judge member echoed the comment on having a "best practices" guide outside the rules, and stated that the Advisory Committee should resist writing rules specific to MDLs.

Another judge member applauded the effort to continue to think about this important but difficult topic. The draft Rule 16(b)(5) is a little unusual in that it is a precatory statement about what a judge should consider, but it does not give the judge any additional tools that the judge does not already have. In this sense, the sketch of Rule 16(b)(5) resembles the Manual for Complex Litigation. This member suggested that, instead, the focus should be on whether there are tools that MDL transferee judges want but do not currently have, and whether those tools are something that an amendment under the Rules Enabling Act process can provide. Judge Dow observed that although a new edition of the Manual for Complex Litigation is in process, it will be several years before it comes out. The Judicial Panel on Multidistrict Litigation, likewise, has tried to provide guidance on best practices, but has held conferences only intermittently. He noted that the Standing Committee's discussion overall evinced more support for the low-impact (Rule 16) approach than the high-impact (Rule 23.3) approach. Director Cooke reported that the FJC is in the preliminary stages of organizing a committee to assist in the preparation of a new edition of the Manual for Complex Litigation.

Discovery Subcommittee. Judge Dow briefly discussed the Discovery Subcommittee's work on privilege log issues. Plaintiffs' and defendants' lawyers have very different views as to whether the current rules present problems. However, there are areas of consensus—that it could be valuable to encourage the parties to discuss privilege-log issues early on, perhaps with the

judge's guidance, and that a system of rolling privilege logs is useful. These areas are the subcommittee's current focus.

Judge Dow also noted the subcommittee's work on sealing. The AO is already reviewing issues related to sealing documents. The Advisory Committee is going to hold off on further consideration of sealing issues and will monitor the progress of the broader AO project.

Rule 9(b) Subcommittee. Judge Dow introduced the work of the new Rule 9(b) Subcommittee (chaired by Judge Lioi). The subcommittee is considering a proposal by Dean Benjamin Spencer to amend Rule 9(b)'s provision concerning pleading conditions of the mind ("[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally"). The subcommittee has had its first meeting and will report to the Advisory Committee at its March meeting.

Other Items

Judge Dow briefly noted a multitude of other projects under consideration by the Advisory Committee, including proposals regarding Rules 41, 55, and 63, as well as one regarding amicus briefs in district courts and one involving the standards and procedures for granting petitions to proceed as a poor person ("in forma pauperis"). Judge Dow also noted that the Advisory Committee is awaiting public comments on the proposed new emergency rule, Rule 87.

Professor Cooper asked whether amicus practice in the district court may present very different questions from amicus practice in appellate courts. In addition to the relative rarity of amicus filings in the district court, he suggested there might be more of a risk that an amicus's participation could interfere with the parties' opportunity to shape the record and develop the issues germane to the litigation in the district court. The discussion during the Appellate Rules Committee's presentation left Professor Cooper concerned about drafting a Civil Rule to address amicus issues.

Judge Bates agreed that amicus filings in the district court could present different issues. He doubted whether there would be many instances where anything in an amicus brief could help to develop the record of the case. For example, in an administrative review case, the record is already set by what was before the administrative agency. And in most other civil cases, the factual record will be developed by the parties through discovery. On the other hand, amicus filings could help to frame or identify issues.

A judge member noted that he too was skeptical about addressing amicus filings in the Civil Rules. This seems to be a solution in search of a problem. If an organization wants to file an amicus brief, it requests leave to file the brief, and the judge decides whether to grant leave and how to handle ancillary issues such as affording the parties an opportunity to respond. Especially given that amicus filings in the district courts are relatively rare, why should the Civil Rules

address this topic when they do not address the general topic of briefs? The judge member also noted that having a rule regarding amicus briefs might encourage people to file more of them.

Judge Bates echoed the judge member's skepticism. Amicus briefs in district courts are almost all filed in just a few courts nationwide, including the District of Columbia (which has a local rule) and the Southern District of New York. This may be something where it is best to leave the practice to local rules in the few courts that see most of the amicus briefs.

Judge Dow stated that he agreed with the comments of the judge member and of Judge Bates. He noted that if a person has the resources to draft an amicus brief, it will have the resources to figure out how to request leave to file it.

A practitioner member stated that amicus briefs are being filed with increasing frequency in MDLs. This is not to say that there should be a Civil Rule on point, but it may be useful to keep in mind that the Appellate Rules' treatment of amicus briefs can be a useful resource for district judges. This member stated that amicus filings in the district court may sometimes attempt to contribute to the record by requesting judicial notice of particular matters; and amicus filings might sometimes add to the complexity in MDLs that are already complex enough. However, trying to craft a Civil Rule to address such issues may be borrowing trouble.

Professor Hartnett returned to the concern (that a member had raised during the discussion of the Appellate Rules Committee's report) that an amicus filing might be made in the district court with the goal of triggering the judge's recusal. Appellate Rule 29 allows the court of appeals to disallow or strike an amicus brief when that brief would require a judge's disqualification. Amicus filings designed to trigger recusal—if they became a common practice—would be more dangerous at the district court level when the case is before a single judge.

Another practitioner member stated that it would be a big mistake to have a national rule governing amicus briefs in district courts. Amicus briefs can be taken for what they are worth, and judges can either read them or not read them. To regulate this on a national basis just does not make sense.

Turning to matters covered in the Civil Rules Committee's written report, Judge Bates noted the Civil Rules Committee's decision not to proceed with a proposal to amend Rule 9 to set a pleading standard for certain claims under the Americans with Disabilities Act. He requested that the Civil Rules Committee coordinate with the Rules Committee Staff at the AO to communicate this decision to Congress. The proposal in question, he noted, initially came from members of the Senate.

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 in Washington, DC on November 4, 2021. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 258.

Information Items

Grand Jury Secrecy Under Rule 6(e). Judge Kethledge described the Advisory Committee's decision not to proceed with a proposed amendment to Rule 6 regarding an exception to grand jury secrecy for materials of exceptional historical or public interest. The Advisory Committee had received multiple proposals for such an exception. Both the Rule 6 Subcommittee (chaired by Judge Michael Garcia) and the full Advisory Committee extensively considered the proposals. The subcommittee held an all-day miniconference where it heard a wide range of perspectives, including from former prosecutors, defense attorneys, the general counsel for the National Archives, a historian, Public Citizen Litigation Group, and the Reporters Committee for Freedom of the Press. The subcommittee thereafter met by phone four times. It had two main tasks. First, it tried to draft the best proposed amendment. Second, it had to decide whether to recommend to the full Advisory Committee whether to proceed with a proposed amendment. The draft rule that the subcommittee worked out would have allowed disclosure only 40 years after a case was closed, and only if the grand jury materials had exceptional historical importance. However, a majority of the subcommittee decided not to recommend that the full Advisory Committee proceed with an amendment.

At its fall 2022 meeting, the Advisory Committee discussed the matter fully and voted 9-3 not to proceed with an amendment. Judge Kethledge noted that the Advisory Committee benefited from a wealth and broad range of relevant experience on the part of its members. The Advisory Committee understood the proposal's appeal and found it to present a close question. The members identified "back end" concerns – that is to say, possible risks that could arise at the time of the disclosure of the grand jury materials – and noted that those concerns could be addressed (although not fully avoided) by employing safeguards. However, Advisory Committee members were concerned that on the "front end" – that is, when a grand jury proceeding is contemplated or ongoing – the potential for later disclosure pursuant to the proposed exception would complicate conversations with witnesses and jeopardize the witnesses' cooperation. A number of members also noted that this exception would be different in kind from those that are currently in the rule. The other exceptions relate to the use of grand jury materials for other criminal prosecutions or national security interests. Historical interest would be an altogether different kind of exception. There was the sense that a historical significance exception would signal a relaxation of grand jury secrecy and could lead to unintended consequences. The grand jury is an ancient institution that advances its purposes in ways that we are often unaware of; this heightens the risk of unintended consequences from a rule amendment. The DOJ has consistently supported a historic significance exception, but all eight former federal prosecutors on the Advisory Committee opposed having an amendment along these lines. In sum, the Advisory Committee voted to not make an amendment, subject to input from the Standing Committee.

Judge Bates stated that he thought this was a carefully considered decision by the Advisory Committee.

A practitioner member expressed agreement with the recommendation not to proceed. This is a hard issue, and he recognizes the appeal of having an exception, but as a former federal prosecutor who is now on the other side of the bar, he does not feel comfortable having an

exception that only touches certain cases, namely those of exceptional historical interest, and therefore treats some grand jury participants differently than others.

A judge member praised the Advisory Committee's report for its thoroughness. This member asked how categorically the Advisory Committee had rejected the possibility of disclosures of very old materials of great public interest. Did the Advisory Committee believe that, had there been a grand jury investigation into the assassination of President Lincoln, disclosing those grand jury materials now would create "front end" problems with the cooperation of current-day witnesses? Judge Kethledge stated that it was the sense of the Advisory Committee that it should not add a new exception to Rule 6, even for material of great historical interest. One can think of examples where one would be glad for materials of such strong historical interest to be disclosed, but that does not mean that there should be a rule permitting such disclosure. As an analogy, take President Lincoln suspending habeas corpus during the Civil War. Many people would say they are glad that he did so because things may have turned out differently if he had not done so. Yet at the same time, most people would not want a general rule allowing the President to suspend habeas corpus when he sees fit.

Additionally, Judge Kethledge noted that although the Advisory Committee decided not to recommend a rule amendment, that does not exclude the possibility of common-law development of an exception. There is a circuit split as to whether federal courts have inherent authority to authorize disclosure of grand jury materials. Justice Breyer thought that the Advisory Committee should resolve the circuit split via rulemaking. However, Judge Kethledge stated his view, which he believed the Advisory Committee shares, that the underlying question of inherent authority was outside the purview of Rules Enabling Act rulemaking. If the Supreme Court resolves the circuit split in favor of recognizing inherent authority to authorize disclosure, the courts will be free to take a case-by-case approach.

Professor Beale added that a number of Advisory Committee members had noted that they felt comfortable with the state of the law prior to *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), and probably would have concluded (as the Advisory Committee had in 2012) that there was not a problem with courts very occasionally authorizing disclosure. Yet writing it out in a rule is fundamentally different: It would change the calculus and change the context under which the grand jury would operate going forward. It is unclear how changing that calculus and context would affect the grand jury as an institution.

A judge member said he thought that the Advisory Committee should consider a rule. He recalled from the Advisory Committee's discussions a shared sense that it is actually a good thing that grand jury materials have been released in certain cases of exceptional historical significance. The problem under the current regime is the circuit-to-circuit variation on whether disclosure is ever possible. Additionally, by not resolving the issue the Advisory Committee is just kicking the can down the road. If the Supreme Court rules that courts lack inherent authority to authorize disclosures not provided for in the Rule, then there will be renewed pressure for a rule amendment. If the Supreme Court instead rules that courts do have such inherent authority, there will still be demands for a rule amendment so as to provide a common approach to disclosure decisions. Therefore, either way, the rulemakers will end up having to take up this issue again.

The same member also stated he was less persuaded by the argument that an exception for materials of exceptional historical interest will dissuade witnesses from testifying. As it is, there are exceptions to grand jury secrecy, including—in some circuits—a multifactor test for whether to release grand-jury materials to the defendant once the defendant has been indicted. Thus, prosecutors already are unable to tell witnesses that there are no circumstances under which their testimony could become public. Furthermore, the comment that certain organizations, such as Al Qaeda or gangs, have long memories is a red herring: These are not the types of cases of exceptional historical interest that would fit within the contemplated exception. The member closed, however, by thanking the Advisory Committee for its thoughtful consideration of the issue.

Professor Hartnett advocated precision in the use of the phrase "inherent authority." It can mean two different things: first, the court's authority to act in the absence of authorization by a statute or rule; and second, the court's authority to act despite a statute or rule that purports to prohibit it from acting. The latter type of inherent authority is much narrower and its scope presents a constitutional question. Judge Kethledge acknowledged this distinction, but noted that the question addressed by the Advisory Committee was only whether to adopt a provision of positive law, in the Criminal Rules, recognizing the exception in question.

Clarification of Court's Authority to Release Redacted Versions of Grand Jury-Related Judicial Opinions. Judge Kethledge introduced this information item, which stems from a suggestion by Chief Judge Howell and former Chief Judge Lamberth of the District of Columbia District Court. The suggestion requested that Rule 6(e) be amended to clarify the court's authority to issue opinions that discuss and potentially reveal matters before the grand jury. Both the subcommittee and entire Advisory Committee considered the issue. The Advisory Committee's conclusion was that the issue is not yet ripe. There has not been any indication so far that redaction is inadequate as a means to avoid contentions that the release of a judicial opinion somehow violates Rule 6. Absent any recent contentions that the release of a judicial opinion violated Rule 6, the Advisory Committee did not think it should act on the suggestion at this time.

Rule 49.1 and CACM Guidance Referenced in the Committee Note. Judge Kethledge introduced this information item, which arises from a suggestion by Judge Furman. Judge Furman suggested amending Rule 49.1 and its committee note to clarify that courts cannot allow parties to file under seal documents to which the public has either a common law or First Amendment right of access. The Advisory Committee appointed a subcommittee to review the issue. Judge Kethledge noted that in his experience, there does seem to be a problem of parties filing documents under seal that should not be so filed.

Judge Furman clarified that the issue is more with the committee note than the text of the rule. The committee note specifies that a financial affidavit in connection with a request for representation under the Criminal Justice Act should be filed under seal. This is in tension with the approach of most courts, which have found that these affidavits are judicial documents and therefore subject to a public right of access under the Constitution. However, at least one court in reliance on the committee note has allowed defendants to file CJA-related financial affidavits under seal.

OTHER COMMITTEE BUSINESS

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 332 summarized most of the relevant information, but an additional bill had been introduced since the finalization of the agenda book. The AMICUS Act, which had been introduced in the previous Congress, was reintroduced in December, albeit with some differences compared to the previous version. As relevant to the Standing Committee, the new bill would apply to any potential amicus in the Courts of Appeals or Supreme Court, regardless of how many briefs it filed in a given year. The Rules Law Clerk also specifically noted the Protecting Our Democracy Act, which had passed the House in December 2021 and now awaits action in the Senate. That bill would prohibit any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of grand jury materials related to the prosecution of certain individuals that the President thereafter pardons. Additionally, the bill would direct the Judicial Conference to promulgate under the Rules Enabling Act rules to facilitate the expeditious handling of civil suits to enforce Congressional subpoenas.

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 339. The Judicial Conference has asked all its committees to provide any feedback on lessons learned over the past two years that may assist it in planning for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts.

Judge Bates asked the Standing Committee whether there was anything the members thought the Standing Committee should focus on in responding to the Judicial Conference. No members had any comments or questions regarding this item.

Judge Bates then asked the Standing Committee members whether there was any concern with delegating to him, Professor Struve, and the Rules Committee Staff the matter of communicating with the Judicial Conference. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

Judicial Conference Committee Self-Evaluation Questionnaire. Every five years, the Judicial Conference requires all its committees to complete a self-evaluation. Judge Bates stated that he had circulated to the Standing Committee members a draft of that response.

The main item to address in the current draft is the modest adjustments to the jurisdictional statement for the Standing Committee and the Advisory Committees. First, the draft deletes the reference to receiving rule amendment suggestions "from bench and bar" because the Advisory Committees receive suggestions from others as well. Second, the draft clarifies that the Standing Committee, rather than the Advisory Committees, approves rules for publication for public comment. Third, the draft's descriptions of the duties of the Standing Committee and Advisory Committees have been revised to reflect the discussion of those duties in the Judicial Conference's procedures governing the rulemaking process.

Judge Bates asked the Standing Committee whether there were any comments regarding the draft response to the Judicial Conference's committee self-evaluation questionnaire. There were none.

Judge Bates requested that the Standing Committee members delegate to him, Professor Struve, the Advisory Committee chairs, and the Rules Committee Staff the matter of responding to the self-evaluation questionnaire. Judge Bates noted that the Advisory Committee chairs had already weighed in on the draft response. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

Update on Judiciary's Response to COVID-19 Pandemic. Julie Wilson provided an update on the judiciary's response to the COVID-19 pandemic. She observed that the federal judge members of the Standing Committee had access to a number of resources on this topic via the "JNet" (the federal judiciary's intranet website). There is a COVID-19 task force studying a wide range of items relevant to the judiciary's response to the pandemic. Its current focus is on issues related to returning to the workplace. The task force has a virtual judiciary operations subgroup ("VJOS") that includes representatives from the courts, federal defenders' offices, and DOJ, and it is studying the use of technology for remote court operations. Ms. Wilson noted that she has highlighted for the VJOS participants the relevant Criminal Rules concerning remote versus in-person participation, and she predicted that suggestions on this topic are likely to reach the rulemakers in the future.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their patience and attention. The Standing Committee will next meet on June 7, 2022. Judge Bates expressed the hope that the meeting would take place in person in Washington, DC.

TAB 1D

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 January 4, 2022. 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; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Burton DeWitt, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal

Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, Department of Justice (DOJ).

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 received an update on three items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) the proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and published for public comment in August 2021; (2) consideration of suggestions to allow electronic filing by pro se litigants; and (3) consideration of amendments to list Juneteenth National Independence Day in the definition of "legal holiday" in the federal rules. Finally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 32, 35, and 40, and the Appendix of Length Limits, with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendment to Rule 32 is a conforming amendment that reflects the proposed transfer of Rule 35's contents into a restructured Rule 40. In Rule 32(g)'s list of papers that require a certificate of compliance, the amendment would replace the reference to papers

submitted under Rules 35(b)(2)(A) or 40(b)(1) with a reference to papers submitted under Rule 40(d)(3)(A).

Rule 35 (En Banc Determination)

The proposed amendment to Rule 35 would transfer its contents to Rule 40 in an effort to provide clear guidance in one rule that will cover en banc hearing and rehearing and panel rehearing.

Rule 40 (Petition for Panel Rehearing)

The proposed amendment to Rule 40 would expand that rule by incorporating into it the provisions of current Rule 35. The proposed amended Rule 40 would govern all petitions for rehearing as well as the rare initial hearing en banc.

Proposed amended Rule 40(a) would provide that a party may petition for panel rehearing, rehearing en banc, or both. It sets a default rule that a party seeking both types of rehearing must file the petitions as a single document. Proposed amended Rule 40(b) would set forth the required content for each kind of petition for rehearing; the requirements are drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).

Proposed amended Rule 40(c)—which is drawn from existing Rules 35(a) and (f)—would describe the reasons and voting protocols for ordering rehearing en banc. Rule 40(c) makes explicit that a court may act sua sponte to order rehearing en banc; this provision also reiterates that rehearing en banc is not favored. Proposed amended Rule 40(d)—drawn from existing Rules 35(b), (c), (d), and existing Rules 40(a), (b), and (d)—would bring together in one place uniform provisions governing matters such as the timing, form, and length of the petition. A new feature in Rule 40(d) would provide that a panel's later amendment of its decision restarts the clock for seeking rehearing.

Proposed Rule 40(e)—which expands and clarifies current Rule 40(a)(4)—addresses the court's options after granting rehearing. Proposed Rule 40(f) is a new provision addressing a panel's authority to act after the filing of a petition for rehearing en banc. Proposed Rule 40(g) carries over (from existing Rule 35) provisions concerning initial hearing en banc.

Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure

The proposed amendments are conforming amendments that would reflect the relocation of length limits for rehearing petitions from Rules 35(b)(2) and 40(b) to proposed amended Rule 40(d)(3).

Information Items

The Advisory Committee met by videoconference on October 7, 2021. In addition to the matters discussed above, agenda items included the consideration of two suggestions related to the filing of amicus briefs, several suggestions regarding in forma pauperis issues, including potential changes to Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis), and a new suggestion regarding costs on appeal.

Amicus Briefs

The Advisory Committee reported that, in response to a suggestion from Senator Sheldon Whitehouse and Representative Henry Johnson, Jr., it is continuing its consideration of whether additional disclosures should be required for amicus briefs. Proposed legislation regarding disclosures in amicus briefs has been filed in the Senate and House, most recently in December 2021.

The Advisory Committee reported that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue is that, without sufficient

disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. On the other hand, when considering any disclosure requirement, it is necessary to consider the First Amendment rights of those who do not wish to disclose themselves.

The Advisory Committee sought the Committee's feedback on these issues. In doing so, the Advisory Committee highlighted the distinction between disclosure regarding an amicus's relationship to a party and disclosure regarding an amicus's relationship to a nonparty. The Advisory Committee also noted that any proposed amendments to Rule 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. Various members of the Committee voiced their perspectives on these issues, and expressed appreciation for the Advisory Committee's ongoing work on these topics.

The Advisory Committee also has before it a separate suggestion regarding amicus briefs and Rule 29. In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The suggestion proposes adopting standards for when judicial disqualification would require a brief to be stricken or its filing prohibited. This suggestion is under consideration by the Advisory Committee.

Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

The Advisory Committee is continuing to consider suggestions to regularize the criteria for granting in forma pauperis status, including possible revisions to Form 4 of the Federal Rules of Appellate Procedure. It is gathering information on how courts handle such applications, including what standards are applied and how Appellate Form 4 is used.

Costs on Appeal

In a recent decision, the Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring arguments about costs to the court of appeals. *See City of San Antonio v. Hotels.com L. P.*, 141 S. Ct. 1628 (2021). Accordingly, the Advisory Committee created a subcommittee to explore the issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Rule 7001 (Types of Adversary Proceedings) with a recommendation that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendment to Rule 7001 addresses a concern raised by Justice Sotomayor in *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021). The *Fulton* Court held that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). In so ruling, the Court found that a contrary reading of § 362(a)(3) would render largely superfluous § 542(a)'s provisions for the turnover of estate property from third parties. In a concurring opinion, Justice Sotomayor noted that under current procedures turnover proceedings can be very slow because, under Rule 7001(1), they must be pursued by an adversary proceeding. Addressing the need of chapter 13 debtors, such as those in *Fulton,* to quickly regain possession of a seized car in order to work and earn money to fund a plan, she stated that the Advisory Committee on Rules of Bankruptcy Procedure should consider rule amendments that would ensure prompt resolution of debtors' requests for turnover under § 542(a). Post-*Fulton*, two suggestions were submitted that echo Justice Sotomayor's call for amendments; these suggestions advocate that the rules be amended to allow all turnover

proceedings to be brought by a quicker motion-based practice rather than by adversary proceeding.

Members of the Advisory Committee generally agreed that debtors should not have to wait an average of a hundred days to get a car needed for a work commute, and they supported a motion-based turnover process in that and similar circumstances involving tangible personal property. There was less support, however, for broader rule changes that would allow all turnover proceedings to occur by motion. The Advisory Committee ultimately recommended an amendment to Rule 7001 that would exempt, from the list of adversary proceedings, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."

Information Items

The Advisory Committee met by videoconference on September 14, 2021. In addition to the recommendation discussed above, the Advisory Committee considered possible rule amendments in response to a suggestion from the Committee on Court Administration and Case Management (CACM Committee) regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account and discussed the progress of the Restyling Subcommittee.

Electronic Signatures

The Bankruptcy Rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors or others without CM/ECF privileges will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently deemed to constitute the person's signature for rules purposes. The issue the Advisory Committee has been considering, therefore, is whether the rules should be amended to allow the electronic signature of someone without a CM/ECF

account to constitute a valid signature and, if so, under what circumstances. The Advisory Committee's Technology Subcommittee is studying this issue.

Bankruptcy Rules Restyling Update

The 3000, 4000, 5000, and 6000 series of the restyled Bankruptcy Rules have been published for comment. The Advisory Committee will be reviewing the comments at its spring 2022 meeting.

In fall 2021, the Restyling Subcommittee completed its initial review of the 7000 and 8000 series and began its initial review of the 9000 series. The subcommittee will continue to meet until the subcommittee and style consultants have agreed on draft amendments. The subcommittee expects to present the 7000, 8000, and 9000 series of restyled rules—the final group of the restyled bankruptcy rules—to the Advisory Committee at its spring 2022 meeting with a request that the Advisory Committee approve those proposed amendments and submit them to the Standing Committee for approval for publication.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing) with a request that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets

a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language is problematic for several reasons. First, while it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. Second, the current language fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Third, the current language could be interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) supersede inconsistent statutory provisions.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1), namely, that a different response time set by statute supersedes the response times set by those rules.

Information Items

The Advisory Committee met by videoconference on October 5, 2021. In addition to the action item discussed above, the Advisory Committee considered reports on the work of the Multidistrict Litigation Subcommittee and the Discovery Subcommittee, and was advised of the formation of an additional subcommittee that will consider a proposal to amend Rule 9(b). The Advisory Committee also retained on its agenda for consideration a suggestion for a rule establishing uniform standards and procedures for filing amicus briefs in the district courts, suggestions that uniform in forma pauperis standards and procedures be incorporated into the Civil Rules, and suggestions to amend Rules 41, 55, and 63.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over time, the subcommittee has narrowed the list of issues on which its work is focused to two, namely (1) efforts to facilitate early attention to "vetting" (through the use of "plaintiff fact sheets" or "census"), and (2) the appointment and compensation of leadership counsel on the plaintiff side. To assist in its work, the subcommittee prepared a sketch of a possible amendment to Rule 16 (Pretrial Conferences; Scheduling; Management) that would apply to MDL proceedings. The amendment sketch encourages the court to enter an order (1) directing the parties to exchange information about their claims and defenses at an early point in the proceedings, (2) addressing the appointment of leadership counsel, and (3) addressing the methods for compensating leadership counsel. The subcommittee drafted a sketch of a corollary amendment to Rule 26(f) (Conference of the Parties; Planning for Discovery) that would require that the discovery plan include the parties' views on whether they should be directed to exchange information about their claims and defenses at an early point in the proceedings. For now, the sketches of possible amendments are only meant to prompt further discussion and information gathering. The subcommittee has yet to determine whether to recommend amendments to the Civil Rules.

Discovery Subcommittee

In 2020, the Discovery Subcommittee was reactivated to study two principal issues. First, the Advisory Committee has received suggestions that it revisit Rule 26(b)(5)(A), the rule that requires that parties withholding materials on grounds of privilege or work product protection provide information about the materials withheld. Though the rule does not say so and the accompanying committee note suggests that a flexible attitude should be adopted, the suggestions state that many or most courts have treated the rule as requiring a document-by-

document log of all withheld materials. One suggestion is that the rule be amended to make it clearer that such a listing is not required, and another is that the rule be amended to provide that a listing by "categories" is sufficient.

As a starting point, the subcommittee determined that it needed to gather information about experience under the current rule. In June 2021, the subcommittee invited the bench and bar to comment on problems encountered under the current rule, as well as several potential ideas for rule changes. The subcommittee received more than 100 comments. In addition, subcommittee members have participated in a number of virtual conferences with both plaintiff and defense attorneys.

While the subcommittee has not yet determined whether to recommend rule changes, it has begun to focus on the Rule 26(f) discovery plan and the Rule 16(b) scheduling conference as places where it might make the most sense for the rules to address the method that will be used to comply with Rule 26(b)(5)(A).

The second issue before the subcommittee is a suggestion for a new rule setting forth a set of requirements for motions seeking permission to seal materials filed in court. In its initial consideration of the suggestion, the subcommittee learned that the AO's Court Services Office is undertaking a project to identify the operational issues related to the management of sealed court records. The goals of the project will be to identify guidance, policy, best practices, and other tools to help courts ensure the timely unsealing of court documents as specified by the relevant court order or other applicable law. Input on this new project was sought from the Appellate, District, and Bankruptcy Clerks Advisory Groups and the AO's newly formed Court Administration and Operations Advisory Council (CAOAC). In light of this effort, the subcommittee determined that further consideration of the suggestion for a new rule should be deferred to await the result of the AO's work.

Amicus Briefs

The Advisory Committee has received a suggestion urging adoption of a rule establishing uniform standards and procedures for filing amicus briefs in the district courts. The proposal is accompanied by a draft rule adapted from a local rule in the District Court for the District of Columbia, and informed by Appellate Rule 29 (Brief of an Amicus Curiae) and the Supreme Court Rules. The Advisory Committee determined that the suggestion should be retained on its study agenda. The first task will be to determine how frequently amicus briefs are filed in district courts outside the District Court for the District of Columbia.

Uniform In Forma Pauperis Standards and Procedures

The Advisory Committee has on its study agenda suggestions to develop uniform in forma pauperis standards and procedures. The Advisory Committee believes that serious problems exist with the administration of 28 U.S.C. § 1915, which allows a person to proceed without prepayment of fees upon submitting an affidavit that states "all assets" the person possesses and states that the person is unable to pay such fees or give security therefor. For example, the procedures for gathering information about an applicant's assets vary widely. Many districts use one of two AO Forms, but many others do not. Another problem is the forms themselves, which have been criticized as ambiguous, as seeking information that is not relevant to the determination, and as invading the privacy of nonparties. Further, the standards for granting leave to proceed in forma pauperis vary widely, not only from court to court but often within a single court as well.

The Advisory Committee retained the topic on its study agenda because of its obvious importance and because it is well-timed to the ongoing work of the Appellate Rules Committee (discussed above) relating to criteria for granting in forma pauperis status. There is clear potential for improvement, but it is not yet clear whether that improvement can be effectuated

through the Rules Enabling Act process.

Rule 41(a) (Dismissal of Actions – Voluntary Dismissal)

Rule 41(a) governs voluntary dismissals without court order. The Advisory Committee is considering a suggestion that Rule 41(a) be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. There exists a division of decisions on the question whether Rule 41(a)(1)(A)(i) authorizes dismissal by notice without court order and without prejudice of some claims but not others. That provision states, in relevant part, that "the plaintiff may dismiss an action without a court order by filing … a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment . . . ." The preponderant view is that the rule authorizes dismissal only of all claims and that anything less is not dismissal of "an action"; however, some courts allow dismissal as to some claims while others remain. The Advisory Committee will consider these and other issues relating to Rule 41, including the practice of allowing dismissal of all claims against a particular defendant even though the rest of the action remains.

Rule 55 (Default; Default Judgment)

Rule 55(a) directs the circumstances under which a clerk "must" enter default, and subdivision (b) directs that the clerk "must" enter default judgment in narrowly defined circumstances. The Advisory Committee has learned that at least some courts restrict the clerk's role in entering defaults short of the scope of subdivision (a), and many courts restrict the clerk's role in entering default judgment under subdivision (b). The Advisory Committee has asked the FJC to survey all of the district courts to better ascertain actual practices under Rule 55. The information gathered will guide the determination whether to pursue an amendment to Rule 55.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met in person (with some participants joining by videoconference) on November 4, 2021. A majority of the meeting was devoted to consideration of the final report of the Rule 6 Subcommittee. The Advisory Committee also decided to form a subcommittee to consider a suggestion to amend Rule 49.1.

Rule 6 (The Grand Jury)

Rule 6(e) (Recording and Disclosing the Proceedings). The Advisory Committee last considered whether to amend Rule 6(e) to allow disclosure of grand jury materials of exceptional historical importance in 2012, when it considered a suggestion from the DOJ to recommend such an amendment. At that time, the Advisory Committee concluded that an amendment would be "premature" because courts were reasonably resolving applications "by reference to their inherent authority" to allow disclosure of matters not specified in the exceptions to grand jury secrecy listed under Rule 6(e)(3). Since then, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), overruled prior circuit precedents and held that the district courts have no authority to allow the disclosure of grand jury matters not included in the exceptions stated in Rule 6(e)(3), thereby deepening a split among the courts of appeals with regard to the district courts' inherent authority. Moreover, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out the circuit split and 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." *McKeever*, 140 S. Ct. at 598 (statement of

Breyer, J.).

In 2020 and 2021, the Advisory Committee received suggestions seeking an amendment to Rule 6(e) that would address the district courts' authority to disclose grand jury materials because of their exceptional historical or public interest, as well as a suggestion seeking a broader exception that would ground a new exception in the public interest or inherent judicial authority. The latter urged an amendment "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In contrast, over the past three administrations (including the suggestion the Advisory Committee considered in 2012), the DOJ has sought an amendment that would abrogate or disavow inherent authority to order disclosures not specified in the rule. The DOJ's most recent submission advocates that "any amendment to Rule 6 should contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive."

After the Rule 6 Subcommittee was formed in May 2020 in reaction to *McKeever* and *Pitch*, two district judges suggested an amendment that would explicitly permit courts to issue judicial opinions when even with redaction there is potential for disclosure of matters occurring before the grand jury.

As reported to the Conference in September 2021, the subcommittee's consideration of the proposals included convening a day-long virtual miniconference in April 2021 at which the subcommittee obtained a wide range of perspectives based on first-hand experience. Participants included 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. In addition, the subcommittee held four meetings over the summer of 2021.

Part of its work included preparing a discussion draft of an amendment that defined a limited exception to grand jury secrecy for historical records meant to balance the interest in disclosure against the vital interests protected by grand jury secrecy. The draft proposal would have (1) delayed disclosure for at least 40 years, (2) required the court to undertake a fact-intensive inquiry and to determine whether the interest in disclosure outweighed the public interest in retaining secrecy, and (3) provided for notice to the government and the opportunity for a hearing at which the government would be responsible for advising the court of any impact the disclosure might have on living persons. In the end, a majority of the subcommittee recommended that the Advisory Committee not amend Rule 6(e).

After careful consideration and a lengthy discussion, a majority of the Advisory Committee agreed with the recommendation of the subcommittee and concluded that even the most carefully drafted amendment would pose too great a danger to the integrity and effectiveness of the grand jury as an institution, and that the interests favoring more disclosure are outweighed by the risk of undermining an institution critical to the criminal justice system.

Further, a majority of members expressed concern about the increased risk to witnesses and their families that would result from even a narrowly tailored amendment such as the discussion draft prepared by the subcommittee. A majority of the members concluded that the dangers of expanded disclosure would remain, and that the addition of the exception would be a significant change that would both complicate the preparation and advising of witnesses and reduce the likelihood that witnesses would testify fully and frankly. Moreover, as drafted, the proposed exception was qualitatively different from the existing exceptions to grand jury secrecy, which are intended to facilitate the resolution of other criminal and civil cases or the investigation of terrorism.

Consideration of these suggestions by both the subcommittee and the full Advisory Committee revealed that this is a close issue. Although many members recognized that there are rare cases of exceptional historical interest where disclosure of grand jury materials may be warranted, the predominant feeling among the members was that no amendment could fully replicate current judicial practice in these cases. Moreover, members felt that, even with strict limits, an amendment expressly allowing disclosure of these materials would tend to increase both the number of requests and actual disclosures, thereby undermining the critical principle of grand jury secrecy.

Members also discussed a broader exception for disclosure in the public interest. The subcommittee had recommended against such a broad exception, and members generally agreed that a broader and less precise exception would be an even greater threat to the grand jury.

Finally, the Advisory Committee chose not to address the question whether federal courts have inherent authority to order disclosure of grand jury materials. In the Advisory Committee's view, this question concerns the scope of "[t]he judicial power" under Article III. That is a constitutional question, not a procedural one, and thus lies beyond the Advisory Committee's authority under the Rules Enabling Act.

The Advisory Committee further declined the suggestion that subdivision (e) be amended to authorize courts "to release judicial decisions issued in grand jury matters" when, "even in redacted form," those decisions reveal "matters occurring before the grand jury." The Advisory Committee agreed with the subcommittee's determination that the means currently available to judges—particularly redaction—were generally adequate to allow for sufficient disclosure while complying with Rule 6(e).

Rule 6(c) (Foreperson and Deputy Foreperson). Also before the Advisory Committee was a suggestion to amend Rule 6(c) 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 Advisory Committee agreed with the recommendation of the subcommittee that at present there is no reason to disrupt varying local practices with a uniform national rule.

Rule 49.1 (Privacy Protections for Filings Made with the Court)

Rule 49.1 was adopted in 2007, as part of a cross-committee effort to respond to the E-Government Act of 2002. The committee note incorporates the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the CACM Committee that "sets out limitations on remote electronic access to certain sensitive materials in criminal cases," including "financial affidavits filed in seeking representation pursuant to the Criminal Justice Act." The guidance states in part that such documents "shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access."

Before the Advisory Committee is a suggestion to amend the rule to delete the reference to financial affidavits in the committee note because the guidance as to financial affidavits is "problematic, if not unconstitutional" and "inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date." *See United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021) (holding that the defendant's financial affidavits were "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment).

The Advisory Committee formed a subcommittee to consider the suggestion. Its work will include consideration of the privacy interests of indigent defendants and their Sixth Amendment right to counsel, and the public rights of access to judicial documents under the First Amendment and the common law. The subcommittee plans to coordinate with the Bankruptcy

and Civil Rules Committees since their rules have similar language, and will also inform both the CACM Committee and the CAOAC that it is considering this issue.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met in person (with some non-member participants joining by videoconference) on November 5, 2021. In addition to an update on Rules 106, 615, and 702, currently out for public comment, the Advisory Committee discussed possible amendments to Rule 611 to regulate the use of illustrative aids and Rule 1006 to clarify the distinction between summaries that are illustrative aids and summaries that are admissible evidence. The Advisory Committee also discussed possible amendments to Rule 611 to provide safeguards when jurors are allowed to pose questions to witnesses, Rule 801(d)(2) to provide for a statement's admissibility against the declarant's successor in interest, Rule 613(b) to provide a witness an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the statement is admitted, and Rule 804(b)(3) to require courts to consider corroborating evidence when determining admissibility of a declaration against penal interest in a criminal case.

Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence)

The Advisory Committee is considering two separate proposed amendments to Rule 611. First, the Advisory Committee is considering adding a new provision that would provide standards for allowing the use of illustrative aids, along with a committee note that would emphasize the distinction between illustrative aids and admissible evidence (including demonstrative evidence). Second, the Advisory Committee is considering adding a new provision to set forth safeguards that must be employed when the court has determined that jurors will be allowed to pose questions to witnesses.

Rule 1006 (Summaries to Prove Content)

The Advisory Committee determined that courts frequently misapply Rule 1006, and most of these errors arise from the failure to distinguish between summaries of evidence that are admissible under Rule 1006 and summaries of evidence that are inadmissible illustrative aids. It is considering amending Rule 1006 to address the mistaken applications in the courts.

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

The Advisory Committee is considering a proposed amendment to Rule 801(d)(2) regarding the hearsay exception for statements of party-opponents. The issue arises in cases in which a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another, and it is the transferee that is the party-opponent. The Advisory Committee is considering an amendment to provide that if a party stands in the shoes of a declarant, then the statement should be admissible against the party if it would be admissible against the declarant.

Rule 613 (Witness's Prior Statement)

The Advisory Committee is considering a proposed amendment to Rule 613(b), which currently permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. However, courts are in dispute about the timing of that opportunity. The Advisory Committee determined that the better rule is to require a prior opportunity to explain or deny the statement (with the court having discretion to allow a later opportunity), because witnesses will usually admit to making the statement, thereby eliminating the need for extrinsic evidence.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

The Advisory Committee is considering a proposed amendment to Rule 804(b)(3). The rule provides a hearsay exception for declarations against interest. In a criminal case in which a

declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement, but there is a dispute about the meaning of the "corroborating circumstances" requirement. The Advisory Committee is considering a proposed amendment to Rule 804(b)(3) that would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

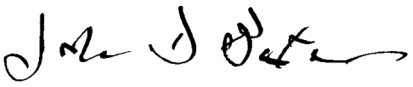
JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (1st Cir.), regarding pandemic-related issues and lessons learned for which Committee members recommend further exploration through the judiciary's strategic planning process. The Committee's views were communicated to Chief Judge Howard by letter dated January 11, 2022.

FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE

In 1987, the Judicial Conference established a requirement that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." JCUS-SEP 1987, p. 60. Because this review is scheduled to occur again in 2022, the Committee was asked to evaluate the continuing importance of its mission as well as its jurisdiction, membership, operating procedures, and relationships with other committees so that the Executive Committee can identify where improvements can be made. To assist in the evaluation process, the Committee was asked to complete the 2022 Judicial Conference Committee Self-Evaluation Questionnaire. The Committee provided the completed questionnaire to the Executive Committee.

Respectfully submitted,



John D. Bates, Chair

Elizabeth J. Cabraser	Troy A. McKenzie
Jesse M. Furman	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank Mays Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zipps
Carolyn B. Kuhl	

TAB 1E

Effective December 1, 2021

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2021)
- Approved by Judicial Conference (Sept 2020) and transmitted to Supreme Court (Oct 2020)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	Amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Amendment conforms the rule to amended Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Amendments conform the forms to amended 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	Subdivision (c) amended to replace 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	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	Amendment conforms the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	AP 26.1, BK 8012
BK 9036	Amendment requires 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.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 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.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 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 were published along with the SBRA Rules in order to give the public a full opportunity to comment. The proposed change to Form 122B was approved at all stages after the public comment period closed in February 2021, and when into effect December 1, 2021. There were no comments on the remaining SBRA forms and they remain in effect as approved in 2019.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. 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 Emergency Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subdivision (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, 2022.	
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 22nd 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	

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
	not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
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).	

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- To be published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved by Standing Committee (January 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to (g) to reflect the consolidation of Rules 35 and 40.	Rules 35 and 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	Rule 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	Rule 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	Rules 35 and 40.
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to all subparts of the rule, not just to subpart (a).	

TAB 1F

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
Mutual Fund Litigation Reform Act	**H.R. 699** *Sponsor:* Emmer (R-MN)	CV 8 & 9	**Bill Text:** https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf **Summary:** This bill provides a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity."	• 2/2/21: Introduced in House; referred to Judiciary Committee and Financial Services Committee • 3/22/21: 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	• 3/3/2021: Introduced in Senate; referred to Judiciary Committee

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			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 Administrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	
Eliminating a Quantifiably Unjust Application of the Law Act of 2021	**H.R. 1693** *Sponsor:* Jeffries (D-NY) *Co-Sponsors:* [56 bipartisan co-sponsors]	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr1693/BILLS-117hr1693rfs.pdf **Summary:** The bill decreases the penalties for certain cocaine-related controlled substance crimes, and allows those convicted under prior law to petition to lower the sentence. The bill then provides that "[n]otwithstanding Rule 43 of the Federal Rules of Criminal Procedure, the defendant is not required to be present" at a hearing to reduce a sentence pursuant to the bill.	• 3/9/21: Introduced in House; referred to Judiciary Committee and Committee on Energy and Commerce • 5/18/21: Referred to Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security • 7/21/21: Judiciary Committee consideration and mark-up session held; reported from committee as amended • 9/28/21: Debated in House • 9/28/21: Passed house in roll call vote 361-66 • 9/29/21: Received in enate; referred to Judiciary Committee

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
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 • 6/24/21: 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)		**Bill Text:** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate] https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House] **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 • 10/19/21: Referred by House Judiciary Committee to Subcommittee on Courts, Intellectual Property, and the Internet

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
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 • 10/19/21: Referred by Judiciary Committee to Subcommittee on Crime, Terrorism, and Homeland Security
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

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
Bankruptcy Venue Reform Act of 2021	**H.R. 4193** *Sponsor*: Lofgren (D-CA) *Co-Sponsors:* Buck (R-CO) Perlmutter (D-CO) Neguse (D-CO) Cooper (D-TN) Thompson (D-CA) Burgess (R-TX) Bishop (R-NC) **S. 2827** *Sponsor:* Cornyn (R-TX) *Co-sponsor:* Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 [House] https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate] **Summary:** Modifies venue requirements relating to Bankruptcy proceedings. Senate version includes a limitation absent from the House version giving "no effect" for purposes of establishing venue to certain mergers, dissolutions, spinoffs, and divisive mergers of entities. Would require the Supreme Court to prescribe rules, under § 2075, to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in Bankruptcy Cases and arising under or related to proceeding before bankruptcy and district courts and BAPS.	• 6/28/21: H.R. 4193 introduced in House; referred to Judiciary Committee • 9/23/21: S. 2827 introduced in Senate; 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
Protecting Our Democracy Act	**H.R. 5314** *Sponsor:* Schiff (D-CA) *Co-Sponsors:* [168 co-sponsors]	CR 6; CV	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/5314/text [House] https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate]	• 9/21/21: H.R. 5314 introduced in House; referred to numerous committees, including House

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
	S. 2921 *Sponsor:* Klobuchar (D-MN) *Co-Sponsors:* Blumenthal (D-CT) Coons (D-DE) Feinstein (D-CA) Hirono (D-HI) Merkley (D-OR) Sanders (I-VT) Warren (D-MA) Wyden (D-OR)		**Summary:** Various provisions of this bill amend existing rules, or direct the Judicial Conference to promulgate additional rules, including: • Prohibiting any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of certain grand jury materials related to individuals pardoned by the President • Requiring the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.	Judiciary Committee • 9/30/21: S. 2921 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs • 12/9/21: H.R. 5314 debated and amended in House under provisions of H. Res. 838 • 12/9/21: H.R. 5314 passed by House • 12/13/21: House bill received in Senate
Congressional Subpoena Compliance and Enforcement Act	H.R. 6079 *Sponsor:* Dean (D-PA) *Co-Sponsors:* Nadler (D-NY) Schiff (D-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf **Summary:** The bill directs the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.	• 11/26/21: Introduced in House; referred to Judiciary Committee
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	S. 3385 *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Sanders (I-VT) Blumenthal (D-CT) Hirono (D-HI) Warren (D-MA) Lujan (D-NM)	AP 29	**Bill Text:** https://www.congress.gov/117/bills/s3385/BILLS-117s3385is.pdf **Summary:** In part, the legislation would require amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief.	• 12/14/21: Introduced in Senate; referred to Judiciary Committee

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Courtroom Videoconferencing Act of 2022	**H.R. 6472** *Sponsor:* Morelle (D-NY) *Co-Sponsor:* Fischbach (R-MN) Bacon (R-NE) Tiffany (R-WI)	CR	**Bill Text:** https://www.congress.gov/117/bills/hr6472/BILLS-117hr6472ih.pdf **Summary:** The bill would make permanent certain CARES Act provisions, including allowing the chief judge of a district court to authorize teleconferencing for initial appearances, arraignments, and misdemeanor pleas or and sentencing. The bill would require the defendant's consent before proceeding via teleconferencing, and would ensure that defendants can utilize video or telephone conferencing to privately consult with counsel. The bill's provisions would apply even in the absence of an emergency situation.	• 1/21/22: Introduced in House; referred to Judiciary Committee
Save Americans from the Fentanyl Emergency Act of 2022	**H.R. 6946** *Sponsor:* Pappas (D-NH) *Co-Sponsosr:* Newhouse (R-WA) Budd (R-NC) Suozzi (D-NY) Van Drew (R-NJ) Cuellar (D-TX) Roybal-Allard (D-CA) Craig (D-MN) Spanberger (D-VA)	CR 43	**Bill Text:** https://www.congress.gov/117/bills/hr6946/BILLS-117hr6946ih.pdf **Summary:** The bill decreases the penalties for certain fentanyl-related controlled substance crimes, and allows those convicted under prior law to petition to lower the sentence. The bill then provides that "[n]otwithstanding rule 43 of the Federal Rules of Criminal Procedure, the defendant is not required to be present" at a hearing to vacate or reduce a sentence pursuant to the bill.	• 3/7/22: Introduced in House; referred to the Committee on Energy and Commerce and Judiciary Committee
Government Surveillance Transparency Act of 2022	**S. 3888** *Sponsor:* Wyden (D-OR) *Co-Sponsors:* Daines (R-MT) Lee (R-UT) Booker (D-NJ) **H.R. 7214** *Sponsor:* Lieu (D-CA) *Co-Sponsors:* Davidson (R-OH)	CR 41	**Bill Text:** https://www.congress.gov/117/bills/s3888/BILLS-117s3888is.pdf [Senate] https://www.congress.gov/117/bills/hr7214/BILLS-117hr7214ih.pdf [House] **Summary:** The bill explicitly adds a sentence and two subdivisions of text to Rule 41(f)(1)(B) regarding what the government must disclose in an inventory taken pursuant to the Rule. See page 25 of either PDF for full text.	• 3/22/22: Introduced in Senate; referred to the Judiciary Committee • 3/24/22: Introduced in the House; referred to the Judiciary Committee

TAB 2

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: April 1, 2022

At its Spring 2021 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 has been completed.

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 --- a step 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: 1) the proponent has offered a statement or portion of a statement that is a misrepresentation of what a person actually said; and 2) the statement offered for completion will rectify the misimpression. The requirement for whether a statement is even eligible as proof of completeness is as narrow under the amendment as it was before.

There were only a few public comments on the proposed amendment to Rule 106. All but one were positive; a couple had suggestions for minor changes. At this meeting, the Committee will determine whether to make any changes to the proposal in light of public comment, and will vote on whether to recommend an amendment to Rule 106 to the Standing Committee for final approval and referral to the Judicial Conference. If all goes well, the effective date of the amendment will be December 1, 2023.

At the last meeting, the Committee agreed in principle to make a change to the proposed amendment---deleting the term "oral or written" from the amendatory language, so the final version would just refer to a "statement." That issue will be recapped in this memo, as it was also a question raised in a public comment.

This memo sets forth the amendment as it was released for public comment. After that, the memo will review possible changes that the Committee may wish to vote upon before a final vote to approve the amendment and send it on to the Standing Committee.

A summary of public comment is set forth at the end of the memo.

The Proposed Amendment and Committee Note as Released for Public Comment

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

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 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 all statements, including 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 rule is expanded to now cover all writings and all statements—whether in documents, in recordings, through assertive conduct, 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).

I. Deleting "written or oral": ~~written or oral~~ statement.

The amendment as issued for public comment currently replaces "writing or recorded statement" with "written or oral statement." At the last meeting, the sense of the Committee was that "written or oral" should be deleted, because if the language is retained, the rule would not

cover a statement that is neither written nor oral. Thus, statements that are made through some form of non-verbal conduct could not be used to complete.

That tentative decision to delete "written or oral" was applauded by the American Association for Justice (AAJ) in its public comment on the rule. AAJ pointed out (as did Judge Sullivan at the last meeting) that "written or oral" might not cover communications such as those made through the use of sign language.

Because there is no evidentiary difference between an oral statement and a statement made through sign language, and also because other types of conduct may be communicative and thus a statement (such as shaking one's head or pointing), it makes eminent sense to delete "written or oral." The Committee will take a final vote on that proposal at the Spring meeting.

If the Committee decides to drop "written or oral" and go forward with "statement" the Committee Note will need to be modified. 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 all statements, including 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~~ in any form, including statements made through conduct or sign language.

II. Public Comment Suggestion to add a Qualifier to the Amendatory Language.

The New York City Bar Association filed a public comment in support of the proposed amendment to Rule 106. But it suggested adding to the amendatory language, as follows:

> If the court finds that fairness requires it, then the ~~The~~ adverse party may do so over a hearsay objection.

The NYCBA says that this language is necessary to prevent courts from essentially allowing an opponent to complete with hearsay in any case in which a portion of a statement is admitted.

It seems that NYCBA's assertion is misconceived, because *there already is a fairness requirement in the rule*. You don't get to invoke the new language unless fairness requires completion in the first place. What is now the first sentence of the rule as amended (what was originally the entire rule) sets forth the trigger for applying the rule --- a misleading portion is admitted and fairness requires completion. All the new sentence does is allow that completion to be done over a hearsay objection. But, again, that hearsay sentence does not come into play until the fairness assessment has been made.

Essentially, the NYCBA suggestion adds a superfluous provision that is likely to be confusing, given the complicated issues that arise around Rule 106. Also, the Stylists say that you can't say the same thing twice inside a single rule. So it appears that the suggestion should not be implemented. It is notable that the NYCBA's concern was not expressed in any other public comment, and has never been suggested in the Committee after more than five years of work on Rule 106.

Another concern with the NYCBA proposal is that while it appears to be superfluous, a court might understandably think it must have an independent purpose, otherwise why put it in? And it could be thought that in order to have some effect, the fairness language was intended to add a new *and different* fairness standard to the question of admissibility of hearsay --- that is, that there is one standard of fairness to determine whether completeness is required, and another, different (but unelaborated) standard for admitting hearsay on completeness grounds. That would be a terrible state of affairs --- complicating what is one of the more complicated rules of evidence, to no apparent purpose. So, however you cut it, it is not advisable to include a fairness standard in the sentence on hearsay.

III. The Effect, if any, of the Supreme Court's Decision in *Hemphill v. New York*

The common-law rule of completeness was recently discussed, obliquely, in a case involving the right to confrontation. The case is *Hemphill v. New York,* 142 S.Ct. 681 (Jan. 20, 2022). This section considers whether anything in *Hemphill* might require a modification or abandonment of the proposed amendment to Rule 106.

Hemphill was charged with murder with a 9 millimeter caliber gun. He claimed that Morris did the shooting. Evidence indicated that Morris had both 9 caliber ammunition and .357 caliber ammunition in his bedroom. The state had first charged Morris with the murder but then dismissed those charges, and Morris pleaded guilty to charges related to his .357 handgun. In his plea allocution, Morris admitted to the charges related to the .357 gun, but denied using a 9 millimeter gun. Morris was unavailable at Hemphill's trial. Hemphill offered *evidence* (not a partial statement) about the presence of the 9 millimeter ammunition in Morris's bedroom. He did not offer any evidence regarding the other ammunition. To rebut Hemphill's evidence, the prosecution offered Morris's plea allocution --- which all agreed was testimonial hearsay under *Crawford.* The trial court held that Hemphill opened the door to Morris's hearsay by proving

only the fact that the 9 millimeter ammunition was present in the bedroom. The court found that by doing so Hemphill forfeited his right to confrontation.

The Supreme Court, in an opinion by Justice Sotomayor, unanimously rejected the state courts' forfeiture arguments and found that admitting Morris's plea allocution violated Hemphill's right to confrontation. The Court declared that under *Crawford, "*the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution's procedures for testing the reliability of that evidence are followed." The Court declared that the trial court "violated this principle by admitting unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct." But "it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause."

It could be said that the state's argument in *Hemphill* had an aura of the rule of completeness. But Justice Sotomayor emphasized that "the Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay." She continued with the following explanation:

> Under that rule, a party "against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder." *Beech Aircraft Corp. v. Rainey*, 488 U. S. 153, 171 (1988) (quoting 7 J. Wigmore, Evidence § 2113, p. 653 (J. Chadbourn rev. 1978)); see also Fed.R.Evid. 106. The parties agree that the rule of completeness does not apply to the facts of this case, as Morris' plea allocution was not part of any *statement* that Hemphill introduced. Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court. (emphasis added)

In his concurring opinion, Justice Alito asserted that a forfeiture of confrontation rights could occur under the common-law rule of completeness. That could happen, according to Justice Alito, if the defendant introduces only a portion of a hearsay declarant's testimonial hearsay --- which did not occur in this case.

Justice Alito takes the position that the common-law rule of completeness would apply *whenever* the defendant introduces a portion of a testimonial hearsay statement. Justice Alito's description of the common-law rule of completeness is probably overstated, however, at least as the common-law rule has developed to today. It is true that the completeness rule began as essentially allowing omitted portions to complete whenever other portions were introduced. But the courts narrowed the doctrine over time. A prior memo from the Reporter on this subject concludes as follows:

> In sum, at common law, parties were permitted to complete both written and oral statements first presented in fragmented form by their adversaries. While the courts employed numerous linguistic formulas to describe the circumstances in which completion was required, *courts generally permitted completion only to prevent a misleading impression that would be created by taking the first fragment out of context.* . . . Finally, the majority of common law courts allowed the completion right to "trump" other evidentiary restrictions and permitted admission of completing remainders that would have been inadmissible had the proponent not introduced a partial, misleading statement.

It seems pretty clear that nothing in *Hemphill* affects the amendment out for public comment. The majority specifically states that it is saying nothing about the rule of completeness. And while Justice Alito has overstated the breadth of the common law rule, that has no effect on anything that is accomplished by the amendment.[1] Moreover, the text of Rule 106 is obviously inapplicable to the question at hand in *Hemphill,* which involved the right to confrontation. As you know, the Court has taken a historical approach to interpreting the right to confrontation; in *Hemphill,* all members of the Court appear to recognize that the common-law rule of completeness might in some case operate to prevent the defendant from invoking his right to confrontation. An example might be the defendant cherry-picking from a guilty plea allocution of a cohort. But under this historical approach, it is the common-law rule of completeness that would be operating, not Rule 106.

In fact there is something to be taken from Justice Alito's position in *Hemphill* that supports the amendment. If the common-law rule of completeness is as broad as he says it is, then the amendment is doing a service by replacing the common-law rule as a matter of evidence. Nobody wants a rule where, if one party admits a portion of something, the opponent is automatically entitled to admit everything else.

All that said, there is a sentence in the Committee Note that might be altered or deleted, in light of the fact that the common-law rule of completeness might still be operative in cases involving a defendant's confrontation claim. Here is the paragraph in the Note involving the common-law rule of completeness:

> 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

[1] To be fair, Justice Alito was describing, but not directly addressing, the breadth of the common-law rule of completeness. His major point was simply that when authorized under the common law rule, completion could justify forfeiture --- and then he cited some older common law language that was less careful in limiting the circumstances in which completion is authorized. So not too much should be made of Justice Alito's description of the trigger for the common-law rule of completeness.

> 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.*

Anyone who agrees with Justice Alito's broad view of the common-law rule of completeness will beg to differ that the results under Rule 106 are generally in accord. While the sentence is correct given how the common law developed, there seems to be little reason to make a statement that essentially picks a fight with Justice Alito's description of the common law. It certainly does not seem critical to opine that the new rule is consistent with the common law. The point is that the common law, whatever it is, can no longer be looked to for evidentiary questions of completeness. So it is probably prudent to delete the last sentence of the above paragraph.

Beyond that, the question is whether, in light of *Hemphill,* something should be said in the Committee Note about the continuing relevance of the common-law of completeness in cases involving the right to confrontation. That is probably not a good idea, however, for a number of reasons: 1) the *Hemphill* Court passed on deciding the applicability of the common-law rule in confrontation cases; 2) Justice Alito's description in passing of the common law is actually at odds with the terms of existing Rule 106, and so the reference to constitutional common law in the Note would probably be confusing; 3) the vast majority of Rule 106 questions arise when the *government* offers a portion of a statement, whereas the constitutional question arises only when the accused does so; and 4) reaching out to opine on a constitutional question that the Rule does not even cover seems inappropriate and unnecessary for a Committee Note.[2]

[2] One example of a Note's reach into constitutional law was the original Advisory Committee Note on the relationship between hearsay and the Confrontation Clause. That extensive Note has been undermined by the Supreme Court's analysis in *Crawford v. Washington.*

While the confrontation question raised by Justice Alito probably should not be addressed in the Committee Note, it must be mentioned that Justice Alito's position actually supports the underlying premise of the amendment: that a party who offers a portion of a statement that is misleading forfeits the right to object to it. And if that forfeiture runs to a constitutional right, as Justice Alito believes, it obviously should apply to a hearsay objection.

IV. Final Draft of the Amendment to Rule 106 and the Committee Note

What follows is the proposal as issued for public comment, but with two changes:

1. Covering all statements, including by conduct or sign language, and making corresponding changes in the Committee Note.

2. Deleting the sentence in the Note stating that Rule 106 is consistent with the common law rule of completeness.

Nothing about the Confrontation Clause is added to the draft below, but it can be added if the Committee decides it necessary.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

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

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ 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 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 the 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 non-hearsay value in showing context. Under the amended rule, the use to which a completing statement can be put will depend on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, Rule 106 has been amended to cover all statements, including 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 statements, in any form -- including statements made through conduct or sign language.

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 unrecorded 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.

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).

Summary of Public Comments on the Proposed Amendment to Rule 106

Victor Glasberg, Esq. (EV-2021-0005-0004) suggests that the amendment allow completeness with a statement "that in fairness ought to be considered at the same time, notwithstanding a hearsay objection." He states that this language "effectuates the apparent intent of the revised rule without appearing to nullify hearsay as a possibly sufficient objection to the proposed supplementation."

The Federal Magistrate Judges Association (EV-2021-0005-0013) supports the proposed amendment to Rule 106, stating that the changes are "consistent with the existing purpose of the Rule to avoid misleading use of out-of-court statements offered at trial."

The American Association for Justice (EV-2021-0005-0030) supports the proposed amendment to Rule 106, but suggests that the reference to "oral or written" statements should be deleted, because that term would not cover statements made through sign language. AAJ also suggests a change to the Committee Note regarding the displacement of common law.

Charles Peckham, Esq. (EV-2021-0005-051) states that the changes to Rules 106 and 615 are "well thought through" and encourages their passage.

The New York City Bar Association (EV-2021-0005-0092) supports the proposed amendment to Rule 106. The Association suggests that the fairness standard that is already in the rule should be reemphasized in the language added concerning hearsay --- so that the amending language should read "If the court finds that fairness requires it, the adverse party may do so over a hearsay objection."

The Federal Bar Association (EV-2021-0005-0094) approves the proposed amendment to Rule 106.

Dennis Quinlan, Esq. (EV-2021-0005-0096) supports the proposed amendment to Rule 106 as "a clear improvement over the previous iteration."

Jeremy D'Amico, Esq. (EV-2021-0005-0223) opposes the proposed extension of Rule 106 to oral unrecorded statements, on the ground that it may be difficult to prove the exact statement that was made.

The National Association of Criminal Defense Lawyers (EV-2021-0005-0224) strongly supports the proposed changes to Rule 106, noting that the changes would rectify longstanding conflicts in the courts – and they would so consistently with "the stated goal of the rule: fairness."

TAB 3

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 615
Date: April 1, 2022

At the Spring 2021 meeting, the Committee unanimously approved, for release for public comment, an amendment 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).

The public comment on the proposed amendment was sparse. The summary of public comments can be found at the end of this memo. All the comments were positive. Two comments --- from the American Association for Justice (AAJ) and the National Association of Criminal Defense Lawyers (NACDL) --- call for some changes to the text or the Note. The colorable suggestions are addressed below.

Finally, at the last meeting the Committee considered three questions raised at the Standing Committee meeting in Spring, 2021. After discussion at the last meeting, the Committee determined the following:

1) the rule should not require that orders pursuant to it be made in writing;[1]

2) the rule should not set forth criteria for issuing an order that extends outside the courtroom;[2] and

[1] According to the Minutes of the last meeting, this Committee decision was made with the proviso that it would be revisited if there was significant public comment in favor of a writing requirement. The only comment received on that issue was from AAJ, which was strongly opposed to a writing requirement.

[2] AAJ, in its comment, agreed with the Committee's position that the criteria for an order extending beyond the courtroom should be left to the court's discretion.

3) the rule as amended clearly and sufficiently instructs that an order regulating activity outside the courtroom may be combined with an exclusion order, or issued independently --- and therefore no further elaboration was needed about the possibility of combining orders.

None of these issues are revisited below. What follows is a discussion of colorable suggestions made by AAJ and NACDL.

I. Specifying that an Order Extending Outside the Courtroom is to be Pursuant to a Party's Request.

The new Rule 615(b) provides that:

> 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.

AAJ suggests that (b) specify that "At a party's request or on its own initiative" the court may enter an order extending outside the courtroom. AAJ contends that the existing language is "vague" because it contrasts with the language of (a), which provides that an order is to be entered at a party's request or on the court's own motion.

What AAJ is missing, however, is that the specification of a party's request in (a) is necessary because this is the rare situation in the Evidence Rules where the court *must* grant the order if the party requests it. One can't speak of a court having to do something without some triggering event.

In contrast, the order under (b) is discretionary with the court. As such, an order under (b) is no different than the orders that a court issues in its discretion under many other rules of evidence. And in none of those other rules is it specified that there must be a party request. It is the general, well-engrained presumption that discretionary orders must always be proceeded by a party request, unless the court acts sua sponte. See, e.g., Rule 502(d) ("A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding."); Rule 1006 ("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 in court."). There is no need to mention this basic presumption --- because how else could the order happen except by request of the party or on a

court's own action? Adding such language to a discretionary provision seems confusing and unnecessary.

In contrast, in (a), there is no other way to say that a court *must* enter an order without conditioning it on a party's request --- otherwise the "must" would mean that the court would have to enter an order even without a party's request. Accordingly, the AAJ suggestion should not be implemented.

II. Deleting the Passage in the Committee Note Discussing the Need for the Rule Change

The first paragraph of the Committee Note establishes the need for the amendment. AAJ suggests that the language italicized below should be deleted:

> 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.*

AAJ considers the italicized passage superfluous and unhelpful. A response is that the language *is* helpfully setting forth why a change is necessary—because the case law on both sides of the issue is problematic, and the problems on either end can be resolved by the new rule language. The balance between protecting against tailoring, and yet providing fair notice, is probably not immediately evident to the novice.[3] It is useful to tell consumers why a rule needs to be amended, and what the stakes are for the amendment. However, it is for the Committee to determine whether the language should be retained. That question will be raised at the meeting. The bottom line is probably that the language is in fact helpful background, but taking it out is not, of course, fatal to the enterprise.

[3] It wasn't evident to me until I read the Ohio Advisory Committee's Note on the subject.

III. Using the Term "Representative" in the Committee Note

AAJ suggests a change to the paragraph in the Committee Note discussing the amendment to the provision allowing an entity to designate a representative who cannot be excluded from trial. The amendment to what would now be Rule 615(a)(2) limits the designation to a single representative. The Committee Note explains the change as follows:

> 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.

AAJ suggests that all references to an "agent" should be changed to "representative." The text of the rule speaks of a "representative" of an entity party, not an agent, so AAJ's suggestion has merit --- it is best to track the text. Moreover, as AAJ emphasizes, a person might be a representative but not an agent of the party --- an example would be an independent contractor, or an advisor. Thus, there is a strong argument that the AAJ suggestion should be adopted.

If the Committee accepts AAJ's helpful suggestion, then the paragraph would look like this (with the blacklined changes):

> Finally, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated ~~agent~~ representative 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~~ representative is exempt at any one time. If an entity seeks to have more than one witness-~~agent~~ representative protected from exclusion, it is free to argue under subdivision (a)(3) that the ~~additional agent~~ witness is essential to presenting the party's claim or defense.

IV. Suggestion to Limit the (a)(3) Exception for Necessary Witnesses

NACDL applauds the clarification that the grant of immunity from exclusion to an entity is limited to one representative. It suggests, however that the (a)(3) exemption for necessary witnesses should be tightened to prevent an entity-party from negating the limitations on (a)(2) through the "back door."

The first suggestion is that the slight amendment to (a)(3) should be rejected. That amendment is as follows:

> ~~a~~ any person whose presence a party shows to be essential to presenting the party's claim or defense;

NACDL argues that the use of "any" broadens the exception to exclusion, and would mean that "all that an entity party would have to do in order to get around (a)(2)'s limitation of one representative in the courtroom is to claim that more than one person is essential to presenting its claim or defense." With respect, this is an overstatement. A party can't get around exclusion by a mere "claim" that a witness is essential. The party seeking the exemption must convince the court, and the court has to find that the witness is, in fact, essential. That's what the rule means when it says that the party has to "show" that the witness is essential. *See, e.g., United States v. Ray,* 2022 WL 558146 (S.D.N.Y.) (noting that the government had satisfied its burden of establishing that the witness was essential because it explained that "based on the evidence at trial, the Government will have the agent calculate tax due during each of the calendar years 2015 to 2019 and the resulting tax liability"). If the government establishes that each witness's presence is essential, there is nothing wrong --- indeed it is consistent with the current rule --- in finding that multiple necessary witnesses will be exempt from exclusion.

The change from "a" to "any" was to emphasize that unlike (a)(2), the protection from exclusion in (a)(3) is not numerically limited --- a result that is in agreement with every court decision under the current rule. It would seem to be a helpful clarification, that should not be changed. It is true that "a" can mean more than one, but adding "any" provides a good distinction from the previous position which is now, "only one."

NACDL's next argument is that (a)(3) should be amended to state that essentiality must be demonstrated to the court by the party seeking exemption from exclusion. The suggested change is as follows:

> (3) any person whose presence a party ~~shows~~ demonstrates, to the satisfaction of the court, to be genuinely essential to presenting the party's claim or defense.

NACDL argues that this change would prevent the possibility that a witness will be exempted merely because a party "claims" essentiality. But the rule already requires more than a claim. The party must "show" essentiality, not just claim it. And obviously if the party has to show it, that showing must be made to the court; and the court should grant the exemption only if it is satisfied that the witness is necessary. (It is true that the Rule 702 amendment should mention in

the text that the decision is to be made by the court. But in that case, the alternative is the jury. In the case of sequestration, the court is obviously the only source of an exemption from exclusion; the jury can't do that.).

There is no real difference between "shows" and "demonstrates." And adding the modifier "genuinely" before "essential" is what stylists call a "redundant intensifier." "Essential" is a finding that cannot by definition mean anything other than genuinely essential. Put another way, no court would ever say that the witness "is essential but not genuinely essential." So, this suggestion probably should be rejected.

NACDL's final suggestion seems to have more merit. It takes issue with a case citation in the proposed Committee Note. The paragraph in question is the last one in the Note:

> 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).

NACDL observes that in *Arayatanon*, the court makes the statement that the defendant "made no showing to overcome the government's representation that both agents were essential." That sounds like all you need to do is claim essentiality and the burden then shifts to the opponent to show that the witnesses are not essential. That is a misreading of the current rule, which states that the party must "show" and not just "claim" essentiality. In essence, the case citation, while properly supporting the point that more than one witness can be exempted under (a)(3), sends an incorrect signal about the moving party's obligation to show essentiality. Therefore, the NACDL suggestion to delete the case citation should be implemented.

The final draft of the text and Committee Note of the proposed amendment, implementing two of the changes discussed above, begins on the next page.

V. Final Draft of the Proposed Amendment to Rule 615, and the Committee Note

Of the changes discussed above, there are two that should be made, both of them to the Committee Note. They are: 1) using the term "representative" rather than "agent" in the Note discussion of (a)(2); and 2) deleting the case citation in the last paragraph of the Note. If the Committee believes that other suggestions are meritorious, then it will be easy to fold them into the draft below.

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. [4]

(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:

[4] Should the "a person" be changed to "any person" in (a)(4) as it is in (a)(3)? The answer is probably no. "Any" is added to (a)(3) to distinguish it from the obviously related (a)(2), which is limited to one person. The Committee wanted to signal, as it does in the Committee Note, that there can be more than one necessary witness under (a)(3). But (a)(4) is a freestanding provision that is dependent on an independent statute. The number of witnesses who will be excluded from exclusion under (a)(4) is not determined by (a)(4) but by the underlying statute. It seems better to leave it as it is, as the risk is that there could be an inadvertent conflict with an underlying statute when any kind of change is made to the rule.

(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 representative 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-representative is exempt at any one time. If an entity seeks to have more than one witness-representative protected from exclusion, it is free to try to show under subdivision (a)(3) that the witness 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).

Summary of Public Comment on the Proposed Amendment to Rule 615

The Federal Magistrate Judges Association (EV-2021-0005-0013) supports the proposed amendment to Rule 615. It views the proposed amendment as "largely clarifying existing practice." It states that the amendment "makes clear that mere exclusion does not operate to prohibit disclosure, placing the onus on a party seeking such a prohibition to specifically request one. We agree with this change and the language chosen to implement it."

The American Association for Justice (EV-2021-0005-0030) supports the proposed amendment, especially the specification that a corporate representative is entitled to only one representative that is protected from exclusion. It suggests that the term "representative" should be used consistently throughout the Committee Note. It also suggests that the provision governing orders outside the courtroom specify that the parties may ask for it or the court can order on its own motion. And it suggests that language in the Note explaining the reason for the amendment should be deleted as "superfluous."

Charles Peckham, Esq. (EV-2021-0005-0051) states that the changes to Rules 106 and 615 are "well thought through" and encourages their passage.

The Federal Bar Association (EV-2021-0005-0094) approves the proposed amendment to Rule 615.

Dennis Quinlan, Esq. (EV-2021-0005-0096) supports the proposed amendment to Rule 615 as "a clear improvement over the previous iteration."

The National Association of Criminal Defense Lawyers (EV-2021-0005-0462) supports the proposed amendment, while suggesting a few changes. Those suggestions include: 1) deleting a reference to a case in the Committee Note that could be read to allow a witness to be designated as "essential" without an inquiry by the court; 2) deleting the proposed change in subdivision (c) to "any" person; and 3) clarifying the limits on the exception to exclusion provided in subdivision (d).

TAB 4

TAB 4A

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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: April 1, 2022

At its Spring 2021 meeting, the Advisory Committee unanimously approved an amendment to Rule 702 and a Committee Note, for release for public comment. The amendment was also unanimously approved by the Standing Committee; several Standing Committee members provided laudatory comments about the proposed amendment.

The public comment period ended in mid-February. 533 comments were posted on Rule 702. In addition, the Committee held a public hearing in which a number of organizations and individuals were heard. The public reaction is somewhat surprising, because the proposed amendment essentially seeks only to clarify the application of Rule 702 as it was amended in 2000 --- and that amendment received 179 comments.

This memo seeks to synthesize and summarize the public comments so that the Committee can determine whether any of them require modifications to the proposed amendment or Committee Note. Summaries of the public comments and the hearing testimony are included in separate attachments in the Agenda Book, behind this memo.

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.

REVIEW OF PUBLIC COMMENTS[1]

I. Overview

Numerically speaking, about 80% of the public comments were in opposition to all or part of the proposed amendment and Committee Note. Of those opposed, almost all were lawyers and law firms representing plaintiffs. Before we get to the specific comments, here are three general observations from one who read every single word over a very fun week:

• **Talking points:** A large majority of complainants were using what appeared to one of four standardized talking points memos, of origin unknown to me. One of the templates cautioned that the preponderance of the evidence standard would give the trial court the "mantel of juror" and would create a "waterfall" of state amendments; another template stated that the preponderance of the evidence standard is "inextricably intertwined" with juror factfinding; a third warned of "time consuming" hearings and "clogged dockets." A fourth asserted that the rule was "unfair to our clients" and that "states will be affected too."

It is for each Committee member to determine the weight to be given to a templated comment. It is raised here to provide a possible explanation for the volume of the comments. The easier it is to make a comment, the more likely there will be one. And it is easier to copy and paste than to write from scratch.

• **Common misperceptions about existing law:** A large number of comments in opposition are based on misunderstandings of the existing law on expert testimony under Rule 702, as it was amended in 2000.

For example, many comments complained that the amendment would shift the burden of proof on reliability to the proponent of the experts, a result asserted to be contrary to the current law requiring the opponent to prove the expert to be unreliable. In fact the burden has been on the proponent to establish reliability at least since *Daubert,* and definitely since the 2000 amendment.

[1] The testimony at the hearing raised essentially the same observations and suggestions as the submitted public comments, so this memo for simplicity purposes refers to "public comment."

Another common refrain was that the amendment conflicts with *Daubert* because it requires the court to evaluate whether the expert's methodology was reliably applied. It is true that the Court in *Daubert* made the infamous statement that the gatekeeper must look only at the expert's methodology and not at the conclusion. But that statement was abandoned by the Court itself in its decision in *Joiner,* where the Court stated that the gatekeeper must consider whether there is an "analytical gap" between the expert's methodology and conclusion. And the "methodology-only" statement in *Daubert* was completely rejected by the 2000 amendment to Rule 702, which added Rule 702(d), specifically requiring the judge to find by a preponderance that the expert's methodology was properly applied.

These common misconceptions actually end up supporting the need for an amendment. The misstatements of law are clearly in good faith, and in fact the statement that an opponent has the burden of showing untrustworthiness is actually correct in a number of lower courts that have misapplied Rule 702. The fact that so many good lawyers misstate the intent and meaning of Rule 702 provides cause for clarifying that: 1) the proponent has the burden of demonstrating reliability; and b) the court must consider whether the expert's opinion reflects a reliable application of the methodology. That's exactly what the amendment does.

• **The volume of negative comments:** The fact that there are so many negative comments seems daunting. Is it a sign that the unanimous Committee, and the unanimous Standing Committee, are just on the wrong track, and that the amendment should be abandoned?

There are many reasons for concluding that the negative comment should not derail the amendment, and at most it justifies some minor changes to the rule.

For one, it depends on how you count. If you count individual lawyers who posted, that is one thing. If you count the members in the firm, or even the members in a litigation department, then it can easily be said that there are more favorable than unfavorable comments.

For another, the public comment to the 2000 amendment to Rule 702 was also largely negative. 179 comments were received in 2000. 110 were opposed. And the opposing comments were eerily similar to those that have been received on the current proposal. To take some representative examples of the comments in 2000:

> **John Borman, Esq. (98-EV-039)** opposes the proposed amendment to Evidence Rule 702 as an unwarranted expansion of the trial court's gatekeeping role. He concludes: "The proposed rule will permit trial judges to choose between opposing witnesses, exclude expert testimony where the judge disagrees, and infringe on the litigant's constitutional right to a jury trial."
>
> **John R. Lanza, Esq. (98-EV-087)** states that the proposed amendment "now places the trial court not as 'a gatekeeper' but as a 'super juror'. This results in costly evidentiary hearings and in preclusion of case determinant expert testimony, based upon the trial judge's interpretation of facts."

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 702 on the ground that it "would trample the rights of Plaintiffs who would be denied their day in Court."

The Montana Trial Lawyers Association (98-EV-098) opposes the proposed amendment to Evidence Rule 702, stating that the reliability requirements set forth in the proposal "go way beyond judicial gatekeeping and usurp the fact finder and jury roles."

The Trial Lawyers Association of Metropolitan Washington, DC (98-EV-100) strongly opposes the proposed change to Evidence Rule 702. The Association believes that the proposal "raises the bar of admissibility on expert opinions to a height that totally usurps the jury's traditional role as the fact-finder. By requiring that federal judges make 'reliability' findings about the facts and methods used by experts, the proposed rule would have judges become the real triers of fact concerning experts." The Association asserts that the proposal is based on a factual assumption that jurors are incompetent--a reflection of "an elitist bias."

Anthony Tarricone, Esq. (98-EV-166) states that the proposed amendment to Evidence Rule 702 would "substitute the judge as finder of fact instead of the jury by removing from the jury consideration of the weight and credibility of evidence." He does not believe that the is "sufficient justification" for the proposed change.

Annette Gonthier Kiely, Esq. (98-EV-167) states that the proposed amendment to Evidence Rule 702 "threatens the traditional role of the jury as the finder of fact by empowering the judge to exclude evidence, whose weight and credibility has traditionally been and should continue to be assessed by the jury in determining the facts in issue."

Douglas K. Sheff, Esq. (98-EV-170) asserts that the proposed amendment to Evidence Rule 702 "would be an affront to the jury system and much of what the founding fathers intended when they created the finest means ever devised to determine disputes."[2]

As the Magistrate Judges' Association recognized in its public comment, the proposed amendment to Rule 702 is a modest clarification of the existing Rule 702. As such, it is probably not surprising that it would receive about the same percentage of negative comments --- on pretty much the same grounds --- as the original proposal. The fact that so many commenters claimed that the proposal was a frontal assault on the system speaks more to what the 2000 amendment (and *Daubert)* might have done than to what this amendment would do. It's the battle of 2000 all over again. But essentially the opposing arguments were overstated then, and seem doubly overstated in response to a clarifying amendment.

[2] A more extended list of negative comments on the 2000 amendment is set forth after the summary of comments to the current proposal, attached to this memo.

• **The side of the v. :** It can't be disputed that the proposed amendment to Rule 702 is divisive. The defendants' side loves it and the plaintiffs' side does not. Whether that divide in itself should derail a unanimously approved amendment is another question. It certainly should not be the case that the Committee may only propose amendments that please both sides. The question for the Committee should be whether there is a good rulemaking reason for a rule that one side likes and the other side does not.

Here would be the justification for the proposed amendment, independent from "whose side is it on": The *Daubert* Court signaled that federal courts should scrutinize expert opinions, for fear that an expert would be providing unreliable testimony, and that the jury would not be in a position to understand that the testimony is flawed. That is why the gatekeeper function was placed in Rule 104(a). The 2000 amendment simply sought to codify and amplify the *Daubert* trilogy, by creating specific admissibility requirements of sufficient facts and data, reliable methodology, and reliable application. The Committee at that time saw all three factors established in *Daubert, Joiner,* and lower court cases. The Committee believed that by making them admissibility requirements, that automatically would mean that the preponderance of the evidence standard would apply to them --- as it applies to the vast majority of admissibility requirements. The Committee Note to the 2000 amendment reflects that assumption.[3] Adding these requirements in 2000 fell harder on the plaintiffs' side, without question. But the Committee believed that *Daubert* and its progeny required such an outcome. The Committee concluded that the gatekeeper function would be a sham if the court would simply say, "close enough, let the jury handle it." It's not at all that the amendment was *intended* to fall harder on plaintiffs; it was simply thought to be good rulemaking, stemming directly from Supreme Court decisions.

Because the current amendment is simply intended to emphasize that the 2000 amendment means what it said, it follows that the same conclusion should apply. While it might fall harder on one side of the v., it is consistent with, indeed mandated by the Supreme Court's assessment that the trial judge must act as an effective gatekeeper. Put another way, this proposal is no more or less objectionable than the 2000 amendment. If its effect is to favor one side over another, that is simply the effect of the 2000 amendment itself.[4]

[3] A similar assumption was made in the 1997 amendment that added Rule 804(b)(6), the forfeiture exception to the hearsay rule. The intent of the amendment was to codify common law, so that the government would have to prove the element of forfeiture by a preponderance of the evidence. It was thought that by making admissibility requirements, that would automatically mean that the factual showings would be governed by Rule 104(a). See the Committee Note to Rule 804(b)(6) ("The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.").

[4] It should be noted that other amendments have fallen on one side of the v. For example, the 2010 amendment to Rule 804(b)(3) imposed an evidentiary burden on the prosecution. The 2006 amendment to Rule 609 made it easier for criminal defendants to testify free from impeachment. The 2020 amendment to Rule 404(b) imposed burdens on the prosecution. The 2016 amendments regarding authentication of electronic evidence likely favor the government in criminal cases. The 2013 amendment to Rule 803(10) provided a procedure that benefits the government. And finally, the 2016 amendment to Rule 803(16), the ancient documents exception, surely falls harder on plaintiffs than defendants.

• **Groups not affiliated with either side.**

It is notable that organizations considered to be neutral submitted public comment in favor of the amendment. Those organizations include the Federal Magistrate Judges' Association, the Association of the Bar of the City of New York, the Federal Bar Association, and the Democracy Forward Foundation.

This memo now proceeds to address the specific attacks and suggestions that were made in the public comment.

II. The Preponderance of the Evidence Standard

By far the most common objection to the proposed amendment concerned the use of the standard "preponderance of the evidence." There are three separate arguments that were directed at the standard: 1) This must mean that the trial judge can only consider *admissible* evidence at the *Daubert* hearing --- which would mean that an expert would be excluded for relying on inadmissible evidence, even though she is allowed to do that under Rule 703; 2) This would turn judges into factfinders, and thus violate the right to a jury trial; 3) The preponderance of the evidence standard is "inextricably intertwined" with juror factfinding. As to all these objections, there was a proposed solution in most of the comments: changing the standard to "a preponderance of information" would (pretty miraculously) solve all of these problems. Each of these arguments, and then the suggested solution and another possible solution, will be discussed in turn.

A. Admissible Evidence Only?

The argument that the preponderance of the evidence standard will mean that only admissible evidence may be considered at a Rule 104(a) hearing is hard to take very seriously. The proposed amendment is *grounded* in Rule 104(a). Rule 104(a) specifically says that in deciding on the admissibility of evidence, the judge is not bound by rules of admissibility --- indeed that is the *only* thing that Rule 104(a) says; the preponderance standard was interpreted into the rule by the Supreme Court in *Bourjaily.* I am not sure how one can conclude that reemphasizing the applicability of the Rule 104(a) standard of proof somehow rejects the very words of the rule itself.

At the public hearing, there were some strained attempts to argue that Rule 104(a) does not in fact include a preponderance of the "evidence" standard but rather requires a preponderance of "proof" or "information." Without going too far into the sinkhole, suffice it to say that the Court in *Bourjaily* and *Daubert* both refer explicitly to a preponderance of the *evidence* standard being grounded in Rule 104(a); that the 1997 amendment to Rule 804(b)(6) --- after *Daubert* and *Bourjaily* --- speaks of "[t]he usual Rule 104(a) preponderance of the *evidence* standard that was adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage"; and that the 2000

amendment to Rule 702 cites Rule 104(a) as controlling and that "[u]nder that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the *evidence*."[5]

There were arguments at the hearing that the Committee was conceding it had made a mistake in referring to "preponderance of the evidence" in the text, by adding a paragraph to the Committee Note to clarify that the term did not mean that the evidence had to be admissible at a trial.[6] Indeed that paragraph was added at the Spring 2021 meeting in response to an expressed concern that the preponderance of the evidence standard might be misinterpreted. But it is, to say the least, ungenerous, to label that paragraph as admitting a mistake. Rather, the intent of the paragraph is to remove any doubt that someone could misapply the text so gravely as to think that the Committee was rejecting the language of the very rule that it was adopting. It's actually rather frightening to think that Committee Notes that are intended to remove any possible doubt are turned around and argued to be confessions of error.

In sum, there is no reasonable ground to conclude that the preponderance of the evidence standard in the proposed amendment limits the gatekeeper to admissible evidence. Therefore, the asserted impact on Rule 703 is also a phantom.

This does not mean that the Committee shouldn't consider a change to the text of the proposed amendment. That will be discussed below. It just means that there is no reason to think that the chosen language somehow limits the gatekeeper to admissible evidence. That's just not so.

B. Turning Judges Into Factfinders

The claim that the preponderance of the evidence standard improperly turns judges into factfinders is belied by two points: 1) the preponderance of the evidence standard has been applied to reviewing expert testimony for the last 30 years, so a claim that it is somehow improper is surely water under the bridge; and 2) most importantly, it is clear that judges *do* and *must* find facts in determining the admissibility of evidence, including expert testimony. Let's discuss this second point.

At a Rule 104(a) hearing, the judge must determine whether a particular admissibility requirement is met. It is usually the case that the admissibility requirement is based on findings of fact. Here are some examples from the cases:

[5] One commenter stated at the hearing that the reference to preponderance of the "evidence" had to refer to admissible evidence only, because something is not even "evidence" until it has been admitted. That is to say that, apparently, there is no such thing as inadmissible evidence. That is surprising, given that a search of the term "inadmissible evidence" gets more that 10,000 hits on Westlaw. A search of a number of those hits did not uncover any court stating that "there is no such thing as inadmissible evidence."

[6] A man from Florida scolded the Committee for making a "mistake", and yet not admitting its shameful conduct until the last paragraph in the Committee Note.

• When a statement is offered under the coconspirator exception, the court must find by a preponderance of the evidence that the defendant and the declarant are members of the same conspiracy. "It is clear that statements by persons alleged to be co-conspirators may be considered by the jury only if the trial court is satisfied by a fair preponderance of the evidence that the defendant was in fact a member of the conspiracy." *United States v. Cicale,* 691 F.2d 95, 103-104 (2d Cir. 1982). The *Cicale* court also notes that "the trial court must view the evidence as a whole, rather than consider the individual pieces in isolation" --- which sounds a lot like finding facts. *See also United States v. Martorano,* 557 F.2d 1, 11 (1st Cir. 1977) ("Under these rules, the question of admissibility of hearsay statements of an alleged coconspirator is committed exclusively to the trial judge who will admit hearsay declarations if he determines, by a preponderance of evidence, that the conspiracy existed, that the declarant and defendant were members of it at time statements were made and that the declarant's statements were made in furtherance of conspiracy."); *United States v. Lora,* 210 F.3d 373 (6th Cir. 2000): "To be admissible under Rule 801(d)(2)(E), the party offering a co-conspirator statement must show by a preponderance of the evidence that: 1) the conspiracy existed; 2) the defendant was a member of the conspiracy; and 3) the co-conspirator's statements were made in furtherance of the conspiracy. *Whether the offering party has made the showing is a question of fact for the court to decide.* Fed.R.Evid. 104(a)."

• When a hearsay statement is offered as an excited utterance under Rule 803(2), the court must find that the declarant was under the influence of a startling event. "As in all questions of admissibility, resolution of any dispute of fact . . . is confided to the trial judge to be decided by preponderance of evidence, and while the trial judge is not confined to legally admissible evidence in making such determination, still he must make findings necessary to support admissibility." *Miller v. Keating*, 754 F.2d 507, 511 (3d Cir. 1985) (discussing Rule 803(2)).

• A trial court of necessity makes findings of fact for privilege determinations --- e.g., whether the client was seeking legal advice, whether the statement was reasonably expected to be confidential, and whether the client waived the privilege. See, e.g., *United States v. Campbell,* 73 F.3d 44, 48 (5th Cir. 1996) (reviewing district court's factual finding of waiver).

• If a statement is offered as the statement of an agent of a party-opponent under Rule 801(d)(2)(D), upon objection the court will have to find that the declarant is in fact an agent. *See, e.g., Pappas v. Middle Earth Condominium Association,* 963 F.2d 534, 538 (2nd Cir. 1992) ("Here, the district court made an *express finding* that the declarant, who arrived at the condominium with a shovel and a bucket after the occupants of condominium had called Castlerock to complain about the icy walkway, was an employee of the management company. Thus, the agency relationship was sufficiently established without identifying the employee.") (emphasis added).

• For a dying declaration offered under Rule 804(b)(2), upon objection the court must make a finding that the declarant was under awareness of imminent death. *See, e.g., Woods v. Cook,* 960 F.3d 295 (6th Cir. 2020) (upholding trial court's findings that the declarant was under awareness of impending death, by relying among other things on the declarant's request for Last Rites).

• In deciding whether a defendant has forfeited his right to object to a statement on hearsay grounds under Rule 804(b)(6), the trial court must find that the defendant acted wrongfully and caused the declarant to be unavailable, with the intent to render the declarant unavailable to testify. These are all factual findings. *See, e.g., United States v. Gurrola,* 898 F.3d 524 (5th Cir. 2018) (no error in the trial court's finding that the defendant murdered his wife specifically to prevent her from testifying against him).

• The Committee Note to the 2019 amendment to Rule 807, the residual exception, cites Rule 104(a) and recognizes that the trial judge must find as a fact that the hearsay statement is supported by sufficient guarantees of trustworthiness.

• In deciding whether an opinion is evaluated under Rule 701 or 702, the trial court must upon objection make a finding that the opinion is or is not based on "scientific, technical, or other specialized knowledge within the scope of Rule 702." *See, e.g., United States v. Stahlman,* 934 F.3d 1199 (11th Cir. 2019) (reviewing a trial court's specific finding that "there is specialized knowledge within the scope of this testimony").

• In deciding whether an expert has based an opinion on sufficiently reliable sources under Rule 703, the trial court upon objection must make a finding that the sources are what other experts in the field would reasonably rely upon. *See, e.g., Advent Systems v. Unisys Corp.,* 925 F.2d 670 (3rd Cir. 1991) (remanding a case because the trial judge had not made a factual inquiry into whether the data relied upon by a damages expert was the type of data on which other experts would reasonably rely). And some courts make findings on whether the underlying data is or is not reliable. *See, e.g., Alfa Corporation v. Oao Alfa Bank, Inc.,* 475 F.Supp.2d 357 (S.D.N.Y. 2007) (finding that an internet source was sufficiently reliable basis for an expert's opinion).

In sum, it is just not true that there is something inappropriate about trial judges acting as factfinders in Rule 104(a) hearings. It happens all the time. ***And judicial factfinding occurs under Rule 702 as well.*** To take just a few examples:

- *Milward v. Rust-Oleum Corp.,* 820 F.3d 469 (1st Cir. 2016): The trial court made a finding that a specific causation expert could not testify because he had not engaged in a scientifically reliable method to "rule in" a particular cause of injury. The court of appeals found no error.

- *United States v. Davis,* 970 F.3d 650 (6th Cir. 2020): The trial court allowed a coroner to testify that drugs caused a victim's death, even though the coroner had not done an autopsy to rule out other causes. The court of appeals held that the trial court did not err in relying on the coroner's testimony that expert practice does not necessarily require an autopsy to establish the cause of death, and that an autopsy was not indicated in the circumstances of the case.

- *In re Mirena IUS Levonogestrel-Related Products Liab. Litig.,* 982 F.3d 113 (2nd Cir. 2020): The trial court properly inquired into whether the expert's methodology was generally accepted, and properly found as a fact, after an in-depth analysis, that the expert had not reliably applied the methodology.

- *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998): "Procedurally, *Daubert* instructs us that the district court must determine admissibility under Rule 702 by following the directions provided in Rule 104(a). Rule 104(a) requires the judge to conduct *preliminary fact-finding* and to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 592–93." (emphasis added).

- *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 744 n. 11 (3d Cir. 1994) (regarding expert testimony): "However, the Supreme Court subsequently made clear that judges should find facts under Rule 104(a) using a preponderance standard."

So it cannot credibly be argued that the proposed amendment is infirm because it requires the trial court to be a factfinder. But there is a less extreme argument in the comments that should be addressed: that is the concern that the trial court will be allowed to "choose sides" and simply say something like "I find the defendant's expert to be more credible than the plaintiff's expert. Summary judgment granted." Let's address the "choosing sides" argument.

First, the same "choosing sides" argument was made in the objections to the 2000 argument. As the proposed amendment simply clarifies the 2000 amendment, these same arguments should probably receive the same treatment.[7]

Second, none of the judicial factfinding above has anything to do with choosing sides. Rather it is just *finding the facts that are necessary to establish the admissibility requirements*.

[7] A summary of the comments received on the 2000 amendments is set forth at the end of the summary of comments on the current proposal, as an attachment in this agenda book.

Third, the Committee Note to the 2000 amendment specifically cautions against the courts choosing sides:

> When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc.,* 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola,* 161 F.3d 77, 85 (1st Cir. 1998) ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

Because, again, the proposed amendment is intended simply to clarify and emphasize the 2000 amendment, this Committee Note remains as an instruction that the trial court is not allowed to "choose sides." And there is good indication in the case law that if a trial court *is* just choosing sides, the court will be found to be in error. *See, e.g., Elosu v. Middlfork Ranch, Inc.,* No. 21-3509 (9th Cir., 2/23/2022) (trial court erred in rejecting expert's testimony on the cause of a fire, mainly on the basis of crediting the contrary expert's testimony as being more credible). Nothing in the amendment changes this existing case law.

C. The Preponderance Standard as "Inextricably Intertwined" With Jury Determinations

The "inextricably intertwined" argument is not based upon the weak argument that judges are prohibited from finding facts in Rule 104(a) hearings. Rather the argument is that the term "preponderance of the evidence" will make it *sound like* judges are becoming jurors --- as that term is usually associated with what the jury does in a civil case.[8] And if they sound like they are becoming jurors, they are more likely to actually take over the jury's role –so goes the argument.

[8] Note, therefore, that even if there is merit to this argument, it does not apply to the application of the proposed amendment in criminal trials.

One response to this argument is that while the preponderance standard is associated with juror factfinding in civil cases, it is *also* specifically associated with the trial court's rulings on admissibility under Rule 104(a). That association began in *Bourjaily*; it was furthered in *Daubert*; and it is specifically invoked in the case law set out above and in the Committee Notes to amendments after *Daubert* --- specifically, the Notes to Rules 801(d)(2)(E), 804(b)(6), 702, and 807. Nothing in the proposed amendment extends the preponderance standard to any new type of finding. It leaves the preponderance standard where it found it --- it just makes it more explicit.

It's hard to deny, though, that if you asked a person unschooled in evidence "who applies the preponderance of the evidence standard?" --- more people would say "the jury" than "the court as to admissibility issues and the jury when evaluating all the evidence." So it is probably fair to say that the preponderance of the evidence standard "sounds like a jury thing" to the neophyte. The question is whether the concern over how a rule might be taken by some people should control a rule that is applied *by courts* in Rule 104(a) hearings. Surely no judge can read this amendment and say, "I must now take over the jury's role."

Whether there is enough of a possible misimpression to justify a change is a question for the Committee. It may be that the preponderance of the evidence standard, even though correctly applied in the proposed amendment, could be altered to avoid a possible misinterpretation (or at least to stop all the arguments about it), in a way that would still emphasize the court's obligation to find that the admissibility factors must be met by a preponderance. The next subsection evaluates drafting alternatives.

D. Alternatives to the Preponderance of the Evidence Standard

Many commentators opposed to the use of the preponderance of the evidence standard state that the asserted problems with that standard can be solved by requiring "a preponderance of the information." It is pretty awesome that the grave problems assertedly posed by the preponderance of the evidence standard – turning a judge into a factfinder, allowing the judge to choose sides, violating the 7th Amendment – can be solved simply by changing the word "evidence" to the word "information." But because most of those concerns about the preponderance of the evidence are unfounded, the real questions are: 1) whether using "information" makes the standard sound less like what the jury does and so is less "inextricably intertwined" with the jury's role; and 2) whether it is a workable standard on its own.

Let's assume that "preponderance of the information" sounds sufficiently different from "preponderance of the evidence" that it will not seem to the casual observer to be a term that is "inextricably intertwined" with the jury's role. Even if that is the case, a preponderance of the "information" standard is simply too vague to be used in the text of the amendment. The Webster dictionary defines "evidence" as something "submitted to a tribunal to ascertain the truth of a matter." It defines "information" as "knowledge obtained from investigation, study, or instruction." The difference is that "information" is free-floating where as "evidence" is information *that has been transmitted to a factfinder*. Ironically, the term "information" could be read by some to allow a judge in a Rule 104(a) hearing to consider relevant information even

though it has never been presented to the factfinder. Instead of cabining the judge, the term "information" could be read to allow the judge to consider material well beyond the actual evidence presented by the parties (such as information from the judge's own internet search) --- or to make credibility determinations based on "information" gleaned during the presentation of that information (such as whether the expert witness seemed believable as a witness, was nervous on the stand, etc.). It seems apparent that the term "information" will lead to arguments about just what a judge may consider in a Rule 104(a) hearing. The term is not sufficiently tied to information *presented to a tribunal* to be helpful.[9]

What About "More Likely Than Not"?

After the public hearing, the Chair and the Reporter conferred to discuss the opposition expressed at the hearing to the preponderance of the evidence standard --- an opposition that was intensified in the public comment. Both agreed, and still agree, that the preponderance of the evidence standard is a correct standard to apply. But both thought that if an alternative was deemed to be useful, even if for appearance's sake, then the rule would work if "preponderance of the evidence" were changed to *"more likely than not."*

The advantage of the "more likely than not" language is that it avoids adopting a phrase that some might think, however wrongheadedly, is for the jury alone --- while still incorporating the standard of proof (more likely than not) mandated by Rule 104(a). Another advantage is that it avoids the "evidence"/ "information" argument that swirled through the public comment, simply by saying nothing about it. It also avoids the expressed albeit incorrect argument that the amendment affects the use of inadmissible information by an expert under Rule 703. And it also means that the paragraph in the Committee Note explaining what is meant (and not meant) by "preponderance of the evidence" can be deleted --- thus avoiding the assumption that by including that provision, the Committee is admitting its own mistake in the text. So there is much to be said for a more likely than not standard. Even though the existing language in the text is correct, this substitute standard is also correct and appears to answer the vast majority of opposition in the public comment.

[9] It is notable that where "information" is used in the Evidence Rules, it is ordinarily in a context that is different from presenting evidence to a court. See, e.g. Rule 606(b) (referring to prejudicial information accessed by jurors); Rule 803(6) (referring to the sources of information for a business record); Rules 101 and 1001 (referring to electronically stored information); Rule 502 (referring to information covered by the attorney-client privilege).

Here is what the proposed amendment would look like if a change were made to "more likely than not":

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 that it is more likely than not that[10]:

(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.

The following changes would need to be made to the Committee Note if a "more likely than not" standard is used:

Committee Note

Rule 702 has been amended in two respects. First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless a court finds it more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. ~~the admissibility requirements set forth in the rule must be established to the court by a preponderance of the evidence~~. "First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless a court finds that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." *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

[10] The question of whether this should be changed to "the court finds" is discussed in the next section.

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.~~

The proposal to change "preponderance of the evidence" to "more likely than not" will be submitted for a vote at the Committee meeting.

III. Adding Back "the court finds"

Supporters of the proposed amendment continue to press for restoration of the language "if the court finds" or "the court determines" to the rule. The draft of the proposed amendment considered by the Committee at the Spring 2021 meeting provided that the expert's testimony is admissible "if the court finds by a preponderance of the evidence . . ." "Finds" was changed to "determines" after some Committee discussion. But eventually the Committee voted to delete this language, due to concern by some members that it would require the court to make a determination for every proffered expert --- even in the absence of an objection to that expert's testimony. There was also a concern that a court determination is not specified in other admissibility rules --- for

example, Rule 803(2) does not say that a hearsay statement is admissible "if the court determines" that the declarant was speaking under the influence of a startling event. The court determination is implicit in all admissibility requirements, so some Committee members thought that it would be unusual to specify it in the amendment to Rule 702.

There are good counterarguments that support reinserting "the court finds/determines" into the rule. First, the language cannot easily be read to require a court to make a finding even in the absence of objection, because the entire body of the Federal Rules of Evidence is based on the opponent making a timely and specific objection. See Rule 103(a) (there is no error unless a timely and specific objection is made). [11]

Second, while it is true that "the court determines" or "finds" is not in the text of other rules of admissibility*, neither is the preponderance of evidence standard*. It can be argued that the very reason for amending the rule is that many courts have shifted the question of expert testimony from admissibility to weight --- from the court to the jury. As such, it seems important to specify that the preponderance standard is to be applied *by the court* at the admissibility level. With the existing proposal, a court so inclined could reason that the rule leaves the preponderance decision to the jury, because it does not specify that it is for the court. 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 this amendment as explicit as possible.

The counterargument is that "the court determines" or "finds" is unnecessary because every rule of evidence is about what courts do. There are no evidence rules that describe what the jury is to do. But the counterargument to that is that the same can be said for the preponderance of the evidence standard --- it is implicit in virtually all the rules --- and yet the Committee has found it necessary to specify that standard in the text. Even though the preponderance standard applies throughout the rules, it hasn't been followed in Rule 702, and it will be more likely to be followed if the standard is in the text. The same should go for "the court finds."

The drafting alternatives in the final section will illustrate how "the court determines" or "finds" might be added to other alternatives for the Committee to consider.

IV. The State Waterfall

Many objectors argued that the amendment would lead to a "waterfall" of state amendments, and that this would be especially problematic in states that adopt a Federal

[11] To the extent that there is any danger of applying the rule to require findings in the absence of objection, it might be alleviated by a Committee Note stating that "as with other rules, the court need not make a determination of admissibility unless the opponent has properly objected. See Rule 103." But that addition might do more harm than good because it is addressing a possible problem where none really exists; it might even be considered an admission of a mistake, if the recent public comment on the preponderance of the evidence standard sets a new trend.

amendment without including the Federal Committee Note.[12] This section considers the relevance of the impact on the states to the proposed amendment.

For the past 30 years, the Committee has worked to put forth workable amendments that solve real problems. The primary focus for the Committee has been, of course, the Federal system. But the unstated premise has always been that the amendment, if well done, will be one that will help the states as well, should they decide to implement it. Put another way, every amendment that has been made has been prepared with the anticipation that it could create a "waterfall" of state amendments, which would be a good thing.

The opponents of the amendment make it sound like every state in the country will be tasked with implementing the Delphic pronouncements of the Advisory Committee. But in fact, the possible impact of this amendment is significantly more limited. It stands to reason that the only states that will be considering this amendment are those that adopted the 2000 amendment. The whole point of the amendment is to clarify that the reliability requirements added by the 2000 amendment must be met by a preponderance, shown to the court. But if the state has not adopted those requirements, it is hard to see why this amendment would raise much controversy; it's unlikely to even be discussed.[13]

So what are the numbers? 20 states have adopted the 2000 amendment to Rule 702. Those states are: Arizona, Delaware, Florida, Georgia, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, North Carolina, Oklahoma, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. So there is no risk of a deluge in 30 states.[14]

Of course, every amendment has transaction costs, and it is for each state to determine whether the cost of following the federal lead outweighs the benefit to the state. It may be, for example, that some states following the 2000 amendment are not suffering the same problems of disuniformity and misapplication that have plagued the federal courts. In those states the proposed amendment would not be necessary. No waterfall there --- the state simply doesn't have to adopt the amendment. The fact that such a state would not adopt the amendment is no reason for its rejection at the federal level. In states following the 2000 approach that have encountered problems, adoption of the amendment could be considered as a helpful clarification to state jurisprudence, and if such a finding is made, adoption would be a positive good --- worth the transaction cost.

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[12] That concern about a lack of a Committee Note was usually expressed in the context of the paragraph in the proposed Committee Note that "corrected the mistake" of using the term "preponderance of the evidence" in the text. Because it was not a mistake, the lack of the accompanying Committee Note was not at all as problematic as the critics would have it. And at any rate, the argument is deflated if the standard is changed to "more likely than not" --- and the passage in the Committee Note would then be deleted.

[13] It's possible that the amendment might encourage a state to adopt the 2000 amendment --- which, however unlikely, is a good thing, not a bad thing.

[14] Alabama does follow the 2000 amendment to Rule 702, but only for expert testimony that is "scientific" --- so maybe that is 20 ½ states that are part of the waterfall.

The bottom line is that the Committee's obligation is to propound sound amendments. If the amendment is sound, then the state waterfall is a good thing. If the amendment is unsound, then it shouldn't be proposed on the federal level in the first place. At the Spring, 2021 meeting, the Committee unanimously determined, after six years of work and study, that the amendment to Rule 702 was a sound method of promoting uniformity and of guaranteeing reliable expert testimony. If the Committee remains of the same mind, then the waterfall of state amendments will be a welcome flow.

V. Time Consuming Hearings

Many of those opposed to the proposed amendment complained that it would lead to "time consuming hearings" and "clogged dockets." This section considers whether such claims warrant reconsideration of the amendment.

The most obvious answer to the charge about hearings and clogged dockets is that none of that will be imposed by this amendment. Again, the amendment is simply intended to emphasize that the Committee meant what it said in 2000. If there are going to be more hearings because of the amendment, that could only be because those hearings are somehow made necessary by the 2000 amendment --- and by *Daubert*, for that matter. More hearings, if they were to occur, would by definition be occurring only in the courts that did not enforce the 2000 amendment. It is hard to get worked up about hearings that are necessitated by a rule that is currently on the books.

The fear about the need for more hearings is also overstated because under current law --- which this amendment does not change --- a court is not required to hold *Daubert/*702 hearings, so long as it has sufficient information upon which to determine that the reliability requirements have been met. *See, e.g., Oddi v. Ford Motor Co.,* 234 F.3d 136, 154 (3rd Cir. 2000) (no error in failing to hold a *Daubert* hearing, where papers had been submitted that were sufficient to support a ruling); *Millenkamp v. Davisco Foods Intl, Inc.,* 562 F.3d 971, 974 (9th Cir. 2009) (no *Daubert* hearing required where the court had an adequate record from the parties' briefing on the expert's methodology and proposed testimony); *United States v. Gadson,* 763 F.3d 1189 (7th Cir. 2013) (a separate pretrial hearing into expert reliability is not required; a *voir dire* process can be sufficient).

That said, it is surely the case that *Daubert* and *Kumho Tire,* and by extension the 2000 amendment to Rule 702, have resulted in an increase in hearings on the admissibility of an expert's testimony. And there is no doubt that such hearings can be time-consuming. But the determination was made in 2000 (and in 1993 in *Daubert*) that the expenditures were worth it in order to assure that unreliable expert testimony was not brought before jurors. Put another way, the decision was made that the cost of hearings was outweighed by the benefit to the search for truth. If that was true in 2000, it is hard to see why it is not true in 2022.

At any rate, rejection of the proposed amendment would not get rid of hearings on the admissibility of expert testimony. At most, it would mean that some courts will correctly hold a hearing on an expert, whereas other courts will avoid a hearing as to the same expert on the ground

that the reliability of the expert's testimony is a question of weight. That disuninformity-based outcome is to be avoided in a system of responsible rulemaking.

VI. Disrespect to the Jury?

A number of the comments in opposition accused the Committee of insulting the jury's intelligence. To the extent that it was a general comment that the proposed amendments required gatekeeping by a preponderance of the evidence, then that criticism can be answered by reference to *Daubert* and the 2000 amendment to Rule 702. Both are grounded in the assumption that without a judicial gatekeeper, expert opinions that are not in fact reliable will be brought before jurors that may not be equipped to understand why the opinion is not reliable. As Judge Rakoff has put it: "the explicit premise of *Daubert* and *Kumho* is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge, so that the Court must play a greater role . . ." *United States v. Glynn,* 578 F.Supp.2d 567 (S.D.N.Y. 2008). So the idea that the amendment *itself* insults the intelligence of jurors because it enforces the court's gatekeeper role established in *Daubert* and the 2000 amendment is an attack on a horse that has left the barn.

Most of the comments regarding disrespect for the jury focused more specifically on a single sentence in a paragraph in the Committee Note that was said to be insulting to jurors. This paragraph, addressing the issue of overstatement, provides as follows:

> 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.*

By way of explanation, in adding that language, I was only trying to make the point that Judge Rakoff made in *Glynn.* The full quote from *Glynn* addressed the need for a gatekeeper as to overstatement:

> "The explicit premise of *Daubert* and *Kumho* is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge, so that the Court must play a greater role, *not only in excluding unreliable testimony, but also in alerting the jury to the limitations of what is presented."*

My paraphrase "unable to evaluate" may be ---unintentionally --- harsher than Judge Rakoff's reference to "lack of background knowledge." Or, maybe critics of the amendment would think that Judge Rakoff was insulting the jury's intelligence in his opinion.

The sentence in italics above is useful to explain the reason for and the focus of the amendment to Rule 702(d). Of course, helpfulness does not mean that it is absolutely essential to the Note. So one possibility is cutting it, simply in order to avoid the accusation that the Committee is trying to insult the competence of jurors. Though the counterargument is that the sentence is useful as it articulates the reason for having a greater focus on overstatement in the first place.

Another possibility is to simply paraphrase Judge Rakoff. Under this alternative, the language would read as follows:

> *Judicial gatekeeping is essential because just as jurors may be unable, due to lack of background knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the background knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.*

It is for the Committee to determine whether to retain the sentence in the Committee Note, modify it, or drop it. The draft below uses the modified language, but it can be easily adopted in the way it was for public comment, or dropped entirely. The Committee will take a vote on the sentence at the Spring meeting.

VII. Saying More About Errant Case Law

Supporters of the amendment continue to press the Committee to call out the three offending cases that wayward courts have relied upon. The Reporter's memo to the Committee for the last meeting set forth the problem of taking such an approach:

> 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.
>
> But there does not seem much benefit, and there is some risk, in calling out these three cases. 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.

To the above argument can be added a public comment cautioning the Committee that declaring certain cases invalid would amount to the Committee "overruling" those cases --- acting more like a super-appellate court than a rulemaker.

The Committee has previously rejected the suggestion that it call out the offending cases by name, and there appears to be nothing new that would change that unanimous decision. But in the public comment period some suggestions were made for what might be considered a "compromise" position: Add a paragraph to the note that calls out some *statements* that are not correct under the preponderance of the evidence standard, without referring to any particular opinion. That paragraph could read something like this:

> Under this amendment, the following statements, made by some courts in the past, are not supportable. These include:
>
> •"There is a presumption in favor of admitting expert testimony."
>
> • "The sufficiency of facts or data supporting an expert opinion is a question for the jury, not the court."
>
> • "Whether the expert has properly applied the methodology is a question for the jury, not the court."
>
> • "The Federal Rules of Evidence establish a liberal thrust in favor of expert testimony."

It is possible that these general statements might be helpful, and including them does not run the risk that the Committee would be criticized for calling out specific cases or courts. The statements are certainly incorrect. But on the other hand, the wrong-ness of these statements is absolutely apparent from the inclusion of the preponderance standard in the text. Arguably these wrong statements have occurred because the preponderance standard was buried in the 2000

amendment Committee Note, and because *Daubert* is a schizophrenic opinion that swings both ways. At one point the *Daubert C*ourt is talking about strict gatekeepers and the preponderance of the evidence (in a footnote) and at another point it brings out the infamous "shaky but admissible" language. So maybe these wayward statements will, after the amendment, seem clearly wrong (and thus less likely to be used).

Under the amendment, it is quite clear that the statements above are wrong as a simple matter of textual analysis. It seems that including the paragraph above is gilding the lily --- with the potential cost that the Committee will appear to be stretching to put an extra thumb on the scale, on one side of the v. Why do that, given all the pushback from the plaintiff's bar?

Moreover, there is plenty in the Committee Note *already* making it clear that these overbroad statements are incorrect. The Committee Note states: "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)." And later on, the Committee Note states: "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."

All in all, the benefit of adding "offending language" to the Note is probably outweighed by the fact that it is so obvious, and that it could be interpreted more as standing on one end of the scale than as responsible rulemaking. So the drafting options in the next section do not contain the compromise paragraph. But of course it can easily be added to the Note if the Committee so desires.

VIII. Drafting Options

The first drafting option is to make no changes at all to the version of the proposed amendment and Committee Note that was issued for public comment. That version is set forth at the beginning of this memo.

If the Committee decides that changes are necessary, then there are three possible changes that, based on the above, should be considered:

1. Change the preponderance of the evidence standard to "more likely than not" and make the necessary corresponding changes to the Committee Note.

2. Reinsert "the court finds." "Finds" is used below because it is much better style than "determines." Using "determines" means the following:

> . . . may testify if the form of opinion or otherwise if the court determines *that* it is more likely than not *that* . . .[15]

Two thats. Clunkiness is avoided if "finds" is used: "if the court finds it more likely than not that . . ."

If there is no risk that courts have to make findings in every case, then why not use "find" for the times that they *do* have to make findings (i.e., upon objection)? Using "finds" is not just better style; it better describes what courts do. As the case law above shows, courts make findings of fact in Rule 104(a) hearings. Why shouldn't the text recognize what courts do?

3. Modify the sentence in the Committee Note regarding the difficulty that jurors may have in determining whether an opinion is overstated. (The alternatives being to delete the modifications or to delete the sentence entirely).

What follows, starting on the next page, is what the rule and Note would look like if all three changes are made. If the Committee decides that only one or a few of the changes should be made, or that other changes are necessary, then the model can be easily adjusted for the final product that will be sent to the Standing Committee.

[15] Stylists have been consulted. They think that "determines it more likely than not" is not ideal. It should be "determines *that* it is more likely than not that." And because this is so, "finds" should be used because it avoids the second "that".

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 court finds it more likely than not 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~~. First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless a court finds it more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *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, due to lack of background knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also ~~be unable to assess~~ lack the background knowledge to determine whether 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.~~

TAB 4B

Summary of Public Comments to the Proposed Amendment to Rule 702

Louis Koerner, Esq., (EV-021-0003) supports the proposed amendment to Rule 702, stating that it will "provide certainty that may have been lacking and may have produced inconsistent results."

Lawyers for Civil Justice (EV-021-0007) supports the proposed amendment to Rule 702, while advocating some adjustments. It states that the amendment is needed because there is "widespread misunderstanding of Rule 702's requirements." LCJ also concludes that the proposed amendment helpfully addresses the problem of experts overstating their conclusions, and that the pertinent text and Committee Note "will be helpful to courts and counsel alike." LCJ suggests that the amendment "would be even more effective if it expressly stated that the court must determine admissibility—a clarification that would directly address the caselaw's core confusion about the Rule's allocation of responsibility between the judge and the jury."

Lawyers for Civil Justice (EV-021-0008) submitted a study of reported case law applying Rule 702 in 2020. The study concludes that the "inconsistent application of the preponderance standard in 2020 cases demonstrates that Rule 702 is not applied the same way throughout the country, or even within the same federal circuit or judicial district. Further, the number of courts that acknowledge the preponderance standard but still adopt a 'liberal thrust' favoring admissibility may reflect larger confusion among federal courts about how to apply Rule 702."

James M. Beck, Esq. (EV-021-0005-0009) states that the proposed changes to Rule 702 "are long overdue and should be more effective in enforcing Rule 702's gatekeeping requirements, particularly with the accompanying notes expressly repudiating reliance on anachronistic, pre-2000 holdings."

The Colorado Civil Justice League (EV-021-0005-0010) believes the proposed amendment "will go far to correct widespread misunderstandings about how courts should address challenges to the admissibility of opinion testimony, and will promote a uniform approach to the gatekeeping function." The League asserts that in Federal courts in the Tenth Circuit, "[a]lthough the Rule 104(a) preponderance of proof standard sometimes is applied, with troubling frequency courts employ different, more permissive tests." It concludes that "[r]evisions to insert within the text of Rule 702 an explicit reference to the court as the decision-maker, and to bolster the draft Note to clarify the rejection of cases that have described perspectives inconsistent with the rule and incorporate examples of incorrect statements of law would make the amendment even more effective."

Anonymous (EV-021-0005-0011) states that "it is not clear that the proposed amendment is needed and it may result in overly strict application of the gatekeeping function."

Shook, Hardy & Bacon, LLP (EV-021-0012), supports the proposed amendment to Rule 702 and the Committee Note, contending that under current law, there is inconsistent application of the gatekeeper standards and that many courts erroneously consider the reliability requirements of Rule 702 to be questions of weight and not admissibility.

The Federal Magistrate Judges Association (EV-2021-0005-0013) supports the proposed changes to Rule 702. It notes that these are "clarifying amendments" that "should improve decision making and reinforce the court's gatekeeping role in evaluating opinion testimony."

The Federation of Defense and Corporate Counsel (EV-2021-0005-0014) supports the proposed amendment to Rule 702. The Federation states that the proposed amendment to Rule 702(d) is "necessary to ensure that District Courts enforce their gatekeeping function." It also states that "[i]t is imperative then that this Committee clearly state the burden of proof within Rule 702 so that District Courts properly and consistently apply the standard." The Federation concludes that the proposed changes are a "necessary response to common misconceptions held by some courts regarding the admissibility standards applicable to expert opinions and are an important step to ensure that verdicts do not rely on unproven science or invalid data."

The Washington Legal Foundation (EV-2021-0005-0015) supports the amendment while suggesting slight modifications. It states that many courts misapply Rule 702, by considering its requirements to present questions of weight rather than admissibility, and that the proposed change eliminates any confusion about the burden of proof. The Foundation also asserts that the amendment "fixes the problem of expert opinions unmoored from the application of reliable methods and principles to the facts of the case" because it "explicitly requires that the expert's testimony be based on sound application of reliable methods and principles to these facts." The Foundation suggests that the text of the proposal be changed to specify that it is the court that must determine that the admissibility factors are met. It also suggests that the Note should "specifically disavow bad case law" as well as specifically state "that there is no presumption that district courts should admit expert evidence."

Hughes Hubbard and Reed, LLP (EV-2021-0005-0016) supports the amendment, stating that "it is now clear that further attention to and clarification of Rule 702 is necessary amidst the increasing divergence of federal court rulings concerning the interpretation of Rule 702 and application of the preponderance standard when assessing the admissibility of expert testimony." It concludes that the amendment "would offer clear guidance to the courts that the sufficiency of the basis for an expert's opinion and his or her application of the principles and methods to the facts of the case always go to the question of admissibility, and not to the weight of the evidence."

A group of senior legal officers of organizations that frequently litigate in the Federal courts (EV-2021-0005-0017) state that the proposed amendment addresses the significant problem of a widespread misunderstanding about Rule 702's requirements, which "frequently results in the admission of factually unsupported or otherwise unreliable opinion testimony that misleads juries, undermines civil justice, and erodes public confidence in the

courts." The officers conclude that the proposed amendment "is a much-needed clarification that will help both courts and counsel adhere to the rule, particularly in jurisdictions where courts have erroneously characterized Rule 702 as reflecting a 'presumption of admissibility.'" They suggest that the Committee Note expressly state that the amendment rejects the pre-*Daubert* case law relied on by some courts to establish a presumption of admissibility of expert testimony.

Phil Cole, Esq. (EV-2021-0005-018) opposes the proposed amendment, contending that it will lead to judges rather than juries weighing expert evidence. He states that "[t]he exposure of an expert's errors is the job of the opposing lawyers not the courts."

Attorneys Information Exchange Group (EV-2021-0005-0019) contends that the current rule has worked well, and that the amendment would change what it asserts to be the existing law that "Rule 702 represents a liberal standard of admissibility for expert opinions."

Greg Allen, Esq. (EV-2021-0005-0020) is concerned that "the proposed change may lead to confusion that could result in the exclusion of qualified experts." He would argue "leave well enough alone."

Robert M.N. Palmer, Esq. (EV-2021-0005-0021) states that Rule 702 is functioning as intended and there is "no need to fix it." He contends that changing the language of the rule may mislead trial courts into thinking that "their role as gatekeeper has somehow changed."

The International Association of Defense Counsel (EV-2021-0005-0022) supports the proposed amendment to Rule 702. It notes that a number of circuit courts have incorrectly stated that expert testimony is presumptively admissible. It concludes that "[a]dding language to Rule 702 specifically referencing the preponderance standard . . . should prevent courts from continuing to misapprehend the standard. It should also encourage both sides to brief the issues in terms of the preponderance of available evidence and encourage courts to make findings on each factor."

Andre Tennille, Esq. (EV-2021-0005-023) states that "the proposed changes do nothing to change the law--but, if adopted, they will spawn more *Daubert* motions, more inconsistency in evidentiary rulings, and more confusion among judges about whether the rule authorizes them to play scientist." He fears that judges will take the amendment as license to usurp the jury's role "and in some cases depriving parties of their right to a jury trial."

Bruce Robert Pfaff, Esq. (EV-2021-0005-0024) contends that an amendment to Rule 702 is unnecessary. He states that "[t]he current version of FRE 702 is perfectly acceptable and capable of fair understanding by lawyers and fair application by judges" and that the proposed amendment "will encourage legal uncertainty and excessive judicial activity and appeals."

The Coalition for Litigation Justice (EV-2021-0005-0025) supports the proposed amendment, stating that "inconsistency among individual district courts emphasizes the need for a clear statement in the Rule that a preponderance of the evidence standard applies to Rule 702 determinations." The Coalition suggests an addition to the Committee Note instructing that a review under Rule 702(b) is insufficient "if it merely cites to the experts' self-serving testimony

as a basis for letting the expert testify." It also suggests that the Committee Note should cite case law that provides illustrations of proper applications of Rule 702 gatekeeping.

The Attorneys' Information Exchange Group (EV-2021-0005-0019--comment submission -- and EV-2021-0005-0026 -- public testimony) opposes the proposed amendment, arguing that the rule is operating properly and that the amendment "would have the effect of hugely altering the proponent's burden of proof and it would convert the trial judge into a 13th juror."

Thompson Hine LLP (EV-2021-0005-0027) supports the amendment, contending that there are a number of courts that incorrectly reject or ignore the preponderance of the evidence standard when applying Rule 702. It states that "[b]y expressly requiring the proponent of the expert testimony to establish the required factors (sufficient factual foundation, reliable principles, and methods that are reliably applied to the facts of the case) by a preponderance of the evidence, the rule text of the Proposed Amendments dispels any doubt about the required assessment of proffered opinion evidence before a jury ever hears the testimony." It argues that the proposal could be improved by adding language to the Committee Note that would expressly reject incorrect precedent. It predicts that the amendment could have a salutary effect on state practices under state counterparts to Rule 702.

Lee Mickus, Esq. (EV-2021-0005-0028) supports the proposed amendment to Rule 702. He contends that many courts are holding that the questions of sufficiency of facts or data and reliability of applications are generally questions of weight and not admissibility. He states that "[a]mending Rule 702 to incorporate the preponderance of evidence standard into the rule will better convey that the elements of Rule 702 are all admissibility issues." He contends, however, that the amendment "would benefit from additional language to focus attention on the court as the decisionmaker" by including language in the text to specify that the court must decide whether the admissibility requirements are met. He rejects the concern that adding "the court determines" to the text would create the inference that the court must decide the admissibility factors even in the absence of an objection. He concludes that "[i]ncluding these words in Rule 702 should not change the expectation, inherent within the adversary system, that an opponent must object to admission of an expert's testimony to initiate the court's scrutiny."

The DRI Center for Law and Policy (EV-2021-0005-0029) supports the proposed amendment to Rule 702. The Center "applauds and supports this Committee's effort to improve the rule (the "FRE 702 Amendment") to achieve a necessary uniformity of application." The Center states that the proposed amendment "does so not by changing the intent or purpose of the rule." It notes that "the amendment reminds the judge of the responsibility to make sure that the proponent of the expert's opinion testimony has satisfied the court that not only is the testimony the product of reliable principles and methods, but also that the expert's opinion reflects a reliable application of those principles and methods to the facts of the case." The Center concludes that these clarifications are necessary because, with some regularity, "courts elide both the preponderance standard and the reliability standard when ruling on proffered FRE 702 evidence**."**

The Center states that the Rule could be improved by specifying that expert evidence is not admissible unless the court finds that the reliability requirements have been met by a preponderance of the evidence**.**

Duane Morris LLP (EV-2021-0005-0031) supports the proposed amendment to Rule 702. It states that "the proposed changes will help to minimize jury exposure to speculative or unreliable expert testimony." It concludes that "language forcing the expert's proponent to prove the testimony's admissibility by a preponderance of the evidence will reemphasize the trial court's ability to declare unreliable expert testimony inadmissible before trial under Fed. R. Evid. 104(a), rather than send the testimony to the jury to determine its weight."

Bayer US LLC (EV-2021-0005-0032) supports the proposed amendment to Rule 702, concluding that it "has a critical purpose: halting reliance on caselaw statements that misunderstand the courts' role in determining the admissibility of expert testimony under Rule 702 and unifying the federal courts behind the analytical standard and approach to gatekeeping that the rule expects." But Bayer suggests that "[b]y leaving out a direct statement that the court must determine the admissibility elements of Rule 702, the amendment does not sufficiently communicate its purpose" and that "[i]ncluding within the text of Rule 702 an explicit indication that the court is the decision-maker for the rule's admissibility elements would overcome this weakness." It also proposes that the Note should "unambiguously declare" rulings that failed to apply the preponderance of the evidence statement to be incompatible with Rule 702. Finally, it suggests that "[i]ncorporating the burden of production into the rule will resolve the misunderstanding about the standard that seems to exist among courts and litigants."

Maria Diamond, Esq., (EV-2021-0005-033) opposes the proposed amendment, expressing concern that it "will create confusion and inconsistency, undermine judicial discretion, and demean the rule of juries." She argues that the changes "encourage judges to become fact finders when determining the admission of expert testimony while having the appropriately more limited traditional rule of being just the judge, not the jury as to all other evidentiary rulings."

Sean Domnick, Esq. (EV-2021-0005-034) opposes the amendment, arguing that expert opinion should be tested through cross-examination and that the proposed changes threaten the right to jury trial.

Nathan VanDerVeer, Esq. (EV-2021-0005-035) contends that the phrase "the preponderance of the evidence" threatens the right to a jury trial, and recommends that it be changed to "the preponderance of available information."

Richard Hay, Esq. (EV-2021-0005-036) states that "[i]ntroducing a preponderance standard would seem to allow, or require, the trial court to hear from opposing experts outside the presence of a jury, and then limit expert testimony to the court's perceived 'winner.'" He contends that the amendment is "unnecessary, expensive and subject to much abuse."

Tom Antunovich, Esq. (EV-2021-0005-037) opposes the amendment and contends that "the text of Rule 702 should NOT be changed but rather the Rule should continue to be refined and developed through case law based on real world application."

The Pharmaceutical Research and Manufacturers of America (EV-2021-0005-038) urges the Committee to adopt the proposed amendment to Rule 702. It asserts that the proposed amendment "will clarify and reinforce federal courts' fundamental obligation to keep scientifically unreliable expert testimony out of the courtroom." It concludes that the amendment "provides much-needed direction that courts cannot simply pass along questions of expert admissibility to the jury" and that if the amendment is adopted, "the benefits may be significant—to biopharmaceutical innovation, to the patients who rely on those medications, and to the overburdened federal judiciary."

The American Institute of Certified Accountants (EV-2021-0005-039) supports the proposed changes to Rule 702. It believes that "these modifications will improve the quality of the judicial process surrounding expert opinions."

William Schmitt, Esq. (EV-2021-0005-0040) states that he has litigated in federal and state courts for over 40 years, and supports the proposed amendment to Rule 702.

The New York State Crime Laboratory Advisory Committee (EV-2021-0005-041) states that New York State crime laboratories follow the suggestions in the Committee Note to the proposed amendment regarding testimony by forensic experts --- "including the recommendation that forensic experts avoid assertions of absolute or one hundred percent certainty where the method is subjective."

Jed Barden, Esq (EV-2021-0005-0042) states that the amendment is "not needed" because "Judges already make it too hard for evidence to be admitted."

The California Society of Certified Public Accountants (EV-2021-0005-0043) states that the proposed changes to Rule 702 "are likely to improve the reliability of admitted expert testimony and thereby improve the quality of the judicial process."

The Product Liability Advisory Council, Inc. (EV-2021-0005-044) states that many courts have applied a presumption of admissibility to expert testimony that is contradicted by *Daubert* and by the 2000 amendment to Rule 702; that courts have misread a statement in the 2000 Committee Note (observing that most motions to exclude expert evidence are rejected) as a statement that there is a presumption of admissibility of expert testimony; that courts incorrectly rely upon pre-2000 case law to hold that the sufficiency of an expert's opinion is a question of weight and not admissibility; and that many courts incorrectly consider a misapplication of methodology to be a question for the jury, not the court. The Council states that the proposed amendment is likely to have a beneficial effect, given the "lengthy gestation and voluminous debate" surrounding the amendment, and its "unequivocal intention to change the way courts are approaching the challenges to expert testimony." It concludes that the changes are "well-targeted to fix specific, demonstrable errors in the regulation of expert testimony."

Brenden Layden, Esq. (EV-2021-0005-045) objects to the amendment to Rule 702 as an "unnecessary further intrusion into the jury's role as fact finder."

Anonymous (EV-2021-0005-046) states that if a change to Rule 702 should be made, it should read, "preponderance of the available information" because "[d]oing otherwise makes the judge a finder of fact."

Daniel Horowitz, Esq. (EV-2021-0005-047) opposes the amendment, stating that "[t]he trial judge's role should be that as a gate keeper, but not as a fact finder when it comes to expert testimony" and that the amendment "takes the fact finding role away from the jury (trier of fact) and instead overturns years of established case law."

Scott Brazil, Esq. (EV-2021-0005-048) states that the change is unnecessary and will be confusing to the courts and counsel.

David Sheller, Esq. (EV-2021-0005-0049) states: "The rule does not require changes. The proposed rule change requires the judge to be a fact finder which violates the right to trial by jury."

Amy Gunn, Esq. (EV-2021-0005-050) that the proposed amendment to Rule 702 is unnecessary and impinges on the factfinding role of the jury in violation of the Seventh Amendment.

Charles Peckham, Esq. (EV-2021-0005-051) states that the changes to Rules 106 and 615 are "well thought through" and encourages their passage. He opposes the changes to Rule 702 as unnecessary and as changing the judge from a legal arbiter to a factfinder.

Michael Phifer, Esq. (EV-2021-0005-052) states that "[i]f any change is made to Rule 702, I would respectfully suggest that the change be made to 'preponderance of the available information' to again combat the endless gamesmanship and arguments over what is and is not evidence."

John Kirtley, Esq. (EV-2021-0005-053) argues that the proposed amendment to Rule 702 "will effectively allow the judge to occupy both the bench and the jury box - anathema to the Constitution."

Mickey Das, Esq. (EV-2021-0005-054) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information."

Robert Snyder, Esq. (EV-2021-0005-00055), opposes the amendment to Rule 702 on the ground that "the Rule works fine as is."

Joshua Hilbe, Esq. (EV-2021-0005-00056) states that "[b]y using the 'preponderance of the evidence' standard to rule on mere issues of admissibility, you transform the Federal Judge from a gatekeeper to a factfinder" which "conflicts with the 7th Amendment."

Reginald McKamie, Esq. (EV-2021-0005-00057) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information."

Ryan Wham, Esq. (EV-2021-0005-00058) contends that the proposed amendment to Rule 702 "would inappropriately put district judges in a factfinder role at preliminary, evidentiary hearings, would require a challenged expert's proponent to marshal additional evidence, and would encourage challengers to introduce additional extraneous evidence."

John McCraw, Esq. (EV-2021-0005-059) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information" rather than a "preponderance of the evidence."

Elizabeth Sanford, Esq. (EV-2021-0005-060) opposes any change to Rule 702 as unnecessary, and contends that the term "preponderance of the evidence" turns a judge into a factfinder.

Richard Stuckey, Esq. (EV-2021-0005-061) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information."

Robert Kisselburgh, Esq. (EV-2021-0005-062) objects to any change as unnecessary and states that "the use of 'preponderance of the evidence' as opposed to 'preponderance of the available information' takes the decision away from the jury and puts it in the hands of the Judge as fact finder."

William Leader, Jr., Esq. (EV-2021-0005-063) sees no reason to make a change to Rule 702.

Dana LeJune, Esq. (EV-2021-0005-0064) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information."

George Farah, Esq. (EV-2021-0005-0065) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information."

Joel Grist, Esq. (EV-2021-0005-066) objects to any change as unnecessary and states that the use of "preponderance of the evidence" as opposed to "preponderance of the available information" turns the judge into a factfinder.

David Mestemaker, Esq. (EV-2021-0005-067) states that "the standard should be 'preponderance of the available information' not 'preponderance of the evidence' as the second standard puts the Judge in the role of a factfinder in violation of the 7th Amendment."

Kacy Shindler, Esq. (EV-2021-0005-068) states that any change to Rule 702 is unnecessary and that "the addition of language to the preponderance standard allows the judge to invade the providence of the jury and serve as a fact finder--which is a violation of the 7th Amendment."

Stephen Barnes, Esq. (EV-2021-0005-069) opposes the amendment on the ground that it will add to the expense of proving an expert's reliability.

Scott Davenport, Esq. (EV-2021-0005-0070) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information."

Matthew Menter, Esq. (EV-2021-0005-0071) contends that under the proposed amendment, "the judge would become a fact finding gatekeeper that would remove much of that function from the jury."

Steve Waldman, Esq. (EV-2021-0005-0072) opposes the amendment, arguing that under the preponderance of the evidence standard, "it will be argued that experts can no longer rely on inadmissible matters."

Ryan Babcock, Esq. (EV-2021-0005-0073) states that the amendment is unnecessary and that allowing the court to make its determination by a preponderance of the evidence "would require, or tend to encourage, the judge to act as a finder of fact, imposing a duty contrary to the Seventh Amendment."

Francisco Medina, Esq. (EV-2021-0005-0074) states that the "preponderance of the evidence" standards turns the judge from a gatekeeper to a factfinder, in violation of the Seventh Amendment.

Joe McGreevy, Esq. (EV-2021-0005-0075) argues that the proposed amendment will take factfinding away from the jury, and that it will create confusion in state courts.

Andres Alonso, Esq. (EV-2021-0005-0076) argues that [t]he proposed amendment is yet another step towards removing jurors from actually deciding cases**."**

Stephen Higdon, Esq. (EV-2021-0005-0077) states that "no change is necessary to this rule" and that "[w]hatever possible benefit it could add will be substantially outweighed by the burden and cost it will impose."

Richard Neville, Esq. (EV-2021-0005-0078) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information."

Joseph Hillebrand, Esq. (EV-2021-0005-0079) states that there is no reason for the amendment and that "[i]f the bar, and the public, cannot trust the judiciary to reasonably and properly apply the rules of evidence, perhaps the wrong persons are being elevated to the federal bench."

Spencer Farris, Esq. (EV-2021-0005-0080) contends that the proposed amendment to Rule 702 "is not only unnecessary but prone to cause confusion and reaction far beyond that which the members of the committee supporting it intend."

Troy Stafford, Esq. (EV-2021-0005-0081) states that Rule 702 has worked "very well" and that it if the rule is changed it should be to "preponderance of the available information" and not so "narrowly" to "preponderance of the evidence."

Jay Murray, Esq. (EV-202100005-0082) argues that any change is unnecessary, and that if any change is made it should require proof of a "preponderance of the available information."

David Sleppy, Esq. (EV-2021-0005-0083) does not believe a change to Rule 702 is needed, and contends that inclusion of the standard of preponderance of the evidence "will remove the jury from the job of fact finder by encouraging trial courts to do that job for them." He states that the standard should be "preponderance of the available information."

Garry Whitaker, Esq. (EV-2021-0005-0084) contends that the proposed amendment to Rule 702 "would move the function for weighing the evidence from the jury to the bench."

Charlie Nichols, Esq. (EV-2021-0005-0085) argues that the proposed amendment's standard of preponderance of the evidence "is an invasion of the factfinding prerogative of the jury" in violation of the Seventh Amendment.

Timothy Garvey, Esq. (EV-2021-0005-0086) states that "not one proponent for amending Rule 702 considers how these amendments will encourage judges to encroach on the peoples' near-sacred right to a trial by jury." He states that "[i]nclusion of the phrase 'by a preponderance of the evidence' encourages judges to remove from the jury its job of determining disputed facts."

Benjamin Baker, Esq. (EV-2021-0005-0087) contends that the proposed amendment to Rule 702 is unnecessary and that "[a]mending the rule for 'clarification' purposes will only provide another opportunity to cause confusion and more appellate decisions that disagree with one another on the purpose of the change."

Anonymous (EV-2021-0005-0088) opposes the proposed amendment, arguing that "it violates the Constitution and turns the judge into a fact finder and therefore jury."

Matthew Christian, Esq. (EV-2021-0005-0089) states: "This new standard will only create more issues, more confusion, and prevent testimony that would otherwise assist a trier of fact in making an informed decision/verdict."

Terrence McCartney, Esq. (EV-2021-0005-0090) opposes the proposed amendment, contending that the current rule works "just fine" and that "the proposed amendments will undermine the constitutional role of juries by usurping a jury's duty to weigh the evidence and determine the facts by making the presiding judge a 'super-juror.'"

Robert Pedroli, Esq. (EV-2021-0005-0091) opposes the proposed amendment, arguing that it will turn the judge into a trier of fact; that it will create confusion in state courts that apply a version of Rule 702; and that adding the preponderance standard to only one of the Evidence Rules will sow confusion as well.

The New York City Bar Association (EV-2021-0005-0092) supports the proposed changes to Rule 702 "because they will provide needed clarity to litigants and courts that are

addressing issues relating to expert testimony." As to the proposed addition of the preponderance standard, the Association comments that "Rule 104(a) is meant to govern questions of preliminary admissibility and it does appear that not all courts are following this standard, perhaps because of the mixed message sent by the *Daubert* opinion." With respect to the amendment of Rule 702(d), the Association states that "it is appropriate for the rules to confirm what *Daubert* and its progeny were meant to accomplish: that judges act as gatekeepers who make sure that juries only hear from expert witnesses whose testimony meets a baseline standard. Not everything is a matter of weight." The Association concludes as follows:

> In recent years, the issue of "junk science" has been one of particular concern in criminal prosecutions, where there are concerns about the scientific validity of many types of "feature-comparison" methods of identification, such as those involving fingerprints, footwear and hair. Such expert testimony gives the impression of scientific certainty, and often leads to convictions later found to be unwarranted. . . . Before expert testimony is presented to the jury, a judge ought to make sure that the expert's opinion reflects a reliable application of scientific principle. . . . The amendment to Rule 702(d) should reduce the incidence of incorrect jury determinations based on unreliable scientific opinion.

The Atlantic Legal Foundation (EV-2021-0005-0093) supports the proposed changes to Rule 702 "because they emphasize the importance of district judges' gatekeeping authority." The Foundation states that the rule changes will "(i) explicitly clarify that the admissibility requirements set forth in Rule 702 must be satisfied by a preponderance of the evidence, and (ii) emphasize that a trial judge must exercise gatekeeping authority with respect to testifying experts' opinions."

The Federal Bar Association (EV-2021-0005-0094) approves of the proposed amendment to Rule 702.

The Civil Justice Association of California (EV-2021-0005-0095) supports the proposed amendment to Rule 702. It states that "[a]dding language to Rule 702 specifically referencing the preponderance standard, instead of leaving it in the Notes, should prevent courts from continuing to misapprehend the standard. It should also encourage both sides to brief the issues in terms of the preponderance of available evidence and encourage courts to make findings on each factor." In addition, the Association supports restoring the previously proposed language emphasizing that it is the court that must determine whether the proponent has met the evidentiary burden as it "would ensure that the reliability determination is made by the judge, rather than left to the jury."

Dennis Quinlan, Esq. (EV-2021-0005-0096) supports the proposed amendment to Rule 702, opining that the change is simply clarifying the standard that already exists.

Michael Stevenson, Esq. (EV-2021-0005-0097) opposes the amendment to Rule 702. He concludes that "[w]ith the proposed modification to Rule 702, judges will eliminate jury trials and become the fact finder with respect to expert testimony." He contends that the preponderance of the evidence standard would "virtually require the presentation of the entire evidence of the case before a decision could be made" on the admissibility of the expert's testimony.

Lawyers for Civil Justice (EV-2021-0005-0098) provided a supplementary submission in support of the rule, in response to the comments criticizing the preponderance of the evidence standard. It asserts that the preponderance standard "is a well-established term that courts have used for many years in deciding the admissibility of evidence, including expert opinions offered under Rule 702." It states that the alternative suggested by some --- a preponderance of the available information --- "would dislodge developed caselaw and sow significant uncertainty." It states that there is no basis for thinking that "preponderance of the evidence" is limited to admissible evidence, as the very language of Rule 104(a) belies that notion. It concludes that "the amendment's action to promote consistency and completeness in the application of Rule 702 supports, rather than undermines, litigants' right to have the legally cognizable claims and defenses determined by a jury."

The American Association for Justice (EV-2021-0005-0099) "is concerned that the changes sought will not be recognized by the judges who need a correction, but that the proposed amendment may unnecessarily limit the admissibility of plaintiffs' experts." It asserts that including the preponderance of the evidence standard "has the unintended potential for causing the court to believe that the court, and not the jury, must weigh and decide the correctness of the scientific evidence, which will intrude and diminish the role of the jury." The Association recommends that a reference to the court determining the issue not be brought back into the rule, and that the phrase "preponderance of the evidence" should be changed to "preponderance of the information." As to the change to Rule 702(d), the Association does not disagree about its overall purpose but declares that "it is not evident that courts or parties will find the direction provided in the rule text helpful."

Scott Lucas, Esq. (EV-2021-0005-0100) declares that "Judges should not take the place of juries. It is not their job to judge the 'preponderance of the evidence.'"

Nicole Snapp-Holloway, Esq. (EV-2021-0005-0101) states that adding the preponderance of the evidence standard "will imply that the court should weigh the expert's testimony - but there is nothing concrete to be weighed against."

Douglas McNamara, Esq. (EV-2021-0005-0102) is concerned about the amendment to Rule 702(d), because the requirement that the opinion reflect the basis and methodology "may suggest that that court must determine not whether the expert used a reliable application, but whether the expert's work product manifests or appears to be something reasonable to the court. This could move the court from assessing the soundness of methodology to soundness of the result."

John Truskett, Esq. (EV-2021-0005-0103) states that no change to Rule 702 is needed and that the proposed amendment "usurps the role of the jury as the fact-finder."

Anonymous (EV-2021-0005-0104) contends that a change to Rule 702 is not necessary and that the proposed addition of the preponderance of the evidence standard "will result in the court weighing the evidence in the case before the jury hears the case."

The National District Attorneys' Association (EV-2021-0005-0105) is opposed to the proposed amendment to Rule 702(d) and the accompanying portion of the Committee Note. It contends that "[t]he proposed substantive change to Rule 702(d) conflicts with *Daubert* and infringes on the province of the jury because it requires trial judges to assess and assign weight to an expert's opinion, even if that opinion results from the reliable application of reliable principles and methodology." And it states that the proposed Committee Note "inappropriately singles out 'forensic experts' and expert opinion testimony related to feature comparison evidence, and urges application of additional and specific admissibility standards not required by the text of Rule 702 or *Daubert* for these categories of evidence."

State Trial Lawyers' Associations (EV-2021-0005-0106) do not believe that Rule 702 should be amended. The members are concerned that the proposed amendment would: "(1) create confusion and inconsistency for state rules modeled after FRE 702, but which have not to date incorporated the Committee Note; (2) undermine the judicial discretion currently employed under FRE 702; and 3) demean the role of juries."

Mariano Acuna, Esq. (EV-2021-0005-0107) states that the proposed amendment to Rule 702 "imposes an undue burden on litigants, increases the costs of litigation, and adversely affects a litigant's right to trial by jury."

Dakota Iow, Esq. (EV-2021-0005-0108) argues that the proposed amendment to Rule 702 "would result in the Court weighing the evidence before it has been heard by the jury" and "would cause the Court to overstep into the Jury's domain."

Brett Agee, Esq. (EV-2021-0005-0109) states that the proposed amendment to Rule 702 "will result in the court weighing the evidence in the case before the jury hears the case" and "require a party to show by preponderance of the evidence that the expert is right."

James Neal, Esq. (EV-2021-0005-0110) concludes that an amendment to Rule 702 is unnecessary and would "necessitate additional litigation over new terms."

Anonymous (EV-2021-0005-0111) asks the Committee "why don't you just abolish jury trials and be done with it?"

DLA Piper LLP (EV-2021-0005-0112) supports the proposed amendment to Rule 702. It argues that "[t]he changes are critical to clear up any lingering judicial misapprehension that the reliability of an expert's ultimate opinion is merely a question of weight for the factfinder to decide and to emphasize the judge's gatekeeper role in determining whether the expert's ultimate opinion is within bounds based on a reliable application of the expert's methodology to the facts of the case." It states that the proposed amendments are especially important for

assuring that Multidistrict Litigation proceeds in an orderly and uniform fashion. It notes that the proposed change to Rule 702(d) "is designed to prevent experts from exaggerating the reliability" of their testimony, and concludes that "this is an important concern because jurors who might lack basis to understand and evaluate the reliability of scientific or technical methodology will likely also lack basis to assess an expert's extravagant claims that are unsupported by the expert's basis and methodology."

The New Jersey Civil Justice Institute (EV-2021-0005-0113) supports the proposed amendment to Rule 702, stating that it "is necessary to ensure clear, predictable, and consistent application of the law." It states that the amendment "resolves misunderstandings about how Rule 702 should be applied in conjunction with: (1) Rule 104(a), which requires trial courts to decide the preliminary questions of whether a witness is qualified and evidence is admissible, and (2) Rule 104(b), which allows the jury to determine what weight to give the evidence *after* the court has admitted it." The Institute sees the amendment to Rule 702(d) as "necessary to ensure that juries hear only reliable expert testimony, not exaggerated claims or untested conclusions" and concludes that the change is essential to emphasize that it is the role of the trial court, not the jury, to determine whether an expert's conclusions are supported by the expert's basic and methodology." The Institute suggests that the proposal would be improved by restoring the language requiring the court to find the admissibility standards are met, and by rejecting specific case law in the Committee Note.

Rex Travis, Esq. (EV-2021-0005-0114) declares that the proposed amendment "is a solution in search of a problem."

Henry A. Meyer, III, Esq. (EV-2-21-0005-0115) contends that the proposed changes to Rule 702 "will take away historical duties and rights from the jury and is a threat to our present system."

Michael Denton, Esq. (EV-2021-0005-0116) states that the proposed amendment to Rule 702 is "nothing other than a thinly disguised attempt to have the trial court do the Jury's work for it --- determine what weight and credibility an expert's testimony should be given."

Wyatt McGuire, Esq. (EV-2021-0005-0117) opposes the proposed amendment, arguing that it "ties the hands of judges who understand the significant overlap between questions of 'weight' and 'admissibility' which plague expert witness considerations."

Keith Reed, Esq. (EV-2021-0005-0118) states that the proposed amendment "would result in an unnecessary hurdle" that removes from the jury a question of fact.

Shane Davis, Esq. (EV-2021-0005-0119) opposes the proposed amendment on the ground that "it would improperly force judges to be fact-finders relating to the qualifications of an expert."

Michael Cok, Esq. (EV-2021-0005-0120) opposes the amendment on the ground that it "would make the judge an arbiter of fact and further abrogate the 7th amendment's right to a jury trial."

The Innocence Project, together with a coalition of public interest organizations and legal scholars (EV-2021-0005-0121) supports the proposed amendment to Rule 702, emphasizing "the importance of amending Federal Rule of Evidence 702 to bring scientific integrity to proceedings in which life and liberty are at stake." It states that "because indigent people and people of color are disproportionately prosecuted in criminal courts, we also consider the proposed amendment to Rule 702 to be a critical economic and racial justice issue." The submitting parties "commend the Committee's recognition that courts have often neglected to faithfully apply the reliability requirements of Rule 702 to proffers of expert testimony—and, crucially, that courts have erroneously concluded that such requirements go to the weight of the proposed testimony, rather than to its admissibility." The parties further "commend the Committee on expanding Rule 702(d) to emphasize that the methodology at issue must not only be reliable, it must be reliably applied." The submitting parties express deep concern about incorrect statements concerning error rates in forensic testimony, noting that such overstatements are often admitted by courts.

The submitting parties suggest a change to Rule 702(c), to provide that: "the testimony is the product of reliable principles and methods *and includes the limitations and uncertainty of those principles and methods*." The submitting parties also suggest an additional sentence emphasizing the preponderance of the evidence standard to the Committee Note.

Donald H. Slavik, Esq. (EV-2021-0005-0122) states that the preponderance of the evidence standard in the proposed amendment "would remove the jury as a fact-finder, essentially eliminating the right to trial by jury."

Chris Knight, Esq. (EV-2021-0005-0123) argues that the proposed changes to Rule 702 shift factfinding from the jury to the judge, and that it is for the jury to decide whether the reliability requirements of Rule 702 are met by a preponderance of the evidence.

Joseph Gates, Esq. (EV-2021-0005-0124) opposes the proposed amendment to Rule 702, arguing that it "forces the Court to usurp the jury's province of finding facts and making credibility decisions as it relates to expert witnesses."

Douglas B. Abrams, Esq. (EV-2021-0005-0125) opposes the proposed amendment to Rule 702, arguing that the current system is working well and the amendments would "require two trials for every products liability case."

Cohen, Placitella & Roth, P.C. (EV-2021-0005-0126) contends that the "preponderance of the evidence" standard in the proposed rule means that the trial judge in a *Daubert* hearing will --- despite the contrary language in Rule 104(a) --- be limited to considering only evidence that would be admissible at trial. It suggests that the problem is solved if "evidence" is changed to "information." The firm contends that the proposed change to Rule 702(d) has "the unintended potential for causing the court to mistakenly believe that it, not the jury, must decide the correctness of scientific evidence, which invades the jury's province and decision-making role."

Austin Easley, Esq. (EV-2021-0005-0127) opposes the proposed amendment on the ground that it "further erodes the role of the jury, and invades their province by asking the trial court to judge credibility issues, over and above the preliminary gatekeeping function."

Anonymous (EV-2021-0005-0128) opines that the proposed amendment "is totally unnecessary and solely an effort by corporate defendants to have Judges usurp the role of jurors."

Paul Redfearn, Esq. (EV-2021-0005-0129) is opposed to the amendment, arguing that it will "demean the function and role of juries, a fundamental Constitutional principle that should not be diminished or devalued."

Micha Brierley, Esq. (EV-202100005-0130) is opposed to the amendment, and claims that "[i]nclusion of the phrase 'by a preponderance of the evidence' will remove the jury from the job of being the fact finder by encouraging trial courts to do that job for them." He suggests that a preponderance of the "information" would be a material improvement because the preponderance of the evidence standard is associated with factfinding; and, according to him, judges do not determine facts at a *Daubert* hearing.

Patrick Mause, Esq. (EV-2021-0005-0131) states that the amendment is unnecessary and "invites courts to aggressively usurp the jury's role of weighing evidence."

Jason M. Hatfield, Esq. (EV-2021-0005-0132) opposes the amendment, arguing that it is unnecessary and that it turns a judge into the factfinder.

Jessica Mallett, Esq. (EV-2021-0006-0133) opposes the proposed amendment to Rule 702 on the ground that it pushes the court's "gate-keeping authority too far as this forces the Court to make a ruling on the admissibility of evidence prior to expert witness testifying to the jury" and "essentially forces the Court to usurp the jury's province of finding facts and making credibility decisions as it relates to expert witnesses."

George R. Wise, Jr. Esq. (EV-2021-0005-0134) opposes the amendment because it "creates a problem where one does not exist" and would usurp the factfinding authority of the jury.

Alan Lane, Esq. (EV-2021-0005-0135) opposes the amendment as unnecessary. He contends that the proposed change takes away from the jury the responsibility to weigh the evidence.

Michael Perez, Esq. (EV-2021-0005-0136) states that the proposed amendment fixes a problem that does not exist and that it erodes the right to a trial by jury by "inviting judges to weigh the evidence as part of the decision process of excluding expert witness testimony."

Paul N. Ford, Esq. (EV-2021-0005-0137) states that the proposed amendment pushes the court's gatekeeping authority too far and impinges on the constitutional right to a jury trial.

Rusty Mitchell, Esq. (EV-2021-0005-0138) opposes the amendment because it pushes the court's gatekeeping authority "too far" and "forces the Court to make a ruling on the

admissibility of evidence prior to expert witness testifying to the jury. This essentially forces the Court to usurp the jury's province of finding facts and making credibility decisions as it relates to expert witnesses."

Patrick Kirby, Esq. (EV-2021-0005-0139) opposes the proposed amendment, arguing that it "would likely create a series of mini trials within the already rigorous time constraints that come with the Scheduling Orders that apply to all phases of the litigation of a case."

Keith Givens, Esq. (EV-2021-0005-0140) states that the proposed amendment to Rule 702 is **"**unnecessary and very unreasonable."

Jonathan Hutto, Esq. (EV-2021-0005-0141) opposes the amendment, stating that it changes the trial court's gatekeeping responsibility to one of factfinding.

Weinberg, Wheeler, Hudgins, Gunn & Dial (EV-2021-0005-0142) supports the proposed amendment to Rule 702. It states that "there is a trend to defer the critical question of the sufficiency of an expert's basis and application of the expert's methodology to being questions of weight rather than admissibility." It contends that the amendment "adds a layer of protection that is desperately needed at the gatekeeping stage of the proceedings." It concludes that a "revised federal standard, guided by a preponderance standard, will ensure only reliable and relevant expert testimony is admitted, thereby improving the judicial system and jury outcomes."

Nicholas Verderame, Esq. (EV-2021-0005-0143) opposes the amendment, opining that it would "allow judges to encroach on the jury's job" and that the amendment "attempts to eliminate trials through motion practice and amending Rule 702 to have the trial judge become the fact finder with respect to expert testimony."

Leslie O'Leary, Esq. (EV-2021-0005-0144) objects to any attempt to call out specific case law in the Committee Note as being wrongly decided. She states that the Advisory Committee is "not a court of law" and should "decline to act as a judicial tribunal and hold that appellate court decisions are wrong as a matter of law." Declaring cases wrongly decided would "dishonor the judiciary and do irreparable harm to the Committee's venerable role as a neutral advisory body."

Altom M. Maglio, Esq. (EV-2021-0005-0145) opposes the amendment on the ground that it will "do nothing but delay and increase the costs of litigation."

John Hickey, Esq. (EV-2021-0005-0146) argues that the proposed changes to Rule 702 "are a solution in search of a problem" and that "the end result will be to tie the hands of the District Court judges in regard to determining exclusion of expert testimony."

John Restaino, Jr., Esq. (EV-2021-0005-0147) opposes the amendment and contends that the rule "should not encourage the courts themselves to find facts."

Nicholas Timko, Esq. (EV-2021-0005-0148) opposes the amendment and states that "the proposed rule would needlessly tie up court resources and lead to court delays."

Alyssa Baskam, Esq. (EV-2021-0005-0149) asserts that the proposed amendment would require courts to "go beyond their role as gatekeepers and instead take up the mantel of juror." She states that the Committee should "leave Rule 702, an entirely effective rule, as it is -- doing what it already needs to do to ensure that jurors consider only relevant, reliable expert testimony."

April Stratte, Esq. (EV-2021-0005-0150) opposes the amendment, concluding that it "should not encourage courts to find facts. This will require expensive and time consuming hearings that will clog dockets and increase costs."

John Hickey, Esq. (EV-2021-0005-0151) states that the proposed changes "are a solution in search of a problem" and that the "increased burden of proof will increase the costs of litigation for already burdened litigants."

Nick Cron, Esq. (EV-2021-0005-0152) states that the proposed amendment "will dilute juries and undermine the importance and efficacy of jury trials and by extension erode our last true democracy."

Abrams & Abrams (EV-2021-0005-0153) contends that the proposed amendment is a "serious attack on every American's Constitutional right to a jury trial." The firm concludes that the amendment "would require the Plaintiff to have to try their case twice—once to the Judge and then once again to the jury."

Parker Miller, Esq. (EV-2021-0005-0154) argues that the proposed changes to Rule 702 "violate the 7th Amendment right to a trial by jury, because they impermissibly usurp the sovereign authority or the jury and place this critical role in the hands of one person - the trial judge."

Lee Steers, Esq. (EV-2021-0005-0155) states that "the rule should not encourage courts to find facts" because "that's unconstitutional." He also contends that the proposed changes to Rule 702 "will require expensive and time consuming hearings that will clog dockets and increase costs."

Cristina Perez Hesano, Esq. (EV-2021-0005-0156) opposes the amendment, arguing that "juries will be stripped of their ability to hear and weigh evidence."

William Carr, Esq. (EV-2021-0005-0157) contends that the proposed amendment to Rule 702 "would adversely affect people trying to get their day in Court by encouraging Courts to make factual determinations regarding expert opinions, which is simply not constitutional."

Clinton Richardson, Esq. (EV-2021-0005-0158) contends that a change to Rule 702 is unnecessary and that it would "require courts to go beyond their rule as gatekeepers and instead take up the mantel of juror."

Donald Smolen, Esq. (EV-2021-0005-0159) thinks that the proposed changes to Rule 702 "encroach upon the province of the jury" because it would "turn our judges into fact finders as opposed to gatekeepers."

Theodore Stacy, Esq. (EV-2021-0005-1060) thinks that the proposed amendment "furthers the intrusion of the judge into the province of the jury."

Jere Beasley, Esq. (EV-2021-0005-0161) opposes the amendment, contending that it "would only further erode a jury's ability to weigh evidence and render a true verdict as envisioned by the 7th Amendment."

David M. Damnick, Esq. (EV-2021-0005-0162) opposes the proposed amendment. He states that the "greater restriction" on Rule 702 evidence will "deprive the courts and juries of legitimate facts and evidence." He can find "absolutely no support for the claims that the Courts have been lax in their administration of expert testimony."

Raymond Hawthorn, Esq. (EV-2021-0005-0163) states that the proposed amendment to Rule 702 is unnecessary: "It was intended to keep out bad science, and Rule 702 as written already does that."

Michael Carter, Esq. (EV-2021-0005-0164) concludes that the proposed amendment to Rule 702 is unfair to plaintiffs and will result in extensive proceedings that would increase the costs of litigation.

S. Scott West, Esq. (EV-2021-0005-0165) objects to the proposed amendment, stating that "[f]actual findings generally are founded in 'preponderance of the evidence' and reside wholly within the purview of constitutionally guaranteed JURIES. Any shifting of the powers and responsibilities of a JURY to a JUDGE is an erosion of those powers and responsibilities and is improper."

H. Clay Barnett, Esq. (EV-2021-0005-0166) states that "the suggested amendments invite additional pretrial entanglements that reduce judicial efficiency, not enhance it."

Kelli Alfreds, Esq. (EV-2021-0005-0167) contends that the proposed amendment to rule 702 "is unnecessary and inefficient" and that it also violates the 7th Amendment.

Lauren James, Esq. (EV-2021-0005-0168) contends that the proposed changes to Rule 702 "violate the 7th Amendment right to a trial by jury because they take away the jury's role of analyzing the weight and credibility of an expert" and that they will increase the expense of litigation.

Dena Young, Esq. (EV-2021-0005-0169) opines that Rule 702 "should not encourage courts to find facts. That's unconstitutional."

Frank Verderame, Esq. (EV-2021-0005-0170) opposes the amendment on the grounds that it will increase the costs of litigation and will transfer factfinding authority from the jury to the judge.

Anonymous (EV-2021-0005-0171) contends that the change is unnecessary and that it will transfer factfinding from the jury to the judge in violation of the 7th Amendment.

David Kwass (EV-2021-0005-0172) opposes the proposed amendment, arguing that it is "unnecessary to safeguard fair trials, invades the traditional province of juries, and makes civil justice slower and costlier."

Kasie Braswell (EV-2021-0005-0173) opposes the proposed amendment on the ground that it will increase the cost of litigation and transfer factfinding authority from the jury to the judge.

Frank Woodson, Esq. (EV-2021-0005-0174) opposes the proposed amendment to Rule 702. In language identical to several other public comments, he states that the amendment "would require courts to go beyond their rule as gatekeepers and instead take up the mantel of juror."

Dee Miles, Esq. (EV-2021-0005-0175) states that the rule is unnecessary because the current standards keep junk science out of the trial.

Ryan Duplechin, Esq. (EV-2021-0005-0176) states that a change to Rule 702 is unnecessary and would increase the expense of litigation.

Warner Hornsby, Esq. (EV-2021-0005-0177) states that a change to Rule 702 is unnecessary and would increase the expense of litigation.

Molly McKibben, Esq. (EV-2021-0005-0178) states that the proposed changes to Rule 702 are unnecessary and would increase the costs of litigation for plaintiffs.

Mitch Williams, Esq. (EV-2021-0005-0179) opposes the amendment because "[u]ltimately, the credibility and weight of the evidence should be decided by the jury, not the judge."

Richard Stratton, Esq. (EV-2021-0005-0180) contends that the proposed amendment would negate the right to trial by jury.

Raeann Warner, Esq. (EV-2021-0005-0181) opposes the proposed amendment, contending that it will lead to minitrials on expert testimony and it will make it harder for individual plaintiffs to get a jury trial.

Demet Basar, Esq. (EV-2021-0005-0182) replicates a comment used by others: "This rule change would require courts to go beyond their rule as gatekeepers and instead take up the mantel of juror."

Leigh O'Dell, Esq. (EV-2021-0005-0183) submitted the same statement in opposition as others (e.g., 0182), concluding that: "This rule change would require courts to go beyond their rule as gatekeepers and instead take up the mantel of juror."

David Byrne, Esq. (EV-2021-0005-0184) states that "the proposed amendment is unnecessary; will further burden our already overworked judiciary; and, potentially undermine the 5th and 7th amendment rights of litigants."

Joseph VanZandt, Esq. (EV-2021-0005-0185) states that "this rule change would require courts to go beyond their rule as gatekeepers and instead play the role of the jury."

James Eubank, Esq. (EV-2021-0005-0186) states that to the extent the proposed amendment is intended to regulate overstatement by experts, "a better amendment would be to add an additional subpart stating that expert testimony may be excluded if the opponent of such evidence demonstrates by a preponderance of the evidence that the conclusions reached by the expert, within the bounds of 702(a)-(d) are not supportable by the methodology employed."

Drew Ashby, Esq. (EV-2021-0005-0187) argues, in language replicated in other public comments, that the phrase "preponderance of the evidence" is "inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Anthony Bolson, Esq. (EV-2021-0005-0188) opposes the amendment, asserting in language identical to other comments, that the rule "should not encourage courts to find facts" and that "the proposed change to Rule 702 will require expensive and time consuming hearings that will clog dockets and increase costs."

Roger Smith, Esq. (EV-2021-0005-0189) objects that the proposed amendment would violate the 7th Amendment and would increase the costs of litigation.

Davis Vaughn, Esq. (EV-2021-0005-0190) objects that the proposed amendment would threaten 7th Amendment rights and would increase the costs of litigation.

Robert Lewis, Esq. (EV-2021-0005-0191) complains that the proposed amendment "gives one person, the judge, the ability to reach factual determinations based on the preponderance of the evidence; giving the judge the power to determine the outcome of the case under the guise of a 702 ruling."

Elizabeth McLafferty, Esq. (EV-2021-0005-0192) opposes the amendment on the ground that it will lead to clogged dockets and increased costs of litigation.

Lauren Miles, Esq. (EV-2021-0005-0193) opposes the amendment with language identical to many other comments, including 0182, 0183, and 0189.

Spencer Pahike, Esq. (EV-2021-0005-0194) states, identically to other comments, that Rule 702 "should not encourage courts to find facts" and that the proposed amendment "will require expensive and time consuming hearings that will clog dockets and increase costs."

Joseph Kramer, Esq. (EV-2021-0005-0195) opposes the amendment on the ground that the preponderance of the evidence standard "will prompt arguments that plaintiffs cannot rely on a handful of studies to support their claims when far more than the preponderance of published research contradicts that position."

Frank Fraiser, Esq. (EV-2021-0005-0196) opposes the proposed changes to Rule 702 because they "will require already overworked Federal Judges to conduct 'mini trials' before conducting the trial itself."

Anthony Baratta, Esq. (EV-2021-0005-0197) states that preponderance of the evidence "is a phrase used to describe how juries are to weight facts"; that a trial judge "is a gatekeeper, not a factfinder"; and that "[t]his phrase, if added, would allow for a trial judge to usurp the role of a jury."

Tony Graffeo, Esq. (EV-2021-0005-0198) concludes that there is "[n]o need to change a Rule that works perfectly well for all sides."

William Hammill, Esq. (EV-2021-0005-0199) states, identically with other comments, that the preponderance of the evidence standard "is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Jeff Helms, Esq. (EV-2021-0005-0200) states that the preponderance standard "presents a jury question for a jury to decide" and that "judges should not sit as a fact-finder on these issues, just on whether the expert opinion is reliable enough for the jury to consider." In language identical to other comments (including 0199) he concludes that the preponderance of the evidence standard "is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Donovan Potter, Esq. (EV-2021-0005-0201) states, identically with others, that the preponderance of the evidence standard "is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Michael Watson, Esq. (EV-2021-0005-0202) submits a comment identical to that of Donovan Potter, #0201.

Gary Bruce, Esq. (EV-2021-0005-0203) states that the preponderance of the evidence standard "seems to put an unnecessary factual determination on the presiding judge" and that "the weight of the evidence should be considered by the fact finder, not filtered out entirely by a trial judge."

Joseph Fried, Esq. (EV-2021-0005-0204) opposes the proposed amendment on the ground that it will turn the judge into a trier of fact and will create more work for the courts.

Chad Cook, Esq. (EV-2021-0005-0205) opposes the amendment, arguing that it will increase costs and "diminish the vital role of the jury in the judicial process."

William Sutton, Esq. (EV-2021-0005-0206) replicates a number of other comments about the judge taking up "the mantel of juror" under the proposed amendment.

Geoffrey Pope, Esq. (EV-2021-0005-0207) echoes the comments of others that the preponderance of the evidence standard "is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Benjamin Keen, Esq. (EV-2021-0005-0208) is opposed to the proposed amendment to Rule 702.

David Dearing, Esq. (EV-2021-0005-0209) concludes that Rule 702 "is already adequately stringent and provides adequate safeguards against unsupported science."

Christopher Glover, Esq. (EV-2021-0005-0210) states that the proposed amendment "is violative of the of the Seventh Amendment to the Constitution because it removes from the jury evidentiary issues and facts giving the role of juror to judges." He also contends that the amendment "puts a higher work load on our federal judges and will greatly increase the cost of litigation."

Protentis Law LLC (EV-2021-0005-0211) opposes the amendment and declares that "[j]udges should not sit as fact-finders on preponderance of evidence issues, and the language of the rule should never encourage them to do so, whether explicitly or implicitly."

Catherine O'Quinn, Esq. (EV-2021-0005-0212) objects in line with other comments that the rule change would require the judge to take up the "mantel" of juror.

Mike Andrews, Esq. (EV-2021-0005-0213) argues that the amendment would require the judge to take up the "mantel" of juror and would cause a "waterfall" of state amendments.

Scott Shipman, Esq. (EV-2021-0005-0214) argues that the amendment would require the judge to take up the "mantel" of juror and would cause a "waterfall" of state amendments.

Quinton Spencer, Esq. (EV-2021-0005-0215) replicates other comments in stating that the preponderance of evidence standard is "inextricably intertwined" with jury factfinding, "which judges must not do in this analysis."

Anthony Stastny, Esq. (EV-2021-0005-0216) replicates other comments in stating that the preponderance of evidence standard is "inextricably intertwined" with jury factfinding, "which judges must not do in this analysis."

Soo Seok Yang, Esq. (EV-2021-0005-0217) opposes the amendment. He asserts that it "will only lead to clog the dockets with more hearings and increase expenses to all parties while adding no meaningful benefit in helping resolve any existing issues."

Susan Cox, Esq. (EV-2021-0005-0218) states that since the 2000 amendment to Rule 702, "a substantial body of law has developed on the role of the trial judge as the gatekeeper and the standards needed for expert testimony to be admissible to the jury." She contends that the amendment "will undermine the substantial guidance currently in existence."

Connor Sheehan, Esq. (EV-2021-0005-0219) asserts that "[t]here is no reason to change the scope of the Rule to create a new legal standard that better-assists insurance companies and tortfeasors in avoiding civil liability for serious harms."

Kenneth R. Berman, Christine P. Bartholomew, William T. Hangley, Paul M. Sandler, Ronald J. Hedges, and Michael P. Lynn (EV-2021-0005-0220) oppose the amendment in a 17-page report. They conclude that the proposal "articulates an admissibility standard that cannot be effectively applied to a great deal of legitimate expert opinion that ought to go to the jury" and that it "will unfairly deny juries and litigants the benefit of juryworthy testimony needed for fair adjudication, critical to resolving their factual and legal disputes." The report concludes: "The question should not be whether a challenged opinion is reliable or unreliable but whether it is reliable enough for the jury's consideration or, stated conversely, too

unreliable for the jury to consider it. That is the Rule 104(b) standard. It provides a logical, fair, and objective threshold, like a summary judgment standard. That is very different from, and considerably more appropriate than, the preponderance of the evidence standard now under consideration."

Patrick Dawson, Esq. (EV-2021-0005-0221) states that the rule should not encourage courts to find facts, and that the amendment will "require expensive and time consuming hearings that will clog dockets and increase costs."

Anonymous (EV-2021-0005-0222) states that the amendment violates the 7th Amendment and will lead to injustice.

Jeremy D'Amico, Esq. (EV-2021-0005-0223) opposes the preponderance of the evidence standard, arguing that it would lead to a situation in which only one side's experts would be allowed to testify --- if the plaintiff's expert satisfied a preponderance of the evidence standard, the defendant's could not, and vice versa.

Matthew Stoddard, Esq. (EV-2021-0005-0224) argues that the proposed amendment "encourages the judge to find facts, and finding facts should be the role of the jury -- not the judge."

Rebecca Gilliland, Esq. (EV-2021-0005-0225) opposes the amendment, contending that it will lead to the following: "7th amendment rights will be impacted, defendants will be given a massive power shift and opportunity to avoid liability where that opportunity should not exist, [and] a large impact on state-law rules that will further bog down a struggling system."

Jonathan Hayes, Esq. (EV-2021-0005-0226) states: "The proposed amendment furthers the intrusion of the judge into the province of the jury. Cross examination is the appropriate remedy for an ill-advised expert opinion, not a judge's opinion."

Josh Wages, Esq. (EV-2021-0005-0227) contends that under Rule 702, the trial judge does not weigh evidence: "That is the role of the jury. Thus, there is no basis for imposing a 'preponderance of the evidence' standard. The witness either satisfies the Rule 702 criteria or not."

Shane Bartlett, Esq. (EV-2021-0005-0228) states, identically with other submitted comments, that the preponderance of the evidence standard is "inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Ryan Beattie, Esq. (EV-2021-0005-0229) contends that the proposed amendment would add costs to litigation and "will expand the courts role and effectively give them the role of the jury."

James Lampkin, Esq. (EV-2021-0005-0230) states, identically with other comments that the proposed amendment will end up with the judge taking up the "mantel of juror" and that it would lead to a "waterfall" of state amendments.

Melanie Penagos, Esq. (EV-2021-0005-0231) argues that the preponderance standard "would allow, or more likely require, the trial court to hear from opposing experts away from the jury and then the courts would thereby limit expert testimony to their selected expert."

Benjamin Locklar, Esq. (EV-2021-0005-0232) opposes the proposed amendment, contending that under it "the barriers to obtaining justice for our clients will be greater than ever."

Jeff Bauer, Esq. (EV-2021-0005-0233) opines that the amendment will increase the costs of litigation, that it will have a negative effect on state rules of evidence, and it will "encourage Courts to find facts, which is solely the role of the jury."

George Tolley, Esq. (EV-2021-0005-0234) opposes the amendment, arguing that it will create uncertainty and will make it more difficult for malpractice claims to get to the jury.

Luke Trammell, Esq. (EV-2021-0005-0235) states that the amendment proposes a solution where there is no problem, and that it creates an "onerous" standard that will clog dockets and increase the cost of litigation.

Matt Griffith, Esq. (EV-2021-0005-0236) states, identically with other comments, that the amendment will require the judge to "take up the mantel of juror" and that it will lead to a "waterfall" of state amendments.

Anonymous (EV-2021-0005-0237) states: "It is a mistake to have the rule encourage courts to find facts. This will slow down an already backlogged system with expensive and time consuming hearings."

Bryan Comer (EV-2021-0005-0238) opposes the amendment, arguing that it will "take away the fact finding from the trier of fact, the jury, and place it in the trial court's hands" and will lead to "more lengthy, time consuming hearings, which will unduly clog the courts' dockets and increase costs for plaintiffs and defendants."

Anonymous (EV-2021-0005-0239) submitted the form statement submitted by many others, which states in its entirety: "The amendment to Rule 702 is unnecessary. Rule 702 captures the *Daubert* standard, which was never intended to be an exacting standard through which courts find facts and throw out evidence. Instead this standard was intended to keep out junk science, and Rule 702 as written already does that effectively. The desire to change an effective rule can only be for some unproductive and unwarranted purpose. This rule change would require courts to go beyond their rule as gatekeepers and instead take up the mantel of juror. Making this standard more exacting will result in even more clogged dockets and more expenses to all parties, an uneconomical and counterproductive inefficiency that resolves no existing problem. It will also result in a waterfall of state law amendments, which generally track this rule, and vitiate well-established precedent, again to no productive or reasonable end. I hope the committee will reconsider this proposed rule, and leave Rule 702, an entirely effective rule, as it is - doing what it already needs to do to ensure that jurors consider only relevant, reliable expert testimony."

Anonymous (EV-2021-0005-0240) submitted the form statement as set forth in comment #239.

David Boohaker, Esq. (EV-2021-0005-0241) opines that "[i]ncreasing the ability of the court to weigh in on factual evidence, especially in a scientific scenario, impermissibly allows the court to act as a fact finder instead of the jury." He also contends that the amendment will lead to expensive hearings that will clog dockets.

Stewart Eisenberg, Esq. (EV-2021-0005-0242) claims that the amendment "will prevent good claims from being heard by juries." He argues that the rule "should not encourage courts to find facts, and that the rule will "require expensive and time consuming hearings that will clog dockets."

Mike Crow, Esq. (EV-2021-0005-0243) filed the form comment set forth in its entirety in the summary to Comment 0239.

Margaret M. Murray (EV-2021-0005-0244) declares, identically with other comments, that the proposed amendment to Rule 702 "would circumvent the law, the judiciary, and the very purpose of the rules and should be rejected entirely."

James Matthews, Esq. (EV-2021-0005-0245) objects that the amendment allows the judge to weigh the evidence and so "may be unconstitutional." He also sees problems if the court tells the jury that it has made a finding that the expert's testimony is reliable.

Evan Allen, Esq. (EV-2021-0005-0246) states that "[c]hanging an effective rule is unnecessary and I fear that it would further clog dockets and increase expense to all parties. More importantly, it would require judges to take on the role of jurors in determining what likely are questions of fact."

Dana Taunton, Esq. (EV-2021-0005-0247) claims that the proposed amendment "would require courts to go beyond their rule as gatekeepers and instead usurp the role of the jury" and that "[m]aking this standard more exacting will result in even more clogged dockets and more expenses to all parties."

Robert Register, Esq. (EV-2021-0005-0248) uses the template set forth in the summary of comment 0239.

Anonymous (EV-2021-0005-0249) posted the template set forth in the summary of comment 0239.

Dylan Martin, Esq. (EV-2021-0005-0250) posted the template set forth in the summary of comment 0239.

Jaime Jackson, Esq. (EV-2021-0005-0251) states: "The proposed amendments will require expensive and time consuming court hearings that will clog dockets and increase costs. The amendments will also impact State law which should be left to the States. The rule should not encourage courts to find facts as this has always been the sacred province of the jury."

Gregory Shevlin, Esq. (EV-2021-0005-0252) opposes the amendment on the grounds that it favors corporate interests and it makes the judge a factfinder.

Steven Newton, Esq. (EV-2021-0005-0253) opposes the amendment, arguing that it is "contrary to the principles in *Daubert* and its progeny and alters the gatekeeping function of the judge somewhat" while also intruding upon the jury's function.

Josh Branch, Esq. (EV-2021-0005-0254) echoes other comments stating that the preponderance of the evidence standard is "inextricably intertwined" with a jury determination.

Gregory Cusimano, Esq. (EV-2021-0005-0255) opposes the amendment on the ground that adding further restrictions on expert testimony will increase costs, so that many meritorious claims will never get to the jury.

Ryan Kral, Esq. (EV-2021-0005-0256) contends that the amendment "will require courts to go beyond their role as gatekeeper and will usurp the role of the juror to consider relevant and reliable expert testimony." He predicts that the amendment will "clog dockets" and increase the expense of litigation.

Eddie Schmidt, Esq. (EV-2021-0005-0257) states that the amendment "is unfair, opens the door to activist judging, needlessly time consuming and will increase litigation costs."

Rachel Minder, Esq. (EV-2021-0005-0258) declares that "Rule 702 does not need to be amended to be an exacting standard through which courts find facts and throw out evidence" because to do so "would only take away the jury's role of analyzing the weight and credibility of an expert, violating the 7th Amendment's right to trial by jury."

Clifford Horwitz, Esq. (EV-2021-0005-0259) concludes that the amendment would "take away the jury's role of analyzing the weight and credibility of an expert, violating the 7th Amendment's right to trial by jury."

Brittany Scott, Esq. (EV-2021-0005-0260) states that the Rule 702 standard is effective as currently written, and that the proposed changes "allow judges to do more than their gatekeeping responsibility and violate plaintiffs' right to trial by jury."

Kendall Dunson, Esq. (EV-2021-0005-0261) believes that a rule change is unnecessary and that the amendment "would add too much responsibility on the judge and violate the 7th Amendment right to a trial by jury."

David Bullard, Esq. (EV-2021-0005-0262) tracked the language of a number of other comments in stating that the preponderance of the evidence standard is "inextricably intertwined" with jury factfinding, and the amendment would improperly transfer factfinding from the jury to the court.

Neil Alger, Esq. (EV-2021-0005-0263) declares that the court "should not (as the amendment proposes) weigh the preponderance of the evidence and make evidentiary findings before allowing the admission of the opinions. This would invade the jury's sacred duty."

Shawn Daniels, Esq. (EV-2021-0005-0264) opposes the amendment, contending that it improperly shifts factfinding power from the jury to the court.

David L. Diab, Esq. (EV-2021-0005-0265) believes that the amendment violates the 7th Amendment because it transfers the power to find facts and determine credibility from the jury to the court.

Jeff Price, Esq. (EV-2021-0005-0266) states that changes to Rule 702 are unnecessary, and that the amendment would result in a "waterfall" of state law amendments.

Ronnie Mabra, Esq. (EV-2021-0005-0267) opines that Rule 702 is working well, that there is no need for an amendment, and the amendment will lead to more work for courts, clogged calendars, and more litigation expense.

Mark Pettit, Esq. (EV-2021-0005-0268) submitted the template that is set forth in the summary of Comment 0239.

Mark Weissburg, Esq. (EV-2021-0005-0269) stated: "This will require expensive and time consuming hearings that will clog dockets and increase costs. State law will be affected too."

Elliot Bienenfield, Esq. (EV-2021-0005-0270) claims that Rule 702 currently works well to screen out junk science, and the amendment "would require all parties filing suit to jump through additional hoops and incur extra costs on litigation just to utilize expert testimony."

Julia Merritt, Esq. (EV-2021-0005-0271) submitted the template reproduced in the summary of Comment 0239.

Thomas Kelliher, Esq. (EV-2021-0005-0272) objects that the amendment will encourage courts to find facts, and that it will also require expensive and time-consuming hearings that will clog dockets and raise the expenses of litigation.

David Wenholz, Esq. (EV-2021-0005-0273) states that the rule should not encourage courts to find facts; that the amendment will lead to greater expense and clogged dockets; and that "states will be affected too."

Michael Silverman, Esq. (EV-2021-0005-0274) states: "This is wrong and thwarts the entire purpose of a jury deciding a civil case. It is denying people justice that the law guarantees and is the foundation of the civil justice system. Let a jury decide the merits of a case."

Jeff Gutkowski, Esq. (EV-2021-0005-0275) argues that the amendment "will result in the removal of a question of fact from the provenance of the jury and instead require judges to weigh facts and evidence, requiring plaintiffs to prove not only that their expert testimony is reasonably reliable and compliant with *Daubert* and Rule 702, but that plaintiffs' expert's testimony is superior to defendants' expert's testimony, before every trial."

Lindsey Macon, Esq. (EV-2021-0005-0276) declares that the use of the preponderance of the evidence standard in the proposed amendment would violate the 7th Amendment, because "the preponderance standard is a standard by which juries are to decide questions of fact."

Bobby Johnson, Esq. (EV-2021-0005-0277) states that the preponderance of the evidence standard is "inextricably intertwined" with juror factfinding and that "Judges should not sit as factfinders on these issues."

Kevin P. O'Brien, Esq. (EV-2021-0005-0278) opposes the amendment on the grounds that 1) judges and not juries should decide facts, 2) the amendment will clog dockets and lead to greater costs of litigation, and 3) the states will be negatively affected.

James B. Ragan, Esq. (EV-2021-0005-0279) argues that over the years the Federal Rules have been modified to increase the advantage of defendants in Federal court, and that the proposed changes to Rule 702 "are simply another step in that march."

Joel Wooten, Esq. (EV-2021-0005-0280) declares that "the most likely effect of these changes is to muddy the waters and create a new cottage industry that attacks every existing, rational interpretation of expert testimony and causes undue and unnecessary delays in litigation and increased attorneys fees and costs over the future meaning these confusing proposed changes to Rule 702."

William Atkins, Esq. (EV-2021-0005-0281) concludes, identically to other comments: "The phrase 'preponderance of the evidence' is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Zbigniew Bednarz, Esq. (EV-2021-0005-0282) posted a comment identical to others, which states: "This change will prevent good claims from being heard by juries. The impact on our clients will be unfair. The rule should not encourage courts to find facts. This will require expensive and time consuming hearings that will clog dockets and increase costs."

Wayne Hogan, Esq. (EV-2021-0005-0283) believes that the preponderance of the evidence standard will mean that judges at a Rule 104(a) hearing may only consider evidence that is admissible; he believes that this mistake will be corrected if the text of the proposed amendment is changed to "preponderance of the information."

Elizabeth Eiland, Esq. (EV-2021-0005—0284) posts, with minor variations, the template reproduced in the summary to Comment 0239.

Caroline Monsewicz, Esq. (EV-2021-0005-0285) asserts that the preponderance of the evidence "is a question of fact for a jury to determine" whereas judges "are tasked with making rulings of law, not fact." She concludes that "[l]anguage to the effect of encouraging and shifting a judge's role to that of a fact-finder will be detrimental to the judicial process for Article III courts, which is unfortunately what this proposed change seeks to do."

Graham Esdale, Esq. (EV-2021-0005-0286) posts the comment identical to that set forth in the summary of Comment 0239.

Anonymous (EV-2021-0005-0287) opposes the amendment, arguing that it will lead to costly hearings that clog the courts, it will turn judges into jurors, and it will have negative effects in the states.

Nolan E. Murray, Esq. (EV-2021-0005-0288) states, identically to other comments, that "[t]he proposed amendments and the comments would circumvent the law, the judiciary and the very purpose of the rules and should be rejected entirely."

Seth Lowry, Esq. (EV-2021-0005-0289) opines that the preponderance of the evidence standard is "inextricably intertwined" with juror factfinding, and so should not apply to a judge's determinations under Rule 104(a).

Anonymous (EV-2021-0005-0290) states, identically to other comments: "This will prevent a good claim from being heard by juries. The impact on our clients will be unfair. This will also require expensive and time consuming hearings, causing delays and increased costs. State law will be affected too."

Pierre Ifill, Esq. (EV-2021-0005-0291) states, identically with other comments, that the preponderance of the evidence standard is "inextricably intertwined" with juror factfinding, and so should not apply to a judge's determinations under Rule 104(a).

Cary Wiggins, Esq. (EV-2021-0005-0292) provides the same comment as that set forth in the summary of Comment 0239.

James Roth, Esq. (EV-2021-0005-0293) provides the same comment as that set forth in the summary of Comment 0239.

R. Dean Hartley, Esq. (EV-2021-0005-0294) states that Rule 702 is working well and should not be changed, and that the proposed amendment improperly shifts factfinding from the jury to the judge.

Eric Croon, Esq. (EV-2021-0005-0295) states that the proposed amendment is "bad" for the citizens of Georgia, and that the Committee should leave Rule 702 alone.

John Herman, Esq. (EV-2021-0005-0296) states that "[t]he appropriate standards are already captured in the rule and this seems to be yet another attempt to increase unnecessary litigation issues that will make it more time consuming and burdensome on the parties and the courts."

Warren Hinds, Esq. (EV-2021-0005-0297) believes that the proposed amendment to Rule 702 "impinges upon the right to a trial by jury and would require courts to go beyond their rule as gatekeepers and instead make factual findings, clog up the dockets, and cost all parties more."

Robert Hammers, Esq. (EV-2021-0005-0298) asserts that the preponderance of the evidence standard "is meant for the fact-finder to weigh evidence on an issue of fact" and that "Judges should not sit as a fact-finder when evaluating admissibility under FRE 702: they should take the expert's disclosed opinions and data and apply the formulaic analysis in concert with the respective circuit court's interpretation of *Daubert* and its progeny."

Richard Mitchell, Esq. (EV-2021-0005-0299) contends that the proposed amendment will be harmful to litigants. He states, identically with other comments, that "*Daubert* was

never intended to be an exacting standard through which courts may find facts and disallow evidence."

Andrew Fulk, Esq. (EV-2021-0005-0300) posted the comment set forth in the summary of Comment 0239, with minor variations such as changing "waterfall" to "deluge."

Leon Hampton, Esq. (EV-2021-0005-0301) states that the current system works well to screen out junk science, and that an amendment to Rule 702 is not necessary.

Marc A. Perper, Esq. (EV-2021-0005-0302) states: "This rule will prevent good claims from being heard by juries. The impact on injured people and consumers will be unfair. The rule will require expensive and time consuming hearings that will clog dockets and increase costs. It will also affect state law, which implicates considerations of federalism."

Joshua Samuels, Esq. (EV-2021-0005-0303) argues that the preponderance of the evidence standard "is a fact finding standard that goes to the weight of the evidence rather than its sufficiency. These are fact issues that are traditionally left to a jury, not admissibility of evidence."

David Zagoria, Esq. (EV-2021-0005-0304) states that the proposed amendment to Rule 702 is unnecessary and harmful, and will slow down litigation.

Anonymous (EV-2021-0005-0305) contends that the proposed amendment "will increase costs to both sides of a case," requiring "expensive and time-consuming hearings and clog dockets at a time when we should be doing the opposite."

Anonymous (EV-2021-0005-0306) declares that the proposed amendment "would augment the role of the courts from gatekeepers to factfinders. It would create the need for more hearings and vetting of experts by the courts, slowing down an already indolent pace of litigation and burdening parties with higher expenses."

Austin T. Osborn, Esq. (EV-2021-0005-0307) contends that the preponderance of the evidence standard converts the court into a factfinder in violation of the 7th Amendment, but that the term "preponderance of the information" would preserve the 7th Amendment.

Richard J. Zalasky, Esq. (EV-2021-0005-0308) states that the conflict in the courts about Rule 702 should be handled by the Supreme Court, not by a rule change. He also contends that the proposed amendment would increase the costs of litigation.

Andrea Sasso, Esq. (EV-2021-0005-0309) argues that the proposed amendment would have a detrimental effect on plaintiffs' claims, that it would improperly allow the court to be a factfinder, and that it would clog courts.

Robin Clark, Esq. (EV-2021-0005-0310) opposes the proposed amendment, contending that "Judges should not sit as a fact-finder on these issues, and the language of the rule should never encourage them to do so, whether explicitly or implicitly."

Anonymous (EV-2021-0005-0311) states: "This rule will prevent valid claims from being heard by juries. It benefits only defendants and is an injustice to plaintiffs."

Terrence Croft (EV-2021-0005-0312) states that the proposed amendment is "unnecessary and harmful."

Christopher Stuckey, Esq. (EV-2021-0005-0313) submits the same statement as Austin Osborn, Comment 0307.

Richard Crowson, Esq. (EV-2021-0005-0314) argues that the proposed amendment "usurps the role of the jury in findings of fact, which is a direct affront to the 7th Amendment right to a trial by jury, which I believe is sacrosanct to the concept of justice in this country. The judge is supposed to play a gatekeeping role to keep junk science out of a trial, not to sit as finder of fact."

Lisa Edwards, Esq. (EV-2021-0005-0315) states that the proposed amendment "would effectively throw out valid claims &/or slow court dockets" and "impinges upon the 7th amendment right to a trial by jury" because it "would require courts to go beyond their rule as gatekeepers and instead act as factfinders/ jurors."

Keith Evra, Esq. (EV-2021-0005-0316) opposes the addition of the preponderance of the evidence standard to Rule 702. He argues that "a jury of 6-12 people are far more capable than 1 person to thoroughly evaluate and weigh evidence under a burden of proof standard because so many people are able to weigh in, not just a singular person."

Greg A. Thurman, Esq. (EV-2021-0005-0317) opposes the proposed amendment, arguing that it will shift factfinding authority from the jury to the court.

Joey M. Chindamo, Esq. (EV-2021-0005-0318) opposes the amendment, arguing that it will lead to a flood of litigation in both state and federal courts. He also claims that the amendment is contrary to *Daubert,* which stated that courts should focus only on the expert's methodology, not on the expert's opinion.

Shane Lazenby, Esq. (EV-2021-0005-0319) states that the proposed amendment makes "the Judge the deciding arbiter of the admissibility of expert testimony beyond the current confines of Rule 702" and therefore infringes on the 7th amendment, because "Courts are meant to be gatekeepers and not fact finders on the admissibility of evidence."

Daniel Thistle, Esq. (EV-2021-0005-0320) states: "This will only prevent good claims from being heard by juries and will have an unfair impact on those people with good claims. The rule should not encourage courts to find facts. It will also increase litigation costs and clog the court dockets. State law will be affected also."

Adam Long, Esq. (EV-2021-0005-0321) declares that the proposed amendment "poses an existential threat to the Rules of Evidence generally" because "[i]n no other area have we sought to curtail the authority of the trial judge to enforce the Rules of Evidence."

D. James Jordan, Esq. (EV-2021-0005-0322) opposes the amendment, arguing it will create problems in state courts. He concludes: "Let the jury decide, not the court."

Tyler Stampone, Esq. (EV-2021-0005-0323) complains that the amendment will lead to clogged dockets, will have a negative effect on state courts, and will transfer factfinding authority from the jury to the court.

Jo Ann Niemi, Esq. (EV-2021-0005-0324) asserts that the term "preponderance of the evidence" "will be interpreted by state and federal court judges as requiring the plaintiff to put on a trial and prove our expert is right." She argues that the preponderance of the evidence standard "would shift the burden of defeating a *Daubert* challenge to the party offering the expert AND the proponent would have to do so by a preponderance of the evidence standard."

Andy Birchfield, Esq. (EV-2021-0005-0325) asserts that the proposed amendment will lead to clogged dockets and will result in the dismissal of meritorious plaintiffs' claims.

Donald Stack, Esq. (EV-2021-0005-0326) opposes the amendment and decries "the gradual but inexorable chipping away of our fundamental principles that have occurred based upon the business interests that have sought to influence the adoption and language of the FRE and FRCP."

Michael Wierzbicki, Esq. (EV-2021-0005-0327) states that the proposed amendment "invades the process of the jury and undermines the adversarial process."

The Attorneys Information Exchange Group (EV-2021-0005-0328) considers "preponderance of the evidence" to be limited to admissible evidence under Rule 104(a), even though that rule specifies that the court is not bound by the rules of evidence. The Group advocates that the term should be changed to "the preponderance of information."

Sydney Everett, Esq. (EV-2021-0005-0329) states that the rule is working well, so that no amendment is necessary, and that the proposed amendment would violate the 7th amendment by transferring factfinding authority to the court.

Michael Eshman, Esq. (EV-2021-0005-0330) contends that a rule change is not necessary, and that the proposed amendment would come at the expense of the 7th amendment right to jury trial.

Josh Vick, Esq. (EV-2021-0005-0331) argues that the preponderance of the evidence standard would undermine the jury's role as finder of fact, whereas the preponderance of the information standard would not. He also argues that the proposed amendment would lead to costly hearings and delays in litigation.

Bradley Melzer, Esq. (EV-2021-0005-0332) opposes the amendment, based on "the preference for a Jury to be the ultimate fact finder, the added expense, the additional time delay that this rule change would cause, and the likely impact on state law."

Troy Marsh, Esq. (EV-2021-0005-0333) submitted the comment set forth in the summary to Comment 0239.

Paul Byrd, Esq. (EV-2021-0005-0334) opposes the proposed amendment on the ground that it will foster minitrials, and states that "we should not further burden the parties already

bearing the burden of proof on all the elements of their causes of action, often injured individuals with scarce resources compared to their wealthy corporate opponents, with an evidentiary rule change that almost certainly will weigh the scales of justice further in favor of the rich over the poor."

J. Bradley Stevens, Esq. (EV-2021-0005-0335) states that the current rule is working well and that the amendment will not help the trial judge manage the gatekeeping function.

Michael Boyd, Esq. (EV-2021-0005-0336) opposes the proposed amendment because "it is the jury's responsibility to weigh the evidence and apply the preponderance of the evidence standard, not the Judge."

Amar Reval, Esq. (EV-2021-0005-0337) states that the rule should not encourage courts to find facts; that the proposed amendment will contribute to the problem of the vanishing trial; and that the amendment will lead to extensive delays in litigation.

Gavin King, Esq. (EV-2021-0005-0338) opposes the amendment, opining that it "serves no purpose other than to tip the balance of the courts toward a particular type of litigants. What's worse: this will eventually lead to the amendment of several state rules."

Joshua Verde, Esq. (EV-2021-0005-0339) opposes placing the burden of persuasion on the party offering the expert, arguing that it is unclear what "elements" a court must consider to determine whether the standard has been met. He also objects to the proposed change to Rule 702(d) on the ground that it "possibly puts an unfair burden on an expert that they must be published or show employment in a field where their conclusions can be applied."

Nicola Drake, Esq. (EV-2021-0005-0340) opposes the amendment to Rule 702 on the ground that it "will allow the Court to become finders of fact, improperly, and that will spill over into state law." She also predicts that the amendment "will clog the courts with costly, time consuming hearings which will be unfair to solo or small firms representing plaintiffs."

Anonymous (EV-2021-0005-0341) contends that the proposed amendment will improperly shift factfinding authority from the jury to the court, and that it will increase litigation costs.

Amy Harriman, Esq. (EV-2021-0005-0342) states, in language the same as other comments: "This will prevent good claims from being heard by juries and the impact on our clients will be unfair. This will require expensive and time consuming hearings that will clog the dockets and increase costs."

Tyler Berberich, Esq. (EV-2021-0005-0343) states: "This amendment should not pass. It will do nothing other than prevent good claims from being heard by juries. The negative impact on injured individuals will be severe and unnecessary."

Timothy McHale, Esq. (EV-2021-0005-0344) states: "This will prevent good claims from being heard by juries. The impact on plaintiffs will be unfair, and it will result in additional expenses and time that will slow down the process."

Jack Smalley, Esq. (EV-2021-0005-0345) submitted the comment that is reproduced in the summary of Comment 0239.

Phillip Lorenz, Esq. (EV-2021-0005-0346) declares that adopting the proposed amendment "will change the trial judge's role from that of reliability gatekeeper to a finder of fact regarding the proffered testimony, thereby invading the province of the jury." He suggests that "the Committee decline to modify Rule 702 unless and until such time as a majority of federal and state judges who are tasked with applying it see the need for such a change."

Kyle McNew, Esq. (EV-2021-0005-0347) objects to the preponderance of the evidence standard, arguing that "judges will understand that to mean they are being placed in a position akin to a factfinder, like a jury. That invites credibility determinations, and that is not the judge's role in the expert gatekeeper function." He suggests as an alternative that Rule104(a) could be mentioned in the text of 702.

Maddison West, Esq. (EV-2021-0005-0348) states: "The impact on our clients will be unjust, unfair, and unconscionable. This will prevent good claims from being heard by juries."

Milette E. Weber, Esq. (EV-2021-0005-0349) states that Rule 702 is functioning well and there is no need for change. She argues that the proposed amendment is contrary to *Daubert* in that it requires the court to evaluate whether the expert's conclusion reflects a proper application of the methodology, whereas *Daubert* instructed courts to look only at the expert's methodology.

Heidi Vicknair, Esq. (EV-2021-0005-0350) states: "This will prevent good claims from being heard by juries and will encourage courts to find facts. Further this will affect state law by trying to change the rules and can lead to inconsistencies and problems."

Aigner Kolom, Esq. (EV-2021-0005-0351) opposes the proposed amendment to Rule 702, believing that it will "prevent good claims from being heard by juries and will encourage courts to find facts" and also that it will affect state law "by trying to change the rules and can lead to inconsistencies and problems."

Justin Owen, Esq. (EV-2021-0005-0352) opposes the proposed amendment stating that its effect would be "the evisceration of litigants' ability to seek redress or pursue causes of action which, in whole or in part, involve or rely upon new, novel, developing, or evolving theories, concepts, fields, and/or subject matter." That result would be "a violation of citizens' constitutional rights of access to the courts and to seek redress for injuries to their person and property, which is an unconscionable result." He also predicts that the amendment would lead to an "avalanche" of additional motions and hearings that would be "gargantuan" if the courts have to apply an evidentiary burden to each and every aspect of an expert's testimony.

Gary C. Eto, Esq. (EV-2021-0005-0353) declares that the proposed amendment would "severely limit litigants' rights to a jury trial by allowing judges to be the finder of fact with respect to expert testimony."

Anonymous (EV-2021-0005-0354) states: "These changes will waste more court time and expense for unnecessary hearings, all while preventing good claims from being presented to a jury."

Daniel Stampone, Esq. (EV-2021-0005-0355) is opposed to the proposed amendment to Rule 702 because it will "result in costly and protracted hearings/litigation that will only serve to infest and clog the dockets while unnecessarily increasing costs."

Leo & Oginni Trial Lawyers, PLLC (EV-2021-0005-0356) declares that the proposed amendment "will ultimately go against the 7th amendment."

Kenneth T. Lumb, Esq. (EV-2021-0005-0357) states that the proposed amendment is "contrary to the law and to the U.S. Constitution" and that it will require expensive hearings that will clog dockets.

Albert Guerrero, Esq. (EV-2021-0005-0358) is concerned that the preponderance of the evidence standard will encourage judges to become triers of fact, and that the amendment "appears to shift the burden in a *Daubert* challenge to the party offering the expert evidence to prove reliability and to do so by a preponderance of the evidence, rather than to the party that is challenging the evidence."

Robert Edwards, Esq. (EV-2021-0005-0359) states that the preponderance of the evidence standard will result in the trial judge "usurping the jury's domain" whereas that will not occur if a "preponderance of the information" standard is used.

Jordan Leibovitz, Esq. (EV-2021-0005-0360) opposes the proposed amendment, contending that it allows judges to be triers of fact, and that it will increase the costs of litigation.

Scott Frost, Esq. (EV-2021-0005-0361) contends that the current Rule 702 is working well, and objects that the proposed amendment "will hurt both sides as experts are excluded based upon one court's decisions and not science."

Seth Harding, Esq. (EV-2021-0005-0362) opposes the proposed amendment. He concludes that the amendment will usurp the jury's role, violate the 7th Amendment, and increase the costs of litigation for plaintiffs. He concludes: "Reminder: The love of money is the root of all kinds of evil. In many cases this amendment will be a tool of this unfortunate principle of human nature."

Devin McNulty, Esq. (EV-2021-0005-0363) predicts that the proposed amendment will lead to costly hearings and lengthy argument schedules and delay.

Mary Leah Miller, Esq. (EV-2021-0005-0364) submitted, with minor variations, the comment that is reproduced in the summary to Comment 0239.

Anonymous (EV-2021-0005-0365) states that **"**these changes will create confusion, restrict judicial discretion, and infringe on the role of the jury."

Estee Lewis, Esq. (EV-2021-0005-0366) contends that the proposed amendment would limit the type of information upon which an expert can rely, and that, "it unduly shifts the burden on the party utilizing an expert" because "with *Daubert* challenges, the burden is on the adverse party to prove that an expert is not qualified, and this burden is then rebutted by the proponent."

Denney & Barrett (EV-2021-0005-0367) is opposed to the proposed amendment, arguing that it puts the judge in the role of factfinder and "the arbiter of which expert's opinion wins"; that it will create costly hearings; and that it is inconsistent with *Daubert's* focus on the expert's methodology rather than the conclusion reached by the expert.

Chris Moore, Esq. (EV-2021-0005-0368) opposes the amendment, because it "shifts the burden to the proponent of the opinion. Traditionally, and correctly, the law requires the party challenging an expert or her opinion to prove their unreliability." He also states that "the rule should not encourage, much less require, courts to find or weigh facts traditionally reserved for juries" and that the rule will lead to expensive hearings that clog the courts.

Stampone Obrien Dilsheimer Law (EV-2021-0005-0369) opposes the proposed amendment on the ground that it is prejudicial to plaintiffs and would encourage the judge to be a factfinder.

Anonymous (EV-2021-0005-0370) contends that the proposed amendment would undermine the difference between judges and juries, and would increase the costs of litigation.

John Hadden, Esq. (EV-2021-0005-0371) opposes the amendment, stating that "[t]he right to a jury trial is inviolate under the 6th and 7th Amendments, but expanding the role of judges to make more and more fact-based determinations that are traditionally the province of the jury erodes the Constitutional guarantees the Founders envisioned."

Derek C. Johnson, Esq. (EV-2021-0005-0372) opposes the amendment, on the grounds that it would create another barrier for injured parties; it would shift factfinding power from the jury to the court; and it would lead to expensive hearings.

Matthew Millea, Esq. (EV-2021-0005-0373) states that "[t]he jury, as the finder of fact, should be the one weighing the evidence, not the judge, whose only task is to determine whether the proposed expert testimony meets the standards of Rule 702." He argues that the proposed amendment will create a conflict with Rule 104(a), the rule that the amendment is explicitly applying, because the amendment somehow implies that the trial court may only consider admissible evidence in ruling on the admissibility of an expert opinion.

Lewis M. Chandler, Esq. (EV-2021-0005-0374) states that the proposed amendment is "another assault on the U.S. Constitution" and that it would foster expensive minihearings.

Patrick Sheehan, Esq. (EV-2021-0005-0375) opposes the amendment, instructing that judges should not be encouraged to find facts, because "that's unconstitutional" and that "[t]he people of this country deserve better protection from and by a legal system that lawyers control."

Erin K. Bradley, Esq. (EV-2021-0005-0376) contends that the proposed amendment would shift factfinding away from the jury to the court, and would result in clogged dockets.

Patrick Ardis, Esq. (EV-2021-0005-0377) provides the same arguments in the same language as Erin Bradley, Comment 0376.

William T. Gibbs, Esq. (EV-2021-0005-0378) argues that the proposed amendment unconstitutionally shifts factfinding authority from the jury to the court.

Rachel Gelfand, Esq. (EV-2021-0005-0379) provides the same arguments in the same language as Erin Bradley, Comment 0376.

Daniel V. Parish, Esq. (EV-2021-0005-0380) provides the same arguments in the same language as Erin Bradley, Comment 0376.

Alison Hawthorne, Esq. (EV-2021-0005-0381) submitted a slightly altered version of the statement reproduced in the summary of Comment 0239 (e.g., "influx" for "waterfall").

David P. Mason, Esq. (EV-2021-0005-0382) argues that Rule 702 is working well, and that the amendment would require expensive and complex hearings on whether experts are properly applying their methodology.

Paul J. Komyatte, Esq. (EV-2021-0005-0383) opposes the amendment on the ground that it would lead to expensive and time-consuming hearings in almost every case, and that it would lead to similar problems in state courts.

Lucas Garrett, Esq. (EV-2021-0005-0384) states that the proposed amendment will have the effect of requiring expensive and time-consuming hearings that will clog dockets and increase costs. He argues that the amendment "encourages judges to venture out of their core competencies and instead wade into the substance of expert testimony in a way that will prevent good claims from being heard by juries."

Anonymous (EV-2021-0005-0385) submitted the statement set forth in the summary of Comment 0239.

David Wool (EV-2021-0005-0386) suggests changing the Committee Note provision that refers to rejecting court decisions holding that sufficiency of basis and reliability of application are questions of weight. He reasons that in any particular opinion, the court may be properly holding that sufficiency of basis or reliability of application may in fact be a question of weight.

Robert Cheeley, **Esq. (EV-2021-0005-0397)** opposes the preponderance of the evidence standard, arguing, identically with others, that it is "inextricably intertwined" with juror factfinding.

Michele L. Reed, Esq. (EV-2021-0005-0388) opposes the proposed amendment on the ground that it shifts factfinding authority to the court, and imposes an adverse prejudicial impact on the party with the burden of proof.

Jennifer Emmel, Esq. (EV-2021-0005-0389) states that the preponderance of the evidence standard calls for judicial factfinding that is inconsistent with gatekeeping. She also contends that the proposed amendment "would result in different standards across different scientific areas and situations, thus precipitating a watershed of appeals."

Christopher Conway, Esq. (EV-2021-0005-0390) states that the preponderance of the evidence standard "takes issues of fact out of the hand of the fact finder, the jury, and into the hands of the judge" which is "a clear and blatant violation of the 7th Amendment."

Edmund A. Normund, Esq. (EV-2021-0005-0391) states that existing rules properly regulate expert testimony, and that any case law that is contrary to the existing rules represents a minority. He concludes that the proposed amendment to Rule 702 "seeks to turn trial judges into pretrial jurors and seeks to require them to weigh evidence and credibility that is properly and currently the role of the fact-finder."

Alex Gillen, Esq. (EV-2021-0005-0392) "can only assume the next rules revision will just do away with the Seventh Amendment in its entirety, truly making the citizens voiceless."

Gabrielle Holland, Esq. (EV-2021-0005-0393) states that the preponderance of the evidence standard is "inextricably intertwined" with jury factfinding, and that **"**the addition of this language is not well-conceived and will relegate the jury to a mere advisory panel rather than the fact-finder, which would essentially make the purpose of a jury null and void."

John O'Neill, Esq. (EV-2021-0005-0394) asserts that the preponderance of the evidence standard "will lead, certainly and unfortunately, to inconsistency in evaluation of the Rules of Evidence by the Court." He also states that "the modification to Rule 702(d) will, certainly and unfortunately, lead courts to become the finder of fact and invade the province of the jury."

Samuel Prillaman, Esq. (EV-2021-0005-0395) states: "The proposed amendments to 702 will prevent juries from hearing good claims and have an unfair effect on our clients. The rule should not encourage courts to find facts. This will require expensive and time consuming hearings that will unnecessarily clog the courts."

Harden Kundlam McKeon & Poletto (EV-2021-0005-0396) supports the proposed amendment to Rule 702. The firm states that it is "essential that the judges enforce their roles as gatekeepers rather than have juries misunderstand when expert's conclusions reach beyond what the expert's basis and methodology support. This leads to confusion and improper verdicts and findings by the jury."

Frederic Halstrom, Esq. (EV-2021-0005-0397) contends that the proposed changes to Rule 702 "are but another attempt to add layers and layers of complexity to the Federal Rules of Evidence purely for special interests." In his view, "requiring the plaintiff to dry run their entire expert case before trial doubles the case costs which will be incurred by plaintiffs, and which are usually advanced by plaintiffs' lawyers."

Ingrid A.. Halstrom, Esq. (EV-2021-0005-0398) opposes the proposed amendment to Rule 702, stating that it "would make it harder for a plaintiff to offer reliable expert testimony,

increase the gatekeeping function of the judge, and diminish the role of the jury by putting the decision to accept or reject expert testimony in the hands of a judge, not the jury."

Robert Frank Melton, Esq. (EV-2021-0005-0399) opposes the amendment, stating that it "will lead to even more pressure on our courts because each court will have to 'weigh' each individual expert opinion to determine as the fact finder, whether that specific opinion meets this highly elevated new burden of proof." He argues that "[t]he focus should remain on the 'principles and methodology' of an expert, as stated clearly in *Daubert v. Merrell Dow Pharmaceuticals*."

G. Bryan Ulmer, III, Esq. (EV-2021-0005-0400) opposes the amendment, stating that it will do more harm than good by: "1) adding confusion to the rules; 2) increasing the burden on a strained court system; 3) adding expense to litigation; and 4) eroding, demeaning, and diminishing the role of the jury as factfinder."

Peters Murdaugh Parker Eltzroth & Detrick (EV-2021-0005-0401) is opposed to the proposed amendment on the grounds that it will be harder for plaintiffs to get claims heard by juries, there will be lengthy hearings, and judges will be allowed to find facts.

Bert Utsey, Esq. (EV-2021-0005-0402) opposes the amendment because it is a solution to a non-existent problem, and it would "negatively affect the trial strategy" of proponents of experts.

William Bonner, Esq. (EV-2021-0005-0403) contends that it is improper to allow judges to find facts in ruling on the admissibility of expert testimony. He also states that if judges are allowed to find facts, "the proposed amendment invites inconsistency because no two judges will view the same set of facts identically."

Wynn E. Clark, Esq. (EV-2021-0005-0404) opposes the proposed amendment on the ground that it will require a party to prove to both the judge and the jury that the expert's opinion is correct.

Scott Blair, Esq. (EV-2021-0005-0405) believes that "this rule change will disproportionately favor corporate defendants with plenty of money to hire experts to now attack the application of a plaintiff expert's opinions even though the underlying science is sound."

Kenneth Elwood, Esq. (EV-2021-0005-0406) opposes the amendment because it will lead to more expense, it would improperly allow the court to find facts in determining the admissibility of expert testimony, and most importantly the proposed amendment "shifts the burden of proof in a *Daubert* challenge."

William Bonner, Esq. (EV-2021-0005-0407) submitted a comment identical to the one he submitted as Comment 0403.

Kathleen A. Farinas, Esq. (EV-2021-0005-0408) states that it is confusing for the preponderance of the evidence standard to be included only in Rule 702, when it applies to

many other rules. She also contends that the proposed change to Rule 702(d) is so subtle that it will not be understood, especially in state courts.

Theile McVey, Esq. (EV-2021-0005-0409) contends that the proposed amendment establishes a "new standard" that "will only create more issues, more confusion, and prevent testimony that would otherwise assist a trier of fact in making an informed decision/verdict."

Chris Finney, Esq. (EV-2021-0005-0410) states that "this rule change seeks to further degrade the 7th Amendment by removing and limiting the function of a jury in the USA. The continual limitations and assaults on the right to a jury trial are again represented in this rule change by taking power from a jury and putting in the hands of judges, thus encouraging and enabling judicial activism which both red and blue citizens dislike."

Rip Andrews, Esq. (EV-2021-0005-0411) states: "This rule change violates the 7th Amendment. It puts judges in the place of juries. Juries are best equipped, by living in the real world, to judge the credibility of experts."

Anonymous (EV-2021-0005-0412) states that the proposed amendment "invites the courts to engage in impermissible and unnecessary fact finding and creates an additional drag on the system that simply rewards big billers and increases costs for all."

Jonathan V. O'Steen, Esq. (EV-2021-0005-0413) argues that the proposed changes to Rule 702 "elevate judges to fact finders, which increases litigation costs through additional extensive briefing and evidentiary hearings. This unnecessarily expands the role of judges in our civil justice system and introduces unnecessary delay."

Peter E (EV-2021-0005-0414) asserts that "Federal courts are already a sinkhole for impecunious parties" and that the proposed amendment would necessitate minitrials that will further increase expense.

Daniel Sciano, Esq. (EV-2021-0005-0415) states that the rules on experts are working well and that the proposed amendment would lead to greater expenses of litigation.

Jane Mauzy, Esq. (EV-2021-0005-0416) opposes the proposed amendment, arguing that the current rules are working well, that the proposed amendment would lead to greater expenses, and that the "changes to Rule 702 would effectively take the jury's role of analyzing the weight and credibility of an expert and place it solely in the hands of the judge" in violation of the 7th Amendment.

Christopher Burke, Esq. (EV-2021-0005-0417) opposes the proposed amendment, arguing that it will improperly increase the role of the judge in violation of the 7th Amendment.

Raphael Qiu, Esq. (EV-2021-0005-0418) posted a statement used by several others: "This will prevent good claims from being heard by juries. The impact on our clients will be unfair. The rule should not encourage courts to find facts. This will require expensive and time consuming hearings that will clog dockets and increase costs. State law will be affected too."

Jeremy O'Steen, Esq. (EV-2021-0005-0419) complains that "[w]ithout explanation in the memorandum, the proposed amendment to Rule 702 shifts the burden of proof in a *Daubert* challenge from the party bringing the challenge to the party offering an expert's testimony." He also argues that the preponderance of the evidence standard improperly shifts factfinding authority to the court, and that the proposed amendment will lead to costly hearings and appeals.

M. Chad Gerke, Esq. (EV-2021-0005-0420) states that the proposed amendment "will keep juries from hearing cases, versus what is provided for in the Bill of Rights (7th Amendment) and what our founding fathers fought so dearly for."

Stewart Gross, Esq. (EV-2021-0005-0421) contends that the proposed changes "elevate judges to fact finders, which increases litigation costs through additional extensive briefing and evidentiary hearings. This unnecessarily expands the role of judges in our civil justice system and introduces unnecessary delay." He also complains that the Committee Note "directly questions the intellect of jurors."

Lyle Warshauer, Esq. (EV-2021-0005-0422) opposes the amendment but states that if the rule is to be amended, the preponderance of the evidence standard should be changed to "preponderance of the information." According to him this is not a semantic difference, because the preponderance of the evidence standard has historically been tied to juror factfinding.

Peter Donovan, Esq. (EV-2021-0005-0423) asserts that "fact-finding must be left to the jury and not the Court and by adding this language it creates a slippery slope where the Court may overstep its authority and make findings of fact that should be left to the jury." He also complains that the proposed amendment would lead to increased motion practice and more expenses of litigation.

Michael J. Warshauer, Esq. (EV-2021-0005-0424) argues that advocates of the rule have misstated and misrepresented the number of cases that have misapplied Rule 702; that advocates of the rule have never mentioned the 7th Amendment right to jury trial; and that the "preponderance of the evidence" standard violates the 7th Amendment while the "preponderance of the information" standard does not.

Bradley Booke, Esq. (EV-2021-0005-0425) opines that the preponderance of the evidence standard is "redundant" because it already applies to the Rule 702 admissibility requirements. He also recommends that the word "reliable" be struck from the amendment.

Eric Shapiro, Esq. (EV-2021-0005-0426) states that the current rules on experts work well, and that allowing the judge to be a factfinder in determining the admissibility of expert testimony likely violates the 7th Amendment.

Rhett Wallace, Esq. (EV-2021-0005-0427) contends that the preponderance of the evidence standard would allow the judge to be a factfinder and therefore it would erode the rights protected by the 7th Amendment. He opines, however, that a standard of "preponderance of the available information" "maintains the trial court's role as a gatekeeper while preserving the rights guaranteed by the 7th Amendment."

Robert K. Poundstone, Esq. (EV-2021-0005-0428) argues that the proposed changes to Rule 702 "question the intellect of jurors" and would lead to extensive hearings that would increase the cost of litigation.

Martzell, Bickford & Centola (EV-2021-0005-0429) opposes the amendment, arguing that adding the preponderance of evidence standard is unnecessary because it already exists in the rule. Their concern is that if the standard is added to the text, this could lead to a perception of a heightened or "enhanced" burden of a plaintiff to have expert testimony admitted as evidence, "which could confuse a trial court and ultimately act as a bar to have plaintiffs' experts heard by a jury, and could potentially cause courts to conflate their role as a gatekeeper on the admissibility of expert testimony with a trial on the merits."

Wayne Parsons Esq. (EV-2021-0005-0430) states that adding the preponderance requirement to the text of the rule is "superfluous" because it already applies, and therefore any such addition might be interpreted "to subtly instruct the courts to grant more motions barring testimony of experts." He also argues that the proposed amendment and Committee Note are demeaning to jurors.

Virgil Adams, Esq. (EV-2021-0005-0431) states: "The proposed change is totally unnecessary and will unfortunately place trial judges in the position of being judge AND jury in determining whether sufficient facts have been proven by a preponderance of the evidence. This will only lead to more confusion and more appeals."

James Fowler, Esq. (EV-2021-0005-0432) recommends that the Committee "should reject any proposed amendment that would conflate the jury's factfinding duties with the court's role as gatekeeper relative to expert testimony." He asserts that the proposed amendment "would prevent meritorious claims from being heard by juries and require expensive and time consuming hearings that would cause congestion to court's dockets and increase costs on litigants."

Dylan Scilabro, Esq. (EV-2021-0005-0433) states that "[o]ut of respect for the 7th amendment of the constitution, the credibility and weight of witness testimony need only be assessed by a jury, not a judge." He also suggests that if the amendment is enacted, it "will absolutely call into question the duty of impartiality that our judges maintain and will put them in a position where their character may be called into question."

Douglas Loefgren, Esq. (EV-2021-0005-0434) states that the proposed amendment "effectively turns a judge into a jury and further erodes the right to trial by jury." He believes that the right to jury trial "is one of the key things that separates our country from most others and makes it truly great."

Lauren Newton, Esq. (EV-2021-0005-0435) states that expert witnesses are already expensive for injured parties, and that the proposed amendment "will increase the burden on judges and lawyers and further deny justice."

Stevie N. Scotten, Esq. (EV-2021-0005-0436) contends that the proposed changes to Rule 702 "directly question the intellect of jurors" and will lead to expensive hearings and delays designed to "elevate trial judges to fact-finders."

Lawrence A. Anderson, Esq. (EV-2021-0005-0437) opposes the proposed amendment on the ground that the preponderance of the evidence standard improperly turns the court into a factfinder. He further contends that the preponderance of evidence standard is contrary to the Supreme Court's decision in *Bourjaily v. United States,* because in that case the Court distinguished the trial court's rule in evaluating evidentiary admissibility from the jury's rule in determining whether the burden of proof (of guilt) was met.

Kevin Swenson, Esq. (EV-2021-0005-0438) argues that the proposed amendment " shifts a significant portion of the fact finder role from the jury to the judge." He also argues that the proposed amendments would make it longer and more expensive to get a case to a jury because all expert issues "would need to be tried twice."

M. Raymond Hatcher, Esq. (EV-2021-0005-0439) argues that the current Rule 702 works very well, and if, as the proposed Committee Note says, the amendment does not change the prerequisites of the rule, there is therefore no reason to change the text.

Ryan Skiver, Esq. (EV-2021-0005-0440) opposes the proposed amendment, because it would mean "that the judge would be deciding the facts instead of the juries" and it would allow the judge to simply "pick sides."

Bryce Montague, Esq. (EV-2021-0005-0441) states that the proposed amendment "would shift the responsibility of deciding the facts in a case to a judge instead of the juries. This would negatively impact plaintiffs as this could lead to exclusion of all of their experts, which could also lead to the failure of meeting their burden of proof."

Joshua D. Payne, Esq. (EV-2021-0005-0442) states that the proposed amendment "would wrongly encourage courts to find facts, assessing the correctness of an expert's opinion rather than whether they have met the threshold requirements of Rule 702." He also argues that the amendment would lead to expensive hearings that would clog dockets.

The Democracy Forward Foundation (EV-2021-0005-0443), an organization working to show that independent science can inform public decisionmaking without political interference, supports the proposed amendment to Rule 702. The Foundation strongly agrees with the Committee Note comments on forensic expert testimony. It states that the Note "is correctly pointing out that courts must be attentive to their longstanding gatekeeping function to prevent juries from receiving evidence that has no scientific basis." It suggests that the Note clarify that the requirements set forth are questions of admissibility and not weight. It concludes that "[e]nsuring that forensic expert evidence meets a minimum standard of reliability is essential to preventing the unjust conviction of innocent people and to promoting public confidence in the judicial system.

Alan Van Gelder, Esq. (EV-2021-0005-0444) contends that the proposed amendment will require expensive hearings that will clog dockets. He also contends that the proposed

amendment "will result in a miscarriage of justice and disproportionately fall on those most in need of the civil justice system."

Peter Cerilli, Esq. (EV-2021-0005-0445) states that the proposed amendment "will effectively create costly and more lengthy multi-level trials, first before a judge weighing the preponderance of forensic expert evidence, and then before the jury itself" and that the costs of additional hearings "will further deter litigants from pursuing their jury trial rights."

Kurt D. Maahs, Esq. (EV-2021-0005-0446) criticizes the proposed amendment on the ground that it shifts fact-finding authority from the jury to the court in violation of the 7th Amendment. He also complains that the proposed Committee Note "directly questions the intellect of jurors."

David J. Llewellyn, Esq. (EV-0005-0447) states, identically with other comments, that: "The phrase 'preponderance of the evidence' is inextricably intertwined with fact-finding and weighing evidence, which judges must not do in this analysis."

Maegen Peek Luka, Esq. (EV-2021-0005-0448) contends that the proposed amendment violates *Daubert* because that case prohibits a court from evaluating the application of the expert's methodology (though the text of Rule 702 requires such a review). She complains that the amendment would violate the right to a jury trial because it gives the judge the power to find facts. She states that the authors of language in the Committee Note "should be ashamed" for demeaning the power of jurors to understand when an expert's opinion may be overstated. She concludes that the amendment is so offensive that it will "tread on the rights our forefathers stressed were critical to the foundation of this nation."

William Bacon, Esq. (EV-2021-0005-0449) objects that the proposed amendment turns the judge into a factfinder, that it will increase the expenses of litigation, that it will add delays, and that it will have a negative effect on the states.

Karl Pearson, Esq. (EV-2021-0005-0450) opposes the amendment on the ground that the preponderance of the evidence standard "allows judges too significant of a gatekeeping role at the expense of jurors who are charged with deciding cases."

Michael Beard, Esq. (EV-2021-0005-0451) predicts that the proposed amendment will lead to delays, clogged dockets, and greater expenses. He also states, identically with other posted comments, that the judge should not be allowed to take up the "mantel of juror." Finally, he states that the proposed amendment "coupled with the abuse of discretion standard of review opens the real possibility that judges assume too much control over trials and impose their view of the merits (i.e., through consideration of expert conclusions) of a case instead of allowing juries to decide cases."

Elise R. Sanguinetti, Esq. (EV-2021-0005-0452) contends that the proposed amendment will erode the right to jury trial by transferring factfinding power to the court; that it will lead to expensive hearings and clogged dockets; and that it will have a negative effect on the states.

Joseph King, Esq. (EV-2021-0005-0453) objects to the proposed amendment on the ground that it imposes "another level of factfinding by the trial court."

Lance Entrekin, Esq. (EV-2021-0005-0454) complains that the proposed amendment shows a "complete contempt" for jurors, and concludes that "[w]e do not need yet another pretext for judges to prevent jurors from hearing testimony offered by adequately qualified and adequately foundationed expert witnesses."

Bryan Baer, Esq. (EV-2021-0005-0455) believes that the amendment will lead to confusion. He states that the preponderance of the evidence standard is "a standard for the finder of fact" whereas an evidentiary ruling is one of "law."

Craig J. Simon, Esq. (EV-2021-0005-0456) opines that the proposed amendment violates the right to trial by jury because it shifts factfinding power to the judge; that it demeans the intelligence of jurors; and that it will lead to clogged dockets and costly hearings.

Andrew Nebenzahl, Esq. (EV-2021-0005-0457) is concerned that the proposed amendment will negatively affect the flexibility mandated by *Daubert.* He also recommends that the phrase "preponderance of the evidence" should be deleted.

Jarred McBride, Esq. (EV-2021-0005-0458) objects to a paragraph in the Committee Note that "questions the intellect of jurors."

Stephen Becker, Esq. (EV-2021-0005-0459) disagrees that courts have been misapplying *Daubert* and Rule 702. He argues that the proposed changes to Rule 702 allow district judges "to decide not merely whether they find that the expert's opinions have a sufficiently sound basis but whether judges believe the expert's opinions are more likely true than not true."

Gary M. DiMuzio, Esq. (EV-2021-0005-0460) opposes the proposed changes to Rule 702. He argues that the change to Rule 702(d) will encourage the judge to become "an amateur scientist" who will decide "who is right." He opposes the preponderance of the evidence standard, fearing that it will be used by defendants to argue for a "higher standard."

Trysta Puntenney, Esq. (EV-2021-0005-0461) states that the preponderance of the evidence standard applies to the jury and not to the judge. She also opines that the proposed amendment demeans jurors.

The National Association of Criminal Defense Lawyers (EV-2021-0005-0462) "enthusiastically supports the Committee's proposed clarification" in the proposed amendment, "given the existing confusion among the lower federal courts as to the proper standard for admitting expert testimony." NACDL states that "the need to exclude unreliable or dubious evidence is particularly acute in the criminal context" because witnesses have testified in "spurious fields of expertise" resulting in wrongful convictions. NACDL agrees that judicial gatekeeping is essential because of the risk that jurors may be unable to assess whether the conclusions of an expert go beyond what the basis and methodology supports.

Anonymous (EV-2021-0004-0463) states that the preponderance of the evidence standard "appears to put a trial court judge firmly in the place of a juror on an issue of fact" and that "an unjustly high standard will prevent litigants from being able to access justice on issues of fact through the means the Constitution intended: through a trial by a jury of their peers."

Hunter W. Lundy, Esq. (EV-2021-0005-0464) opposes the proposed amendment on the ground that it is "taking away the fact-finding duties of the jury."

Crane, Phillips & Rainwater, PLLC (EV-2021-0005-0465) opposes the amendment, arguing that it erodes the factfinding duties of the jury and that it will create a trial within a trial.

Charles Williamson, Esq. (EV-2021-0005-0466) states that "Rule 702 is perfectly fine as it is, and adding another step to the courthouse is nothing more than a dilatory tactic, unilaterally favoring the defendants, who as a matter of course throw whatever stones they can to force a settlement for pennies on the dollar." He concludes that the asserted problems in applying the rule are "espoused by the Defense Bar, who has the money for lobbying efforts." He states that the proposed amendment "promotes nothing more than the continued destruction of American citizens' rights to a fair trial beneath the boot of corporate greed. Do not be deceived!"

Professors Richard Jolly and Valerie Hans (EV-2021-0005-0467) take no position on the text of the proposed amendment but object to language in the proposed Committee Note stating that jurors may be unable to assess whether an expert's conclusion reflects a proper application of basis and methodology. The professors argue that the language is unnecessary to support the rule, and underestimates the ability of jurors as demonstrated in some empirical studies.

Dennis E. Murray, Esq. (EV-2021-0005-0468) concludes, in language identical to other public comments: "The proposed amendments and the comments would circumvent the law, the judiciary and the very purpose of the rules and should be rejected entirely."

Brian Snyder, Esq. (EV-2021-0005-0469) contends that the proposed amendment is "another example of a rule that is not necessary and that will negatively affect only plaintiffs" and states that if the proposed amendment is enacted, "the fundamental right to a civil trial by jury will be in peril."

William C. Ourand, Esq. (EV-2021-0005-0470) relies on John Adams's quote: "Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds." He also states that the amendment is contrary to *Daubert,* which states that the court should review only the expert's methodology.

Michael Bryan Slaughter, Esq. (EV-2021-0005-0471) argues that the proposed amendment threatens the constitutional right to a jury trial, and will lead to extra expenses of litigation.

Waters & Kraus (EV-2021-0005-0472) believe that the proposed amendment's use of the term "preponderance of the evidence" means "preponderance of the admissible evidence" even though it is referring to a judge's determination in a Rule 104(a) hearing. Working with that assumption, the firm concludes that many experts, such as those employing a differential diagnosis, will be excluded because they will be relying in part on inadmissible evidence.

Lincoln Combs, Esq. (EV-2021-0005-0473) argues that the demands on expert testimony already impose unjustified expense, and that the proposed amendment will just make it worse. He believes that the proposed amendment is inconsistent with the constitutional right to a jury trial.

Matthew MacLeod, Esq. (EV-2021-0005-0474) opposes the proposed amendment, stating that it "raises the specter of protracted litigation and delay when unnecessary, and blurs the duties and obligations of judge and juries."

Brian Leonard, Esq. (EV-2021-0005-0475) predicts that if the proposed amendment is adopted, "the traditional role of jurors will be weakened, opening the door to further erosion. Further, the proposed amendments will surely result in unnecessary delay and undue expense."

Bob Schuster, Esq. (EV-2021-0005-0476) opposes the proposed amendment. He argues that the real risk is not that juries are being "hornswoggled" by experts. Instead, the real risk is that "we get farther and farther away from justice, that the cottage industry that has formed around *Daubert* and other expert witness challenges only gets larger, that the motions get thicker, and the trial delays get extended."

Patrick A. Salvi, II, Esq. and Salvi Schostok & Pritchard (EV-2021-0005-0477) oppose the amendment, concluding with language offered in other posted comments: "The proposed amendments and the comments would circumvent the law, the judiciary and the very purpose of the rules and should be rejected entirely."

Gary McCallister, Esq. (EV-2021-0005-0478) states that the preponderance of the evidence standard improperly alters the balance between the court and the jury, but that a preponderance of the information standard would be acceptable.

Frederick Berry, Esq. (EV-2021-0005-0479) states that the preponderance of the evidence standard "will force the trial court to take on the untraditional role of a fact finder where the matter will eventually be resolved by a jury."

Charles E. Soechting, Jr., Esq. (EV-2021-0005-0480) argues that the proposed amendment would "disrupt the safeguards as built into the checks and balances between the judiciary and the jury which threatens the rights of the parties, significantly." He also claims that the amendment would lead to a clog in the courts.

Husch Blackwell, LLP (EV-2021-0005-0481) supports the proposed amendment to Rule 702. It states that "[t]he distinction between weight and admissibility has become so prevalent that it has effectively lost all meaning, giving courts carte blanche to disregard issues which strike at the very heart of an expert's reliability." It concludes that "[a]mending Rule 702 to

place the focus back on the courts' gatekeeping function will not only force litigants to contend with the flaws in their experts' testimony, but it will likewise require courts to clarify and articulate the actual standards of admissibility."

George L. Garrow, Jr., Esq. (EV-2021-0005-0482) opposes the amendment, arguing that the preponderance of the evidence standard will "remove the jury from the job of being fact-finder" --- but the "preponderance of information" standard will not.

Frances Lynch, Esq. (EV-2021-0005-0483) opposes the proposed amendment, arguing that "it will take decisions out of the hands of jurors. This is incorrect and unconstitutional." He states that the term "preponderance of the evidence" is "connected with fact finding and the weighing of evidence – a job for the jury."

Patrick J. Wigle, Esq. (EV-2021-0005-0484) opposes the amendment because it "makes it more difficult for a plaintiff's experts to be heard by the jury." He also claims that amending Rule 702 to require "evidence" means that only admissible evidence can be presented in support of an expert, even if it is permissible for the expert to rely on inadmissible information in forming his or her opinions.

Andrew Mahoney, Esq. (EV-2021-0005-0485) opposes the proposed amendment, stating that it "will cause confusion and lead to the exclusion of qualified experts in addition to creating far more work and making it more difficult and costly for injured parties to have their shot at justice in trial."

Ilya E. Lerna, Esq. (EV-2021-0005-0486) claims that the proposed amendment "directly conflicts with Rule 104 in the case of expert testimony and binds the court to the rules of evidence in preliminary matters of admissibility." He also concludes that "this amendment invades the jury's role in evaluating and making the final determination of correctness of expert testimony."

Mark Breyer, Esq. (EV-2021-0005-0487) opposes the proposed amendment because it turns the judge into a factfinder. He states that " if we are going to set up a rule that is fair to all sides it is far better to set one up where error is likely to be reviewed (allowing an expert) than a standard that is likely to potentially prevent a meritorious case from being heard."

Sean McGarry, Esq. (EV-2021-0005-0488) opposes the proposed amendment, arguing that it "contradicts the purpose of Rule 102 because it would create additional delays caused by extensive briefing and evidentiary hearings, increase costs for parties, and invite appeals on trial court decisions." He also argues that the proposed amendment infringes upon the 7th Amendment because it turns judges into factfinders.

Jarrod Burch, Esq. (EV-2021-0005-0489) states: "Rule 702 is effective at keeping junk science from being presented to the jurors. The change would also create the need for more hearings/ vetting of experts by the courts that will clog dockets and increase case expenses, as well as unfairly toss more plaintiff claims."

Lynn Shumway, Esq. (EV-2021-0005-0490) fears that "many trial court judges will interpret the proposed rule to require them to decide between the plaintiff and defendant expert evidence as being admissible and actually take the case away from the jury by deciding which expert has shown the preponderance of the evidence.'"

Brian LaCien, Esq. (EV-2021-0005-0491) opposes the proposed changes to Rule 702 on the ground that they will cause trial delays and they "only seek to tip the scale in favor of excluding expert testimony."

Sheila L. Birnbaum, Esq. and Mark Cheffo, Esq. (EV-2021-0005-0492) support the proposed amendment to Rule 702. They state that the inclusion of the preponderance of the evidence standard is a "clarification" that will provide "much-needed guidance to both parties and courts and help ensure consistency and predictability in how Rule 702 is applied." They argue that "this predictability is particularly important in MDLs, where inconsistent application of the same rule sows confusion and undermines the uniformity that MDLs exist to create." They support the suggestion that "the court determines" should be added to the text to emphasize that it is the court's obligation to rule on expert testimony upon an objection. They disagree with the concerns that "the changes will confuse the courts or mislead them into assessing expert testimony more aggressively than under the current rule." They contend that "judicial overreach has not been a problem in assessing the reliability of expert testimony and, in fact, more consistent judicial involvement will be welcome to the extent it aims to ensure uniformity and, more importantly, the presentation of sound science to the jury."

John Michaels, Esq. (EV-2021-0005-0493) opposes the amendment, seeing no need for a change to the current practices regarding the admissibility of expert testimony.

Zacharay Mushkatel, Esq. (EV-2021-0005-0494) opposes the amendment, stating that "inviting judicial officers to apply a legal standard to fields of science, medicine or any specialty necessarily invites them to evaluate evidence -- a forum strictly intended for jury consideration and NOT judicial officers."

William A. Rossbach, Esq. (EV-2021-0005-0495) thinks that the term "preponderance of the evidence" must mean "preponderance of the admissible evidence" --- leading to an internal contradiction with Rule 104(a) which provides that the court is not bound by rules of evidence. He suggests that this conundrum is solved by changing the word "evidence" to "information."

Mary Raybon, Esq. (EV-2021-0005-0496) opposes the proposed amendment, declaring that it "would have a chilling effect on courts, who would in essence be able to go beyond their rule as gatekeepers and instead become like that of a juror."

Kristine Keala Meredith, Esq. (EV-2021-0005-0497) states that the proposed amendment would lead to "side litigation" and that it would improperly transfer factfinding from the jury to the court.

Aaron Eiesland, Esq. (EV-2021-0005-0498) states that that "the proposed changes to FRE 702 would only erode the protections provided for in the United States Constitution and outsource these civil liberties to unanswerable parties."

James E. Coogan, Esq. (EV-2021-0005-0499) is "not in favor of the addition of the preponderance standard because FRE 702 already sets forth specific requirements for the expert's opinion to be admissible." He states that "it's not abundantly clear why adding the standard to this rule (duplicative of 104(a)) is going to rectify those erroneous rulings" that give rise to the amendment. He approves of the paragraph in the Committee Note rejecting the requirement that the expert's opinion must do more than merely "help" the jury, because, in his experience, the idea that the opinion must do more than "help" has been "an improper bar to expert testimony."

Josh Autry, Esq. (EV-2021-0005-0500) opposes the proposed amendment and the Committee Note. He concludes that "the proposed amendment does not substantively change the rule, but nevertheless gives defense counsel an added tool in their arsenal to seek unwarranted exclusion of plaintiffs' experts and to cast doubt on decades of binding caselaw by the Courts of Appeals and by the Supreme Court itself."

Amy Hernandez, Esq. (EV-2021-0005-0501) opposes the proposed amendment to Rule 702 and joins the comments of Michael Warshauer (Comment 0424).

Tyler J. Atkins, Esq. (EV-2021-0005-0502) is "very concerned that the proposed changes to the rule would unduly invade every party's right to a trial on the merits by effectively transforming the judge into a pretrial factfinder."

Grace Babcock, Esq. (EV-2021-0005-0503) opposes the amendment, stating that juries, and not judges, "are in the best position to determine the weight afforded to an expert's work." She claims that "[t]he law requires a party challenging an expert to prove the unreliability of the expert and her work, but the proposed amendment shifts that burden to the party offering the opinion instead."

Colin M. Simpson, Esq. (EV-2021-0005-0504) opposes the proposed amendment, on the grounds that it will shift factfinding authority from the jury to the court, it will impose an additional hurdle for plaintiffs, and it will create problems in state courts. He also objects to the Committee Note's reference to the possibility that the jury may not be able to assess whether the expert's opinion accurately reflects the basis and methodology.

Anonymous (EV-2021-0005-0505) supports the proposed amendment to Rule 702, stating that by including the standard of proof in the text, "the rule helps to create standardization across all courts."

Rachel A. Fuerst, Esq. (EV-2021-0005-0506) objects that the proposed amendment will increase litigation expenses and clog dockets, to the detriment of the indigent.

Mark Schultz, Esq. (EV-2021-0005-0507) states: "The jury is instructed as to the burden of proof as to each element of a cause of action or crime. Placing a separate burden on expert testimony and taking it away from the jury is contrary to American jurisprudence."

A.J. de Bartolemeo, Esq. and Brian R. Morrison, Esq. (EV-2021-0005-0508) object to the preponderance of the evidence standard as it could "force the court to take over the jury's role in deciding whether an expert is 'correct' in his or her opinion." They argue that the change to Rule 702(d) will allow defendants to argue that an expert's opinion should be excluded because it is "unpopular, even if it is not extravagant."

Brian Franciskato, Esq. (EV-2021-0005-0509) opposes the proposed amendment to Rule 702. He states that "[t]he U.S. Constitution and the current Federal Rules, require the jury to consider the evidence and make their decision based on the preponderance of the evidence. Having an additional procedure for a judge to consider the evidence, under the same standard, is unconstitutional, in violation of the 7th Amendment right to a jury trial." He also predicts that the amendment would lead to greater costs on plaintiffs.

American Property Casualty Association (EV-2021-0005-0510) analyzes some cases decided during the public comment period and concludes that "Courts are not consistently applying FRE 702 to require that expert evidence meet each of the Rule's admissibility requirements by the preponderance of the evidence standard." It supports the clarification of adding a preponderance of the evidence standard to the text of Rule 702. It suggests that the rule be further clarified by stating that the court must determine admissibility.

Jennifer L. Joost, Esq. (EV-2021-0005-0511) objects to the term "preponderance of the evidence" and states that "if Rule 702 is amended as currently proposed, the burden of any confusion caused by the use of the word 'evidence' instead of the more accurate word, 'information,' will be borne by plaintiffs."

Robin Greenwald, Esq., Ellen Relkin, Esq., and James Bilsborrow, Esq. (EV-2021-0005-0512) believe that "the proposed amendments make it more likely that courts will be compelled to pick a winner rather than serving as a gatekeeper for reliable expert testimony." They opine that a preponderance standard implies a comparative inquiry, i.e., that the plaintiff's experts must be better than the defendant's experts. They also contend that the amendment to Rule 704(d) would "require the parties to litigate what is the correct opinion, potentially stripping this ultimate issue from the jury."

Leah Snyder, Esq. (EV-2021-0005-0513) states that the proposed amendment will lead to burdens on expert testimony that "only a professional witness could overcome." She claims that the proposed amendment would lead to greater expense, and dismissal of meritorious claims by plaintiffs.

Rudolph Migliore, Esq. (EV-2021-0005-0514) states that "[a]dding another standard will only further complicate the judge's already complex task under the law and lead to more litigation and appeals related to how the standard is to be applied in this context."

Frederick S. Longer, Esq. (EV-2021-0005-0515) opposes the proposed amendment to Rule 702, opining that "the introduction of the preponderance standard is hardly a clarification, but a direct effort to change the existing preponderance of information standard."

J. Randolph Pickett, Esq. (EV-2021-0005-0516) states that "[t]he idea that the judge should act as a fact finder, and weigh evidence prior to the jury's consideration, is yet another example of further erosion of the right to jury trial."

Michael Hanby, Esq. (EV-2021-0005-0517) is "concerned that the 'preponderance of evidence standard' improperly takes away the jury's role in deciding claims. The party seeking to introduce expert testimony will essentially have the burden of presenting their evidence twice—once in front of the judge and once in front of the jury. This will needlessly result in extra work and time for the court."

Yvonne M. Flaherty, Esq. (EV-2021-0005-0518) declares that "[i]mposing a preponderance of the evidence standard effectively requires the parties to first try their case to the Court and, if the Court sides with the Plaintiff's expert, then the parties proceed to a second trial to a jury."

Michael J. Donahue, Esq. (EV-2021-0005-0519) declares that the proposed amendment "conflates the jury's fact-finding duties with the court's role as gatekeeper relative to expert testimony. If this proposed amendment is adopted, some courts will conclude that a new, additional hurdle to admissibility must be imposed."

Lauren G. Barnes, Esq. (EV-2021-0005-0520) opposes the proposed amendment, stating that "not only does it risk usurping the function of the jury, but the rule change also invites delay in litigating cases."

Theresa M. Blanco, Esq. (EV-2021-0005-0521) opposes the amendment. She states that the preponderance of the evidence standard "will have the practical effect of making judges factfinders, thereby usurping the role of the jury" and it will increase costs for plaintiffs.

Carlos F. Llinas Negret, Esq. (EV-2021-0005-0522) opposes the amendment, arguing that *Daubert* and Rule 702 are working well and there is no need to upset longstanding precedent.

Ellis & Thomas, PLLC (EV-2021-0005-0523) states, in language identical to many other comments: "This will prevent good claims from being heard by juries. The impact on plaintiffs will be unfair. The rule should not encourage courts to find facts. This is an unfair shift of the burden. This will require expensive and time consuming hearings that will clog dockets and increase costs. State law will be affected too."

Melanie L. Ben, Esq. (EV-2021-0005-0524) opposes the amendment. She states that it "will be extremely inefficient and will cause the work load to unnecessarily and inefficiently shift the tasks from the jury to a judge."

U.A. Lewis, Esq. (EV-2021-0005-0525) contends that the proposed amendment "will prevent juries from deciding claims, even the really good claims," and deprive jurors of "additional means to allow the people to have a say in what justice means in the US." He warns that "[i]f a person cannot look forward to their day in court before an impartial jury as the finder of fact, then it may result in not waiting for the court at all, and taking matters into their own hands."

Stuart Ollanik, Esq. (EV-2021-0005-0526) opposes the proposed amendment, arguing that it "provides a statement of burden of proof not supported by the case law, and inconsistent with the proper role of the trial court as gatekeeper of expert evidence, which is to determine whether a proper foundation has been laid, not to weigh testimony of competing experts and determine which side wins." He contends that the rule will lead to increased expenses of litigation.

Trent Shuping, Esq. (EV-2021-0005-0527) opposes the amendment on the ground it will "perhaps require the judge to usurp the constitutional role of the jury." He concludes that under the amendment "it will no longer be necessary to simply demonstrate the admissibility of evidence under the rules, but it will be necessary to first fully persuade judges as to the truth of the underlying facts and the expert's conclusions."

Timothy A. Loranger, Esq. (EV-2021-0005-0528) states that the proposed amendment "only encourages further departure from the bedrock principle, enshrined in the 7th Amendment, that facts and controversies be decided by a jury."

Andre Archuleta, Esq. (EV-2021-0005-0529) states that the amendment "will make the process extremely inefficient" and that "the amendment takes one of the main jobs of the jury, weighing an expert's opinion away."

Stephen J. Herman, Esq. (EV-2021-0005-0530) states that under the proposed amendment "Judges seem encouraged to err, in difficult cases, on the side of excluding testimony, and keeping it hidden from the jury's consideration."

Chase Ruffin, Esq. (EV-2021-0005-0531) believes that the proposed amendment "will invite trial court judges to usurp the role of juries by weighing the ultimate credibility of expert opinions under the guise of 'reliability' determinations." He believes that this will result in inconsistent and unpredictable rulings on expert admissibility.

Public Justice (EV-2021-0005-0532) contends that a reference to preponderance of the "evidence" will be interpreted to mean "admissible evidence" and so objects to that term. Public Justice also counsels against adding criticisms of individual cases to the Committee Note. It also contends that "the court determines" should be kept out of the text, arguing that including the language "will engender a cottage industry of disputes as to the nature of the findings that the Rule is requiring. Judges know when findings are necessary. They should not be required to tie up their time and litigants' time with the inevitable 'findings hearings' when they are unnecessary."

Sara Silzer, Esq. (EV-2021-0005-0533) opines that the proposed changes to Rule 702 "are not necessary or helpful, particularly given that they may create inconsistency in how state evidence rules are applied. They seem to encourage judges to become fact finders when determining the admission of expert testimony while having the appropriately more limited traditional role of being 'just the judge, not the jury' as to all other evidentiary rulings."

Here are some representative opposing comments to the 2000 amendment to Rule 702

Henry G. Miller, Esq. (98-EV-034) opposes the proposed change to Rule 702 on the ground that it is "autocratic and less than egalitarian to so distrust the jury's determination of which expert to believe."

James A. Grutz, Esq. (98-EV-036) is opposed to the proposed amendment to Evidence Rule 702 on the ground that it places "far too much discretion in the trial court's hands" leaving the potential for "eroding away a litigant's right to trial by jury."

Thomas A. Conlin, Esq. (98-EV-037) opposes the proposed amendment to Evidence Rule 702, stating that the proposed amendatory language is "superfluous." He declares that courts can use existing rules to "weed out testimony which is — essentially — without *foundation*." Mr. Conlin encourages the Advisory Committee to "let cross-examination work its wonders, and let jurors, not judges, decide cases."

John Borman, Esq. (98-EV-039) opposes the proposed amendment to Evidence Rule 702 as an unwarranted expansion of the trial court's gatekeeping role. He concludes: "The proposed rule will permit trial judges to choose between opposing witnesses, exclude expert testimony where the judge disagrees, and infringe on the litigant's constitutional right to a jury trial."

Donald A. Shapiro, Esq. (98-EV-040) is opposed to the proposed amendment to Evidence Rule 702. He states that the proposal provides "too much discretion to the trial judges to exclude expert testimony" and might allow trial judges "to pick and choose which experts they dislike and to bar their testimony as opposed to letting juries decide the credibility and reliability of experts."

M. Robert Blanchard, Esq. (98-EV-043) states that "the proposed change to Rule 702 will permit trial judges to simply choose which side of the case they want to win, as happens too often already, and will infringe on the litigants' constitutional right to a jury trial."

Richard L. Duncan, Esq. (98-EV-044) is opposed to the proposed change to Evidence Rule 702. He argues that the proposed amendment would "infringe a litigant's constitutional right to a jury trial and create unequal justice" because it would "invite the wealthier litigant to raise the standards of proof to an impossibly high level which a poor litigant will be unable to afford and will encourage the tendency of hourly paid attorneys to substitute Motions in Limine for a trial on the evidence."

The National Board of the American Board of Trial Advocates (98-EV-049) "opposes the proposed amendment to Evidence Rule 702 because it invades the province of the jury, adversely impacts and even preempts the fact-finding and decision-making powers of the jury, places an onerous burden on the judiciary, litigants and counsel and does not promote the efficient administration of justice."

The Lawyers' Club of San Francisco (98-EV-050) opposes the proposed amendment to Evidence Rule 702. It contends that "the proposed amendment is a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony." The Club concludes that under the amendment, the trial court could "choose between two opposing

witnesses, and exclude the testimony of the witnesses with which they disagree, thereby taking away the right to a jury trial on the opinion governing the outcome of the case."

Michael S. Allred, Esq. (98-EV-059) opposes the proposed amendment on the ground that it will "place the federal bench in a position that it can entertain or exclude evidence at a whim based upon a subjective appraisal of the testimony."

Russell W. Budd, Esq. (98-EV-061) opposes the proposed revision to Evidence Rule 702. He believes that the proposal "will license the trial judge to usurp the role of the jury".

Trial Lawyers for Public Justice (98-EV-072) oppose the proposed amendment to Evidence Rule 702. They argue that the rule "will pose undue restrictions on the admissibility of expert testimony"; that it would "unwisely expand trial judges' gatekeeping role, by permitting them to substitute their judgments on reliability of expert testimony for that of the experts' peers".

Professor Adina Schwartz (98-EV-085) states that "[b]y allowing admissibility to be based not on stature among scientists but on judges' own scientific views or extra-scientific biases, proposed Rule 702 licenses unjustified encroachment on the jury's role."

John R. Lanza, Esq. (98-EV-087) states that the proposed amendment "now places the trial court not as 'a gatekeeper' but as a 'super juror'. This results in costly evidentiary hearings and in preclusion of case determinant expert testimony, based upon the trial judge's interpretation of facts."

Alvin A. Wolff, Jr., Esq. (98-EV-095) opposes the proposed amendment to Evidence Rule 702 on the ground that it "would trample the rights of Plaintiffs who would be denied their day in Court."

The Montana Trial Lawyers Association (98-EV-098) opposes the proposed amendment to Evidence Rule 702, stating that the reliability requirements set forth in the proposal "go way beyond judicial gatekeeping and usurp the fact finder and jury roles."

The Trial Lawyers Association of Metropolitan Washington, DC (98-EV-100) strongly opposes the proposed change to Evidence Rule 702. The Association believes that the proposal "raises the bar of admissibility on expert opinions to a height that totally usurps the jury's traditional role as the fact-finder. By requiring that federal judges make 'reliability' findings about the facts and methods used by experts, the proposed rule would have judges become the real triers of fact concerning experts." The Association asserts that the proposal is based on a factual assumption that jurors are incompetent--a reflection of "an elitist bias."

Peter S. Everett, Esq. (98-EV-102) objects to the proposed amendment on the ground that it is "designed to apply the *Daubert* decision more broadly." Mr. Everett declares that *Daubert* is premised upon "an unhealthy disrespect for the abilities of jurors to sort out meritorious claims from those that lack merit."

Michigan Protection and Advocacy Service (98-EV-109) opposes the proposed amendment to Evidence Rule 702, on the ground that it will "invade the province of the jury, denying parties a fair opportunity to present a complete case or defense."

James B. Ragan, Esq. (98-EV-113) objects to the part of the proposed amendment to Evidence Rule 702 that requires the trial judge to determine that the expert reliably applied the principles and methods to the facts of the case. This question, in his view, "is more appropriately decided by the jury."

The Sturdevant Law Firm (98-EV-119) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a dramatic enlargement of the power of the trial judge in controlling what is and what is not admissible expert testimony" and that it "seriously alters the right of the litigants to a trial by jury."

James B. McIver, Esq. (98-EV-121) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a change not needed and would have adverse effects on obtaining truth and justice in America."

Stephen M. Vaughan, Esq. (98-EV-122) opposes the proposed amendment to Evidence Rule 702, arguing that it is "a change not needed and would have adverse effects on obtaining truth and justice in America."

The Arizona Trial Lawyers Association (98-EV-124) opposes the proposed amendment to Evidence Rule 702 and believes that "the efforts to expand Daubert beyond the limits of scientific causation testimony is ill advised and contrary to the constitutional rights of citizens to a trial by jury." The Association declares that under the proposed amendment, "experts testifying based on their experience or knowledge are prohibited." It states that "perhaps" the Advisory Committee "thinks that it was appropriate that Galileo was blinded for his radical ideas".

Eliot P. Tucker, Esq. (98-EV-128) opposes the proposed amendment to Evidence Rule 702, contending that it is "another erosion on the right to trial by jury that the federal courts seem hell-bent on fostering."

The Law Firm of Shernoff, Bidart, Darras & Arkin (98-EV-129) opposes the proposed amendment to Evidence Rule 702, arguing that the proposal "will expand the already-existing danger to consumer actions arising from Daubert itself and inappropriately limits the jury's power to make the very determination it was designed and intended by the framers of the Constitution to make."

Michael A. Pohl, Esq. (98-EV-133) opposes the proposed amendment to Evidence Rule 702. He asserts that applying Daubert to the testimony of experts in cases such as those involving family physicians, securities issues or employment-related matters "would tend to stack the deck against the proponent of the evidence when issues of the credibility of the witnesses in those type cases should normally be left to the trier of fact."

Barry J. Nace (98-EV-135) opposes the proposed amendment to Evidence Rule 702, concluding that "if we are going to have any opportunity for a jury to decide the credibility and the weight to be given to opinion testimony, then reliability should not be something decided by the trial

court." He also asserts that the proposal's reliability requirements are in conflict with Rule 703, which "requires only that the experts use facts or data reasonably relied upon by experts."

Tyrone P. Bujold, Esq. (98-EV-138) opposes the proposed amendment to Evidence Rule 702. He contends that the proposal rests on the unjustified premise that jurors "are frequently confused by charlatan experts." He concludes that "[w]e need not fear the jury system. And we need not create pinched rules which give trial judges far more than they need, want, or is required."

Karl Protil, Esq. (98-EV-145) strongly opposes the proposed amendment to Evidence Rule 702, and states that *"Daubert* was never intended to apply to standard of care opinions — these are not subject to the scientific method." He concludes that the proposal usurps the role of the jury.

Norman E. Harned, Esq. (98-EV-155) opposes the proposed change to Evidence Rule 702, on the ground that its effect "is to substitute trial of the facts by judges rather than by juries."

Darrell W. Aherin, Esq. (98-EV-157) states that "some federal judges at the trial level are usurping the role of the jury. The current climate appears to be so probusiness I would hope that any proposed rules won't lead to further unfairness and deny access to the courts for individual litigants."

Anthony Tarricone, Esq. (98-EV-166) states that the proposed amendment to Evidence Rule 702 would "substitute the judge as finder of fact instead of the jury by removing from the jury consideration of the weight and credibility of evidence." He does not believe that the is "sufficient justification" for the proposed change.

Annette Gonthier Kiely, Esq. (98-EV-167) states that the proposed amendment to Evidence Rule 702 "threatens the traditional role of the jury as the finder of fact by empowering the judge to exclude evidence, whose weight and credibility has traditionally been and should continue to be assessed by the jury in determining the facts in issue."

Douglas K. Sheff, Esq. (98-EV-170) asserts that the proposed amendment to Evidence Rule 702 "would be an affront to the jury system and much of what the founding fathers intended when they created the finest means ever devised to determine disputes."

The National Employment Lawyers Association (98-EV-179) opposes the proposed amendment to Evidence Rule 702, stating that the "vague terms in the proposed amendment invite judges to go beyond their gatekeeping function to usurp the role of the jury in determining of the credibility and probative value of an expert's opinion."

179 comments; 110 opposed.

TAB 4C

Public Hearing on Proposed Amendments to the Federal Rules of Evidence 106, 615, and 702
Judicial Conference Advisory Committee on Evidence Rules

* Via Videoconference January 21, 2022 – 9:30 A.M.(ET)

Summary of Witness Testimony

14 Favor Amendment

6 Oppose Any amendment

3 Offer Comments/Corrections Without Supporting or Opposing Amendment

1. **Rebecca E. Bazan, Duane Morris LLP (Support for Rule 702 Amendment)**

   Ms. Bazan testified in support of the proposed amendment to Rule 702. She noted problematic trends in which Rule 702 is misapplied in life sciences and toxic tort cases where expert testimony is crucial. Ms. Bazan explained that speculative and unreliable testimony is deemed admissible and is passed on to the jury, with any reliability problems going to the weight of the testimony. Ms. Bazan contended that litigants are willing to file weaker cases knowing that they may be able to get past summary judgment and extract a settlement. Ms. Bazan opined that the proposed changes to Rule 702 would reaffirm the trial judge's gatekeeping function through specific reference to the preponderance standard. She thought that the amendment would cut down on the filing of specious cases, would keep unreliable expert testimony from the jury, would streamline the issues that make it to trial, and would produce more accurate settlement assessments.

2. **Douglas K. Burrell, DRI Center for Law & Public Policy (Support for Rule 702 Amendment)**

   Mr. Burrell testified on behalf of the DRI Center for Law & Public Policy, a think-tank that undertakes in-depth studies on issues including rules changes. He stated that the Center strongly supports the proposed amendment to Rule 702 and appreciates the Advisory Committee's lengthy work on the subject. In particular, Mr. Burrell expressed support for the proposed amendment to Rule 702(d) requiring an expert's opinion to reflect a reliable application of principles and methods. He explained that the amendment is necessary because many federal decisions rely upon stale precedent that preceded the 2000 amendment to Rule 702 in turning the reliability of the expert's ultimate opinion over to the jury. Mr. Burrell also explained that several pre-2000 federal opinions erroneously state that there is a "presumption in favor of admitting expert opinion testimony" that undermines the trial judge's gatekeeping role and the preponderance standard. He suggested that the Committee add sentences to the proposed Advisory Committee note as follows: "Rule 702 neither favors nor disfavors the admissibility of expert testimony. Prior

statements of a heightened standard or of a presumption in favor of admissibility are erroneous."

3. Larry E. Coben, Anapol Weiss (Opposes Rule 702 Amendment)

Mr. Coben offered testimony in his capacity as a trial lawyer and on behalf of a nonprofit organization of civil lawyers that represents consumers in products liability cases. He argued that Rule 702 provides appropriate boundaries for the admission of expert testimony as currently drafted and that the existing Rule allows juries to decide disputed cases. Mr. Coben suggested that criticism of federal courts applying the existing standard is misplaced, noting that a trial judge who fails to mention the preponderance standard expressly may nonetheless apply it correctly. He expressed concern that adding a preponderance standard to the text of Rule 702 would lead trial judges to confuse the admissibility question with a proponent's burden of proof on the merits. Further, he suggested that the standard, if added, should not read a "preponderance of the *evidence*" because trial judges need not rely on admissible evidence in determining admissibility (he suggested this was in conflict with Rule 703). Rather it should reference a "preponderance of the information." Finally, Mr. Coben suggested that the amendment must do more than "clarify" existing standards to draw the public response that has occurred, and that it will be interpreted as a substantive change to the Rule 702 standard. He predicted that the amendment would produce an avalanche of new legal arguments that would expand litigation and would convert trial judges into the thirteenth juror.

4. Alex R. Dahl, Lawyers for Civil Justice (Support for Rule 702 Amendment)

Mr. Dahl testified on behalf of LCJ in support of the proposed amendment to Rule 702. According to Mr. Dahl, extensive LCJ research shows widespread misunderstanding of Rule 702. He offered two recommendations to improve the proposed amendment and to ensure that judges and litigants appreciate the clarifications being made. First, the Committee should reinsert the "if the court finds" language into the text of the proposed amendment to clearly signal that it is the judge and not the jury who evaluates all the requirements of Rule 702. He suggested that adding the preponderance standard to the text is helpful but still relies on the reader to infer that the judge applies it. Second, the amendment should expressly reject the caselaw that is inconsistent with the amendment by adding references to problematic cases (*Loudermill*, et. al) to the Committee Note. He opined that such a specific rejection of stale precedent would not serve as a "rebuke" to Federal judges, but rather would help judges get it right by avoiding precedent inconsistent with the Rule 702 standard.

5. Gardner M. Duvall, Whiteford Taylor Preston LLP (Support for Rule 702 Amendment)

Mr. Duvall testified in support of the proposed amendment to Rule 702. He explained that there is conflicting federal precedent on the application of Rule 702, much of which fails to follow the proper process for admitting expert testimony. Many federal opinions cite back to pre-2000 precedent and admit expert testimony in areas that have been admitted previously, more in keeping with the *Frye* standard than the *Daubert* approach. He suggested that the Advisory Committee has identified a pervasive problem with federal courts passing on reliability inquiries to juries.

6. Ronni E. Fuchs, Troutman Pepper (Support for Rule 702 Amendment)

Ms. Fuchs represents clients in mass tort and products liability cases largely focused on the proper application of Rule 702. She testified to the profound effect of unpredictability in the operation of Rule 702 on rational client decision-making. Ms. Fuchs' clients require information about admissibility standards and likely outcomes to make rational decisions about investing significant resources in the process to qualify and challenge expert witnesses. She opined that a common understanding of the burden of proof with respect to admitting expert testimony is critical. Because federal judges do not apply the Rule 702 standard consistently, common understanding and predictability are lacking. Some federal courts find that Rule 702 liberally favors admission and provides a presumption against excluding an expert. Others hold that reliability issues go to the weight of the evidence and should be passed on to juries. Ms. Fuchs' stated that predictability is critical for *all* parties involved in litigation and that the amendment would offer important clarification to correct pervasive misunderstandings that would allow clients to make rational decisions about litigation investment.

7. James Gotz, Hausfeld LLP

Mr. Gotz represents plaintiffs in pharmaceutical, mass tort, and environmental cases. He offered suggestions about the Advisory Committee note accompanying the proposed amendment to Rule 702. Specifically, while he praised the draft note language clarifying that certain issues will go only to the weight of an admissible expert opinion, he expressed concern that examples of matters affecting weight in the draft note could be perceived as *always* affecting only weight and as the *only* matters affecting weight. He urged the Committee to add language to the note clarifying that determining weight versus admissibility is a holistic, context-driven analysis requiring case-by-case determinations. He suggested the following sentence: "Whether a challenge is a matter that goes to weight or admissibility is necessarily a case-specific decision." Furthermore, he noted that the Committee note to the 2000 amendment to Rule 702 offered very helpful guidance for trial judges exercising their gatekeeping authority and that the note and the post-2000 precedent applying it could be perceived to have been "overruled" by a 2023 amendment to Rule 702. To avoid this perception, Mr. Gotz suggested adding another sentence to the draft

Committee note, as follows: "Because Rule 702 is being clarified is and not changed, the Advisory Committee note to the 2000 amendment should continue to be used."

8. Wayne Hogan, Terrell Hogan Yegelwel P.A. (Opposes Rule 702 Amendment)

Mr. Hogan argued that the amendment would risk the abridgment of the right to trial by jury. He opined that the text of the proposed rule utilizes incorrect language when it directs trial judges to decide on admissibility requirements by "a preponderance of the *evidence*." He argued that requiring use of "evidence" is inconsistent with Rule 104(a), which permits judges to consider even inadmissible information in determining admissibility. He stated that the amendment should not rely on note language to make that distinction clear and argued that the text of the proposed amendment should be altered to require a decision based upon a "preponderance of the *information*." Mr. Hogan noted that many states adopt the language of the Federal Rules of Evidence without accompanying Advisory Committee notes and that it is crucial to ensure that proper meaning is conveyed in rule text and not in Committee notes.

9. Katie R. Jackson, Shook Hardy & Bacon L.L.P. (Support for Rule 702 Amendment)

Ms. Jackson testified concerning her lengthy research project on the application of Rule 702 in her capacity as a fellow for Lawyers for Civil Justice. She reported that she reviewed over 1,000 federal cases and authored a report, which was filed with the Advisory Committee. Her research produced several findings. First, she noted that two-thirds of federal cases do not mention the proponent's burden of proof or the preponderance standard in connection with Rule 702. She acknowledged that a failure to mention the preponderance standard does not necessarily indicate misapplication of the standard. Still, she noted that this would be akin to two-thirds of federal cases regarding discovery obligations failing to mention governing Federal Rule of Civil Procedure 26(b). In addition, Ms. Jackson reported that 13 % of federal cases erroneously indicate that there is a presumption in favor of the admissibility of expert testimony. Finally, she found courts that articulated *both* a preponderance standard in tandem with a presumption favoring admissibility. She argued that this direct conflict in articulated standards reveals the general confusion in the federal courts about application of the preponderance standard in connection with Rule 702. She concluded that her research showed that Rule 702 is not applied consistently and that the proposed amendment would help clarify the appropriate standard of proof.

10. Andrew E. Kantra, Troutman Pepper (Support for Rule 702 Amendment)

Mr. Kantra testified that his practice focuses on counseling clients on expert witness issues in mass tort cases and in multidistrict litigation in the pharmaceutical context. He explained that he has witnessed the wholesale admission of unreliable expert testimony due to a misperception among smart and distinguished jurists that there is a presumption in favor

of admissibility. He argued that the proposed amendment is essential and would direct trial judges to perform the careful evaluation of expert testimony that is necessary and not to "presume" admissibility.

11. Toyja E. Kelley, DRI Center for Law & Public Policy (Support for Rule 702 Amendment)

The President of the DRI Center for Law & Public Policy testified in favor of the proposed amendment. He noted that the Supreme Court in *Bourjaily* held that the preponderance of the evidence standard applies to Rule 104(a) determinations, but that courts have overlooked it and have sometimes been reversed for applying it in the Rule 702 context. He opined that the amendment should expressly state the preponderance standard to correct courts that find a presumption in favor of admissibility, but urged the Committee to re-insert language clarifying that the decision is for "the court" and not for the jury. Mr. Kelley noted that he represents clients on both the plaintiffs' and defense side and that the proposed changes to Rule 702 are critical whether he is representing a plaintiff or a defendant.

12. Eric G. Lasker, Hollingsworth LLP (Support for Rule 702 Amendment)

Mr. Lasker testified that he is a co-author of a law review article that called on the Advisory Committee to amend Rule 702 and that he favors the proposed amendment. He opined that the amendment would go a long way to improving the administration of justice. He expressed support for the LCJ proposal to add "if the court determines" language to the text of the amendment, explaining that the history under the 2000 amendment to Rule 702 illustrates the ability of the federal courts to overlook implicit understandings. He also supported note language urging courts to reject pre-2000 precedent. And he noted that an amendment would be only the first step in preventing the admission of shoddy experts that undermine the public faith in science. He suggested that steps should be taken to better educate the federal judiciary on the operation of a 2023 amendment.

13. Mary Massaron, Plunkett Clooney Attorneys & Counselors at Law (Support for Rule 702 Amendment)

As an appellate practitioner, Ms. Massaron testified that aberrant outcomes at the trial level are often due to the admission of unreliable expert opinion testimony. She opined that improvident admission of expert testimony comes from federal courts applying inconsistent and incorrect understandings of Rule 702. She suggested that district courts focus upon a proffered expert's credentials, but leave rigorous examination of their methods, principles, and application to the jury. She further suggested that jurors fall back on external cues such as impressive credentials when they lack the ability to understand the scientific principles and methodology. She opined that jurors are unlikely to detect a

highly-credentialed expert who is misapplying methods and principles in the context of the specific case. She stated that it is nearly impossible to correct Rule 702 errors on appeal due to the abuse of discretion and harmless error standards that apply, and that rigorous consideration at the trial level is essential to just outcomes. She concluded that adopting the proposed amendment is essential and that it is vital for the Committee to identify cases misapplying the Rule 702 standard in the Committee note to help well-meaning jurists trying to get it right.

14. John M. Masslon II, Washington Legal Foundation (Support for Rule 702 Amendment)

Mr. Masslon testified in support of the proposed amendment to Rule 702 but offered suggestions to improve the amendment. First, he opined that the Committee should specifically cite rejected federal opinions in the Committee note. He suggested that the Committee had done this in past amendments and that it was important to prevent courts from relying upon outdated precedent. He argued that doing so would give the cases a "red flag" on Lexis and Westlaw and might support Rule 11 sanctions for lawyers relying upon them. In addition, Mr. Masslon suggested a sentence in the Committee note clarifying that there is no presumption in favor of the admissibility of expert testimony. Finally, Mr. Masslon urged the Committee to clarify the court's obligation to perform gatekeeping by adding "if the *court* finds that the proponent has demonstrated by a preponderance of the evidence that" to the text of the proposed rule.

15. Lee Mickus, Evans Fears & Schuttert LLP (Support for Rule 702 Amendment)

Mr. Mickus testified that he encounters Rule 702 disputes frequently in his practice as a civil defense litigator in products liability cases. He supports the proposed amendment but urges the Committee to re-insert the word "court" into the text to clarify the trial judge's gatekeeping role. He opined that an amendment is necessary because federal courts are caught between Rule 702 and pre-existing contrary caselaw that encourages them to pass reliability issues to the jury. Because judges will look to the text of an amended rule first, Mr. Mickus suggested that the text needs to offer an unmistakable signal that the *judge* and not the jury must evaluate all of the requirements of Rule 702. Mr. Mickus also expressed doubt that a trial judge would mistakenly assume that she had to make "findings" in the absence of any objection. He noted that objections are required in the adversary system across all Federal Rules of Evidence, so trial judges are unlikely to assume such a major change in practice without express directions to undertake *sua sponte* review.

16. Amir Nassihi, Shook Hardy & Bacon L.L.P. (Support for Rule 702 Amendment)

As co-chair of his firm's class action group, Mr. Nassihi testified in favor of the proposed amendment to Rule 702. He explained that there is conflicting federal precedent on the application of Rule 702 at the class certification stage, and described federal opinions applying a flexible, less rigorous standard at that stage. Mr. Nassihi opined that the proposed amendment clarifying the preponderance of the evidence standard would help reinforce the importance of applying Rule 702 properly in high stakes hearings like class certification.

17. Leslie W. O'Leary, Ciresi Conlin LLP

Ms. O'Leary testified in opposition to rejecting specific Federal cases in the Advisory Committee note to the proposed amendment (as has been urged by others). She represents plaintiffs in products liability cases that are focused on the admissibility of expert testimony under Rule 702. She argued that there was a false narrative that junk science is running rampant in the federal courts. Rather, she suggested that federal courts have remained vigilant and cautious in screening expert testimony. She argued that it was not the Committee's role to reject federal opinions. She opined that the rejection of specific cases would appear biased and would be inappropriate without an examination of the full trial record in those cases.

18. Jared M. Placitella, Cohen Placitella & Roth P.C. (Opposition to Rule 702 Amendment)

Mr. Placitella represents plaintiffs in toxic tort cases and testified in opposition to any amendment to Rule 702. He opined that the preponderance standard has been used for twenty years, eliminating any need to "add" it to the Rule. He expressed concern that an amendment would invade the province of the jury by causing courts to believe that they must decide the "correctness" of scientific evidence. Mr. Placitella suggested greater education in the area of forensic experts rather than an amendment to Rule 702 that would affect all areas of expert opinion testimony.

He further argued that the proposed amendment should not require the trial judge to analyze "evidence." Mr. Placitella noted that Rule 104(a) makes it clear the trial judges are "not bound by the rules of evidence" in resolving questions of admissibility. He opined that trial courts may mistakenly find that they are bound by the rules of evidence in administering Rule 702 if an amendment uses the term "evidence." He suggested that the use of the term "evidence" in Rule 702 would contradict Rule 703. Should the Committee proceed with an amendment, he suggested language, such as: "These matters should be established by a preponderance of the *proof*" or better yet of the "information."

19. Bill Rossbach, Rossbach Law P.C. (Opposition to Proposed Amendment to Rule 702)

Mr. Rossbach testified in opposition to the use of the phrase "preponderance of the evidence" in the proposed amendment to Rule 702. He suggested that the Supreme Court's *Bourjaily* opinion also utilized the phrase "preponderance of the proof" and that the proposed amendment should use the term "information" rather than "evidence." He emphasized that the court's inquiry is not whether the proponent wins or loses on the merits, but whether Rule 702 is satisfied. In addition, Mr. Rossbach urged the Committee not to "scold" prior federal decisions in the Committee note if the principal goal of the amendment is education – he argued that rebuke is not an effective pedagogical method. Mr. Rossbach also called into question the methodology behind the LCJ study suggesting widespread confusion in the application of Rule 702. He argued that federal courts are not necessarily misapplying Rule 702 simply because two-thirds fail to articulate the preponderance standard in their rulings. Finally, he suggested that the amendment risks undermining the constitutional right to a jury trial.

20. Thomas J. Sheehan, Shook Hardy & Bacon L.L.P. (Support for Rule 702 Amendment)

Mr. Sheehan thanked the Committee for all of the work it has done to address the confusion surrounding Rule 702. He noted that numerous articles and reports published in the 22 years since the last amendment to Rule 702 all recognize courts' struggle to apply 702. He suggested that the confusion surrounding Rule 702 was driven by repeated misstatements in old cases about the role of the trial judge in screening expert testimony. Mr. Sheehan opined that rules amendments can work to correct misunderstandings by prompting judges to reexamine the Rule and their role in administering it. He characterized the proposed amendments as "modest," but still felt they would help judges better apply Rule 702. Mr. Sheehan urged the Committee to re-insert "if the court determines" back into the rule to eliminate any ambiguity about the trial court's gatekeeping role. He stated that the precedent supporting the use of the phrase "preponderance of the evidence" (instead of "preponderance of the information"). He argued that it is important to adopt a change accompanied by a note that highlights how courts have misapplied the Rule in the past.

21. Gerson Smoger, Smoger & Associates P.C. (Opposition to Proposed Amendment to Rule 702)

Mr. Smoger spoke in opposition to the proposed amendment to Rule 702. He opined that the proposed amendment should not use the terminology "the court finds" or "preponderance of the evidence" for fear that it will cause more lengthy, expensive

evaluation of expert opinion testimony. Should any amendment be advanced, the text should use the phrase "preponderance of the information."

22. Navan Ward, American Association for Justice

Mr. Ward testified in favor of the AAJ's recommendations for Rule 702. He explained that his clients rely upon experts to support their claims and that their exclusion ends cases (in a way that it does not for defendants). Specifically, he argued that: 1) removal of the "court finds" language from the text of the proposed amendment was appropriate and that language should not be re-inserted, because including it raises to a risk that trial judges think they must find an expert's opinion "correct"; and 2) a proposed amendment should use the phrase "preponderance of the information" and not "preponderance of the evidence." Mr. Ward explained that the Advisory Committee's draft note already provides that "evidence means information" and that this clarification should be made in rule text. He further suggested that the clarification regarding information in the note be moved to a more prominent place in the note.

23. Michael J. Warshauer, Warshauer Law Group (Opposition to Proposed Amendment to Rule 702)

Mr. Warshauer testified in opposition to any amendment to Rule 702, arguing that the research suggesting a problem with Rule 702 is misleading. Mr. Warshauer explained that Rule 702 is often the most expensive and time-consuming aspect of the litigation process and cautioned that the goal of the Federal Rules of Evidence is not to reduce trial dockets or to protect defendants. Rather, he opined that their goal is to ensure that the promise of the 7th amendment is kept and administered fairly. He claimed that defendants want the trial judge to become the finder of fact in place of the jury – and want trial judges to be a "fence" and not a gatekeeper. Mr. Warshauer criticized the phrase "preponderance of the evidence" in the proposed amendment to Rule 702 because he fears it encourages judges to make findings of fact. If there must be an amendment, he argued the text should reference a "preponderance of the available information." According to Mr. Warshauer, using the term "evidence" will cause trial courts to weigh expert testimony and pick a winner.

TAB 5

TAB 5A

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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: April 1, 2022

At its last meeting, the Committee approved in principle 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. The court 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 argument, and are not offered to prove a fact. That is the line that will be followed in this memo, and in the proposed 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 three 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 is a discussion of the benefits of codifying a rule on illustrative aids. Part Three sets forth a draft rule 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, which governs the admissibility of summaries of voluminous evidence. An amendment that would add guidelines on illustrative aids would dovetail with an amendment to Rule 1006 emphasizing 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 an action item at this meeting. The Committee must decide whether to approve the amendment with the recommendation to the Standing Committee that it be released for public comment. If the proposal is approved by the Committee and sent through the rulemaking process successfully, it would become effective on December 1, 2024.

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" with the proviso that courts don't always get the distinctions right:

> 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 illustrative aid is sufficiently helpful and not substantially misleading or otherwise prejudicial, it may be presented at trial, but, as the court held in *Baugh*, in most courts *it may not be given to the jury for use in deliberations.* Some judges believe they have the discretion to allow the jury to use pedagogical aids, powerpoints, etc. in their deliberations, over a party's objection.

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 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]

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.) (barring the use of an 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).

[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

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 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]

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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.").

[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:

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).

As seen below and in Professor Richter's memo on Rule 1006, courts have been confused about the line between Rule 1006 summaries and illustrative aids. Correcting that confusion will probably require amendments to both Rule 1006 and 611.

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 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

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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.

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 --- most often after a jury's request, and pursuant to a limiting instruction.

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). The proposed amendment to Rule 1006 would specifically state that illustrative aids in summary form are regulated by Rule 611 and not by Rule 1006.

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. Finally, a number of courts do not distinguish properly between demonstrative evidence offered to prove a fact, and illustrative aids that are not evidence.

II. Costs and Benefits of a Rule Governing Illustrative Aids

The major benefit of the amendment is that it could 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.* As Professor Richter points out, almost

[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."

all the mistakes that are made under Rule 1006 are grounded in the confusion between summaries admissible as evidence and summaries that are offered as illustrative aids.

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 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. Moreover, the transaction costs are highest when the amendment changes well-understood terms in an existing rule. That is not happening with this proposal.

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. Clearly the best place is Rule 611. That is where the Advisory Committee thought the court's authority to admit illustrative aids would lie.[9] 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.[10]

One specific issue of location is, what happens if the Committee approves both its proposal for a subsection on illustrative aids and a proposal for a subsection on safeguards required for questioning by jurors? (A memo on the latter proposal is included in the agenda book). One proposal would have to be (d) and the other (e). While the placement probably doesn't make a lot of difference, the best result is probably to add the illustrative aids proposal first, as (d). There are at least two reasons for this placement: 1) The illustrative aids provision will be applied much more frequently than the juror questioning provision – indeed the illustrative aids provision will be applied in virtually every case. So to the extent higher placement in a rule indicates a higher priority, the illustrative aids provision should go first; and 2) Courts currently regulate illustrative aids under Rule 611(a), so the closer the provision is to Rule 611(a), the better.[11]

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[9] See Advisory Committee Note to Rule 611(a) (saying that Rule 611(a) is intended to cover "the use of demonstrative evidence").

[10] While authority to regulate illustrative aids is also found in Rule 403, it would be wrong to add anything specific about illustrative aids to that rule. Rule 403 applies generally across the rules; it would be confusing to add specific limitations to that rule.

[11] This does not mean, of course, that the illustrative aids provision should be a new Rule 611(b), bumping the existing provisions down. The Advisory Committee has always been opposed to changing the number or letter of existing provisions, due to the transaction costs for lawyers and judges, which would include the disruption of electronic searches. Nor should the proposal be added to Rule 611(a) itself, as that is a very general provision used to cover a

The proposal below provides for a new Rule 611(d) on illustrative aids.

III. Proposed Amendment on Illustrative Aids, for Release for Public Comment.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * *

(d) Illustrative Aids. [12]

(1) ***Permitted Uses.*** The court may allow a party to present an illustrative aid to help the factfinder understand evidence or argument if:

(A) its utility in helping the jury understand the evidence or argument is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time; and

(B) all parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use.

(2) ***Use in Jury Deliberations.*** An illustrative aid may not be provided to the jury during deliberations over a party's objection unless the court, for good cause, orders otherwise.

(3) ***Record.*** An illustrative aid that is used at trial must be entered into the record.

Comment:

Subparagraph (d)(1(A) basically tracks the Rule 403 test. So why not just say "Rule 403"? Because the whole innovation is that there is 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

wide variety of actions by the court, and it would be jarring to add a specific provision on illustrative aids at the end of it.

[12] Thanks as always to Joe Kimble and Bryan Garner for their help in structuring what turned out to be a complex provision.

was supposed to be probative for. That articulation received good reviews, and the above proposal applies the same kind of articulation of probative value.

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 thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, to study it and to use it to help determine the disputed facts.

The second category --- the category covered by this Rule --- is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this Rule as "illustrative aids," have also been 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.

A similar distinction must be drawn between a summary of voluminous, admissible information offered to prove a fact, and a summary of evidence or argument that is offered solely to assist the factfinder in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which are now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not 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, or to stoke unfair prejudice.

This rule requires the court to assess the value of the illustrative aid in assisting the factfinder to understand a 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 substantive 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 use 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. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance [at a jury trial] may not give sufficient opportunity for analysis by other parties, particularly if they are complex. The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided. The point is that the opponent must have the opportunity to raise any issues of fairness or prejudice with the court before the jury sees the illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute, and is admissible only in accompaniment with testimony or presentation by the proponent, the amendment provides that illustrative aids ordinarily are not to go to the jury room unless all parties agree. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow 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. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record.

TAB 5B

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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: April 1, 2022

The Committee is considering an amendment to Rule 1006, governing the use of summaries to prove voluminous content. The amendment would clarify certain aspects of the Rule that have caused repeated problems for some federal courts. The difficulties courts experience in applying Rule 1006 largely stem from confusion about the distinction between a summary offered as an illustrative or pedagogical aid pursuant to Rule 611(a) and a Rule 1006 summary offered as alternative evidence of underlying voluminous content. The Committee is also considering an amendment to Rule 611 to provide guidance regarding the proper use of illustrative aids. Any amendment to Rule 1006 would be a useful companion to a Rule 611 amendment to help delineate important distinctions between Rule 611 and Rule 1006 summaries. An amendment to Rule 1006 is an action item for this meeting.

Part I of this memorandum briefly describes the intended operation of Rule 1006. Although many federal courts properly apply the rule, some courts repeatedly struggle with four issues under Rule 1006. Part II highlights confusion over the evidentiary status of a Rule 1006 summary and describes decisions holding that Rule 1006 summaries are "not evidence" and may be relied upon merely as aids to understanding. Part III addresses 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 IV describes opinions that permit Rule 1006 summaries – which are supposed to be accurate and non-argumentative summaries proving the "content" of the voluminous underlying material – to include assumptions, conclusions, and arguments not found in the underlying material. Part V explores the use of testimonial summaries pursuant to Rule 1006 and the complications that arise in connection with this practice. Finally, Part VI sets forth a draft amendment and Committee note, based upon the Committee's discussion at the Fall 2021 meeting that would address all of these issues.

I. Rule 1006: A Brief Overview

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.[1] 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.[2] 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.[3] 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.[4] Finally, the court has discretion under Rule 1006 to require the proponent of the summary to "produce" the underlying writings, recordings, or photographs in court.[5]

II. Courts 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."[6] Most courts have recognized the proper status of a Rule 1006 summary as evidence.[7] As the Fourth Circuit explained in *United States v. Janati*:

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[1] Fed. R. Evid. 1006.

[2] *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).

[3] *See United States v. Milkiewicz,* 470 F.3d 390, 396 (1st Cir. 2006) ("The proponent must show that the voluminous source materials are what the proponent claims them to be and that the summary accurately summarizes the source materials.").

[4] *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.").

[5] Fed. R. Evid. 1006.

[6] Advisory Committee's 1973 note to Fed. R. Evid. 1006 (emphasis added).

[7] *See, e.g.*, *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013) (noting that the trial court instructed the jury that the Rule 1006 summary was not evidence and clarifying that "the 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.*

> 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.[8]

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."[9]

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.[10] 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*

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.").

[8] *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004).

[9] *United States v. Simmons*, 11 F.4th 239, 262 (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).

[10] *United States v. Bailey*, 973 F.3d 548, 567 (6th Cir. 2020) (emphasis added).

evidence."[11] 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.[12]

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*.[13] In that case, the 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."[14] 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."[15]

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.[16] 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."[17] 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."[18] Because the summaries at issue were properly admitted

[11] *Id.* (quoting *United States v. Vasilakos*, 508 F.3d 401, 412 (6th Cir. 2007)).

[12] *Id*

[13] 594 F.2d 558, 561 (6th Cir. 1979).

[14] *Id.*

[15] *Bailey*, 973 F.3d at 568.

[16] *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).

[17] *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.").

[18] *Id.* at 1111–12.

through Rule 1006, the court held that the district court's refusal to give a limiting instruction was proper.[19]

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."[20] 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."[21] 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."[22]

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."[23] 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

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[19] 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 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.

[20] 264 F.3d 535, 546 (5th Cir. 2001).

[21] *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").

[22] *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).

[23] *United States v. Williams*, 264 F.3d 561, 575 (5th Cir. 2001).

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*. [24] The court explained that summaries admitted through Rule 1006 "are elevated to the position" of substantive evidence.[25] The court also distinguished charts admitted as pedagogical aids through Rule 611(a), which do not constitute substantive evidence.[26] Therefore, the Fifth Circuit has conflicting precedent regarding the proper evidentiary status of a Rule 1006 summary.[27]

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). The amendment to Rule 1006 being considered by the Committee would clarify that a proper Rule 1006 summary is to be admitted "as evidence."

III. 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.

[24] *United States v. Spalding,* 894 F.3d 173, 185 n.17 (5th Cir. 2018).

[25] *Id.*

[26] *Id.* at n. 16.

[27] 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).

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.[28]

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."[29] 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.[30]

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*.[31]

Several cases from the Fifth Circuit also hold that Rule 1006 summaries must be "based on competent evidence already before the jury."[32] 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."[33] In *United States v. Harms*, the Fifth Circuit

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[28] 715 F.3d 362, 374 (1st Cir. 2013) (citations omitted).

[29] *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013).

[30] 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).

[31] *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").

[32] *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).

[33] *United States v. Mazkouri*, 945 F.3d 293, 301 n.1 (5th Cir. 2019).

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."[34]

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.[35]

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.[36]

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*.[37] 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.

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[34] 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)).

[35] *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.").

[36] 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.").

[37] 470 F.3d 390, 395–98 (1st Cir. 2006).

> 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 serves its purpose of allowing the jury to consider secondary evidence as a substitute for the originals.[38]

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."[39]

Again, decisions *requiring* the admission of the underlying records themselves misapprehend the purpose of a Rule 1006 summary, which is 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. The amendment being considered by the Committee would clarify that a properly supported Rule 1006 summary may be admitted whether or not the underlying voluminous records – or some portion of them -- have also been admitted.

IV. Courts that Allow Rule 1006 Summaries Containing Assumptions and Conclusions Not Included in Underlying Writings or Recordings

A. Confusion in the Courts

Because a Rule 1006 summary is designed to substitute for evidence of originals, a Rule 1006 summary must accurately reflect the underlying documents and must not include assumptions,

[38] *United States v. Milkiewicz*, 470 F.3d 390, 395–98 (1st Cir. 2006) (citations omitted).

[39] 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).

conclusions, or arguments not contained in those underlying documents.[40] 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 misrepresent their contents or make arguments about the inferences the jury should draw from them.[41]

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."[42] 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.'[43]

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.'"[44] The Eighth Circuit recently agreed in *United States v. Fechner*.[45] And the Eleventh Circuit also expressed the view that Rule 1006

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[40] *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.").

[41] 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).

[42] 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.").

[43] *United States v. Lynch*, 735 F. App'x 780, 787 (3d Cir. 2018) (citation omitted).

[44] 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.").

[45] 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)).

summaries may contain assumptions and conclusions not reflected in the original records in its recent opinion in *United States v. Melgen*.[46]

B. "Accurate" vs. "Non-argumentative"

An amendment to Rule 1006 should clarify this important distinction between a Rule 611(a) pedagogical device and a Rule 1006 summary: a summary admitted pursuant to Rule 1006 must accurately reflect underlying voluminous materials in a non-argumentative manner due to its substantive evidentiary status and its purpose to *substitute* for the underlying records which need not be introduced into evidence.[47] To that end, the draft amendment included in the Fall 2021 Agenda memorandum contained language requiring an "accurate" summary. At the Fall 2021 meeting, Committee members expressed concern about requiring an "accurate" summary in rule text because that would suggest that a trial court must make a finding that a proffered summary is "accurate" before allowing its admission. The Committee decided to replace the term "accurate" with the modifier "non-argumentative" in the draft amendment currently under consideration.

The federal courts that correctly analyze Rule 1006 summaries explain that they must be *both* accurate and non-argumentative:

- "the exhibit must *accurately* summarize those documents. It must *not misrepresent* their contents *or make arguments* about the inferences the jury should draw from them."[48]

- "The proponent must show that the voluminous source materials are what the proponent claims them to be and that the summary *accurately* summarizes the source materials;…. [c]onsequently, they must fairly represent the underlying documents and be '*accurate and nonprejudicial*.'"[49]

[46] 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); *see also United States v. Maurya*, 25 F.4th 829, 840 (11th Cir. 2022) ("Summary charts are permitted generally by Federal Rule of Evidence 1006. But to curb abuse, those charts are admissible only when any assumptions they make are 'supported by evidence in the record.'").

[47] Of course, the trial judge would still have discretion to determine whether a Rule 1006 summary was accurate – the addition of arrows or other aids to understanding summarized information may remain appropriate and non-prejudicial. *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").

[48] *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013) (emphasis added).

[49] *United States v. Milkiewicz*, 470 F.3d 390, 395–98 (1st Cir. 2006) (emphasis added).

- the purpose of Rule 1006 "is to reduce the volume of written documents that are introduced into evidence by allowing in evidence *accurate* derivatives."[50]

- "the chart itself is admitted as evidence in order to give the jury evidence of the underlying documents; … it must be *an objectively accurate summarization* of the underlying documents, not a skewed selection of *some* of the documents to further the proponent's theory of the case."[51]

- Rule 1006 summaries "must be supported by a foundation showing that the exhibit is an *accurate summary* of the underlying materials."[52]

For Rule 1006 summaries to serve their purpose, they must be both accurate and non-argumentative. The two terms, as used by the courts, seem to signify slightly different concerns. "Accuracy" seems to deal with whether a summary correctly reflects the information that is in the underlying documents. The "argumentative" nature of the summary relates to whether it uses argument or inference to sway the jury – a form of unfair prejudice. For example, if underlying documents revealed 500 banking transactions and a summary suggested 1,500 transactions, the summary would be inaccurate but not necessarily argumentative. If, on the other hand, the summary reflected "500 fraudulent withdrawals," it would be argumentative though not necessarily inaccurate. Because it serves as an admissible substitute for underlying voluminous information, federal courts seem to review a Rule 1006 summary with both concerns in mind.

Federal courts do seem to make findings about accuracy, as well as about whether the summary is argumentative and prejudicial, in reviewing admissibility of a Rule 1006 summary. In *United States v. Moore*, the defendant argued that the trial court erred in admitting government charts summarizing defendants' cell phone data under Rule 1006 because they were misleading.[53] On appeal, the Fourth Circuit affirmed, finding that: "[t]he charts and maps created by law enforcement accurately summarized the voluminous cell phone data."[54]

Similarly, the Seventh Circuit in *United States v. White* found that the district court had properly admitted a summary under Rule 1006.[55] The court found that the chart was "representative" of the underlying materials because "it simply catalogued instances of objective characteristics and added those instances together to create totals."[56] The Seventh Circuit noted with approval the district court's "extensive steps" to review the content of the chart, requiring the

[50] *United States v. Moore*, 843 F. App'x 498, 504 (4th Cir. 2021) (emphasis added).

[51] *United States v. Oloyede*, 933 F.3d 302, 310 (4th Cir. 2019).

[52] *United States v. Lynch*, 735 F. App'x 780, 785 (3d Cir. 2018); *see also* 2 McCormick on Evid. § 241 (7th ed.) ("So long as they are *accurate*, however, such summaries may present only one party's side of the case.") (emphasis added).

[53] 843 F. App'x 498, 504 (4th Cir. 2021).

[54] *Id.*

[55] 737 F.3d 1121, 1135–36.

[56] *Id.*

government to note on the chart that it reflected only "236 of 548" transactions and prohibiting the government from referring to transactions as "bailouts" or as "suspect." Thus, the court looked at both accuracy and unfair prejudice resulting from an argumentative summary.

The defendant in *United States v. Lynch* also contested the admission of Rule 1006 summaries, claiming that the government presented inadequate foundation to support them.[57] On appeal, the Third Circuit affirmed, explaining that the government's foundation witness "verified every data entry back to its underlying document and confirmed that the formulas were operating correctly in the charts, which was sufficient to establish that the summaries were accurate."[58] The court went on to note that the same witness had "sufficiently shown that [another chart] accurately summarized the six documents."[59] The court concluded that the district court had properly admitted the summaries, noting that the jury could still determine how much weight to give them.

In *United States v. Gordon,* the district court offered a preliminary pre-trial ruling on the admissibility of Rule 1006 summaries. In so doing, the court made findings regarding the accuracy of the government's proffered charts:

> Considering the Government's reply, the content included in the summary chart is accurate and reliable. First, the eighty-eight movies contained on the chart but not ordered are seemingly accurate portrayals of the information from the website pages. Mr. Gordon does not argue that these movies were not listed on the website. Second, the Government has deleted from the chart the three titles he states were neither ordered nor listed on any of the three websites. Lastly, the twenty-one titles not listed on the websites that were the subject of online orders are accurate even without the inclusion of the website pages.[60]

To capture fully the foundation required by the federal cases, an amendment to Rule 1006 might use both terms: "an accurate and non-argumentative written summary…". Employing only the modifier "non-argumentative" in rule text could prove problematic if courts interpret the amendment to fully describe the required foundation, and therefore to eliminate the longstanding requirement of accuracy which is essential to the substantive admission of Rule 1006 summaries. The draft amendment included in Part VI below includes accuracy as a bracketed option.

V. Testimonial Summaries

The Committee is also considering an amendment to Rule 1006 that would limit it to "written" summaries, to eliminate the practice of witnesses orally summarizing information on the witness stand. Most summaries admitted under Rule 1006 are *written* summaries admitted in the form of

[57] 735 F. App'x 780, 787 (3d Cir. 2018).

[58] *Id.*

[59] *Id.*

[60] No. 1:19-CR-00007-JAW, 2019 WL 4308127, at *5 (D. Me. Sept. 11, 2019).

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 testifying witness is essential to provide the requisite foundation.[61] 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. 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 the precise terms of a writing, and when the terms are in dispute only the writing itself, or a true copy, provides reliable evidence.[62]

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 current 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.[63] And federal courts

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[61] *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).

[62] *Seiler v. Lucasfilm*, Ltd. 808 F.2d 1316, 1319 (9th Cir. 1986).

[63] 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).

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.[64] 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."[65]

A proper Rule 1006 testimonial summary by a witness is one that conveys the content of underlying voluminous records accurately and does not draw inferences about the records or offer opinions based upon them.[66] 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.[67]

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

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[64] 849 F.3d 638, 645 (5th Cir. 2017).

[65] *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).

[66] *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.").

[67] *Id.* at 459 (D.D.C. 2020).

"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.[68] 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 case pursuant to Rule 611(a).[69] 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

[68] *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).

[69] *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.").

> "must have an adequate foundation in evidence that is already admitted, and should be accompanied by a cautionary jury instruction."[70]

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.[71]

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.[72] Again, the conflation of Rule 611(a) standards and Rule 1006 standards can be seen 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.[73] 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.[74] 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."[75] 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."[76] Therefore, it appears that the standards governing Rule

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[70] *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).

[71] *Id.*

[72] *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, 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.").

[73] 849 F.3d 638, 645 (5th Cir. 2017).

[74] Of course, the Fifth Circuit is one that has confused the Rule 1006 requirements even outside the context of oral, testimonial summaries.

[75] *Id.*

[76] *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

611(a) pedagogical aids creep into the Rule 1006 precedent in the context of oral, testimonial summaries as well.

At its Fall 2021 meeting, the Committee decided to consider an amendment to Rule 1006 that would limit it to "written" summaries, charts, or calculations. As noted above, this 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. The amendment would be designed to eliminate reliance on Rule 1006 to present "summary witnesses" who organize and argue a case based upon admitted evidence. This amendment would also curtail the practice of presenting undisclosed expert testimony in the guise of a Rule 1006 "testimonial summary."[77] The amendment would still permit a properly qualified expert witness who prepared a written Rule 1006 summary to serve as the foundation witness for it, explaining that the summary accurately reflects voluminous, admissible records. And the expert might also provide an appropriate expert opinion authorized under Rule 702, using the summary as support. At its last meeting, the Committee expressed concern about whether the term "written" would cover summaries presented in electronic form. Language has been added to the draft Committee note explaining that a "written" summary includes one in electronic form pursuant to Rule 101(b)(6).[78]

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.[79] Releasing a proposed amendment to Rule 1006 requiring

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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).

[77] *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).

[78] Fed. R. Evid. 101(b)(6) ("a reference to any kind of written material or any other medium includes electronically stored information.").

[79] 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

a "written" summary for public comment could help ferret out any unanticipated disruptions to existing practice, however.

VI. Rule 1006: Draft Amendment and Committee Note

Here is the draft Rule 1006 amendment and Committee note, reflecting the Committee's discussion at its Fall 2021 meeting begin on the next page.

RULE 1006. SUMMARIES TO PROVE CONTENT

(a) Written Summaries of Voluminous Materials Admissible as Evidence. The ~~proponent~~ court may admit as ~~substantive~~[80] evidence ~~use~~ a[n] [accurate and] [81] non-argumentative written summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids not Covered. An illustrative aid that summarizes evidence and argument is governed by Rule 611(d).

Draft Committee Note

Rule 1006 has been amended to correct misperceptions about the operation of the Rule by some federal courts, as well as to require that a summary offered under the rule

"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.

[80] At the Fall 2021 meeting, it was suggested that the modifier "substantive" be added to the text of subsection (a) to emphasize the clarification of the amendment that Rule 1006 summaries are, in fact, evidence and should not be accompanied by limiting instructions. After further review, the Chair and Reporter noted that the term "substantive" is not used elsewhere in the Rules and that the modifier is unnecessary given that the amendment clarifies that Rule 1006 summaries are admitted as "evidence." Thus, the proposal here is to eliminate the modifier "substantive" from the text of subsection (a) as it was tentatively agreed upon at the Fall meeting. The term "substantive" is used in the relevant discussion in the Committee Note, below.

[81] As discussed in Part IV above, the Committee may wish to consider adding the modifier "accurate" to rule text or eliminating the modifier "non-argumentative."

must be in written or electronic form. Courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the Rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some 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 that are 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 some 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 admitted into evidence as alternate proof of the content of voluminous writings, recordings, or photographs must [accurately reflect the underlying voluminous materials and] be non-argumentative. Some courts have improperly permitted summaries admitted under this rule to contain argument and inference so long as it is supported by record evidence. Rule 1006 summaries may not misrepresent the contents of the underlying materials or make arguments about the inferences the jury should draw from them, and the amendment so provides. 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 adding argument or inference.][82]

Finally, the amendment requires a "written" summary, chart, or calculation, eliminating the use 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 the use of a summary witnesses to orally summarize voluminous materials raises the possibility of abuse, because the testimony may

[82] The Committee should consider whether this point is helpful instruction or rather whether it might be just opening up a can of worms.

be more advocacy than summary. *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, which 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 in court. The amendment requires a written summary, chart, or calculation accompanied by appropriate foundational testimony. A written summary includes one that is produced in an electronic format. *See* Rule 101(b)(6).

Although Rule 1006 refers to materials too voluminous to be examined "in court" and permits the trial judge to order production of underlying materials "in court", the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between a summary of voluminous, admissible information offered to prove a fact, and a summary of evidence or argument that is offered solely to assist the factfinder in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 611(d).

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible amendment to Rule 611 to add safeguards when jurors are allowed to ask questions of witnesses
Date: April 1, 2022

At its last meeting, the Committee agreed to move forward with an amendment 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.

The proposal to add a new subdivision to Rule 611, setting forth procedural requirements when jurors are allowed to ask questions to witnesses, was discussed at the January Standing Committee, and some suggestions for improving the draft were made. Those changes are incorporated below.

The discussion below of case law is largely derived from the previous memo on the subject, and is included here to provide context for the Committee.

The proposal is an action item for the Spring Meeting. The Committee will vote on whether to recommend to the Standing Committee that the proposal be released for public comment. Assuming it is released for public comment, the timeline for enactment (if all goes well) is December 1, 2024.

I. Case Law on Juror Questioning of Witnesses

Every circuit court has issued a ruling on juror questioning of witnesses. Essentially these rulings articulate the risks of prejudice to the parties, as well as the benefits of increased juror attention and better juror understanding. The courts differ on how they weigh these risks and benefits. Some courts are fairly hostile to juror questioning, others are quite permissive, as discussed below.

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

But other 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*

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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").

[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").

Question Asking, 12 Law & Hum. Behav. 231, 233-34 (1988) (addressing benefits of juror questioning). [Internal citations and quotations omitted.]

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, described necessary safeguards:

> [I]n 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

[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).

> instructed that they will be allowed to submit questions, limited to 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 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 or by a party, not the juror.
● Counsel should be allowed to re-examine witnesses after a juror's question is answered by the witness.

III. The Justification for an Amendment Setting Forth Safeguards for Juror Questioning of Witnesses

The obvious benefit of the amendment is that it will assist the court and the parties when the decision is made to allow jurors to ask questions. The amendment would place, in rule text, 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 point 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. That assurance would not be as great if the safeguards were placed in a benchbook or a published list of "best practices."

> 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.

III. Proposed Amendment

What follows is the proposal tentatively approved by the Committee at the last meeting, with some changes implemented by the Style Subcommittee, and other changes made in response to comments at the prior Advisory Committee meeting and the Standing Committee meeting, as indicated in the footnotes below.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

* * *

(e) 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 the court must instruct the jury that: [7]

(A) any question must be submitted to the court in writing;

(B) a juror must not disclose a question's content to any other juror;

(C) the court may rephrase or decline to ask a question posed by a juror;

(D) a juror must draw no inference from the fact that a juror's question is asked, rephrased or not asked; [8]

(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.

[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.

The proposal is designated as a new subdivision (e). Currently Rule 611 has three subdivisions (a)-(c). In another memo in this Agenda Book, there is a proposal to add a subdivision to Rule 611 that would regulate the use of illustrative aids. In that memo, the argument is made that if both proposals to amend Rule 611 are put forward, it is mildly preferable to include the illustrative aids proposal as (d), and the jury question proposal as (e).

[7] The draft previously considered by the Committee provided that the instructions had to be given "before any witnesses are called." Commentary at the Standing Committee meeting found that provision to be too inflexible.

[8] The draft previously considered by the Committee provided that the juror should not draw a negative inference from the fact that the juror's question is not asked. The revision appropriately covers any possible inference, not only from having the question not asked, but also from having the question asked or rephrased.

(2) Procedure When a Question is Submitted. When a question is submitted by a juror, the court must, outside the jury's hearing:

(A) review the question with counsel to determine whether it is appropriate under these rules; and

(B) allow a party to object to it.

(3) Reading the Question to a Witness. If the court allows a juror's question to be asked, the court must read it to the witness or permit one of the parties to ask the question. [9]

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, 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"? If the question goes to unimportant points, the court can and should reject it under the Evidence Rules.

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.

[9] The phrase "or permit one of the parties to ask the question" was suggested by a Standing Committee member to cover the possibility that one of the parties might want to ask the question that is posed by the juror, and so should be able to do so.

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. While it seems problematic to add such a provision to the text, the draft Committee Note below discusses the possibility of follow-up questions.

Draft Committee Note

New subdivision (e) sets forth procedural safeguards that are necessary when a court decides to allow jurors to ask questions of witnesses at trial. Courts have taken different positions on whether to allow jurors to ask questions of witnesses. But courts agree that before the practice is undertaken, trial judges should weigh the benefits of allowing juror questions in a particular case against the potential harm that it might cause. And they agree that safeguards must be imposed.

Rule 611(e) 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 minimum procedural safeguards that are necessary when the court decides to allow juror questions. These safeguards are necessary to ensure that the parties are not prejudiced, and that jurors remain impartial factfinders.

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 often not in a single case in each circuit. The intent of the amendment is to assist courts and counsel by setting forth all the critical safeguards in uniform language and in one place.

The safeguards and instructions listed in the rule are mandatory, but they are not intended to be exclusive. Courts are free to impose additional safeguards, or to provide additional instructions, when necessary to protect the parties from prejudice, or to assure that the jurors maintain their neutral role.

A court may refuse to allow a juror's question to be posed, or to modify it, for a number of reasons. For example, the question may call for inadmissible information; it may assume facts that are not in evidence; the witness to whom the question is posed may not have the personal knowledge required to answer; the question may be argumentative; or the question might be better posed at a different point in the trial. In some situations, one of the parties may wish to pose the question, and the court may in its discretion allow the party to ask a juror's question --- so long, of

course, as it is permissible under the rules of evidence. In any case, the court should not disclose --- to the parties or to the jury --- which juror submitted the question.[10]

After a juror's question is asked, a party may wish to ask follow-up questions or to reopen questioning. The court has discretion under Rule 611(a) to allow or prohibit such questions.[11]

[10] This paragraph was added to the earlier version of the Committee Note to respond to comments made at the last Advisory Committee meeting.

[11] This provision has been added to the earlier version of the Committee Note to respond to comments made at the last Advisory Committee meeting.

TAB 7

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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: April 1, 2022

At the last meeting, the Committee tentatively approved an amendment to Rule 801(d)(2). The amendment would 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. The proposed amendment would bind the successor if the statement would have been admissible against the declarant (or the declarant's principal) as a party-opponent statement.

Rule 801(d)(2) currently provides a hearsay exemption for statements offered against a party-opponent:

> **(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).

As discussed in previous memoranda, courts are split on how this exemption operates in what might be broadly called "representative actions" --- where the party against whom the statement is offered is relying on rights and claims that were initially held by the declarant or the declarant's principal (as a statement of an agent of a party-opponent). 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 brings a section 1983 action against both officers, alleging that he was beaten by them after they arrested him. 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." A hearsay objection in an action brought by Jim will be overruled, 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.

Given that the Committee reviewed and approved the arguments supporting the proposed amendment at the last meeting, this memorandum only briefly summarizes the background law. The major purpose of the memo is to set out the text of the proposed amendment and Committee Note for final approval. At the meeting, the Committee will determine whether to recommend that the amendment be released for public comment. If all goes well, the amendment would become effective on December 1, 2024.

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 as discussed at the last meeting, the terminology of "predecessor-in-interest" is probably not workable for a textual change to the rule.

I. The Division in the Case Law on the Admissibility of a Hearsay Statement Against a Successor Party Under Rule 801(d)(2)

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 is offered against a party who derives its claim or defense from the declarant (or the declarant's principal), 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 or the declarant's principal, it is reasonable to conclude that the party-opponent should be as bound as the declarant or principal would be.

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. 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.

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.[1]

The only policy argument for the *Huff* position that is made in 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 truthfulness of 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 can be used to elicit any suspect motivations or misperceptions 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. [2]

[1] The Advisory Committee may well have avoided reference to "privity" because of the fuzziness of that term. Avoiding the term "privity" does not mean that the Advisory Committee rejected admissibility in a successor situation, especially given the fact that the Advisory Committee sought to expand admissibility of party-opponent statements from how they were treated under common law. See Advisory Committee Note to Rule 801(d)(2), calling for a "generous treatment of this avenue to admissibility."

[2] In any event, the concern about witness untrustworthiness is not applicable to written or recorded statements of the declarant. And the *Huff* rule has been applied to prohibit admission of the decedent's written and recorded statements as well.

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:

> [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.
>
> *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).[3]

[3] 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

Courts finding admissibility are often hit with the argument that they are admitting unreliable hearsay. But that argument is easily defeated -- because the party-opponent exemption is not based on reliability. 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 to Rule 801(d)(2) 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."[4]

II. Policy Arguments

As the Committee recognized at the last meeting, 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 or the declarant's principal, the declarant or principal is essentially a real party in interest. It is the declarant's or principal'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

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).

[4] Advisory Committee Note to Rule 802(d).

offered against it that are made by the very person (or the agent of that person) whose injuries (or defense) the successor is relying on at trial.

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 or principal and pressing their claim or defense. It is inconsistent and unfair for a successor to argue that the declarant's statement is unreliable hearsay when it is relying on the validity the claim or defense of that same declarant or that declarant's principal.

4. The contrary rule, that a successor is not bound, 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. [5]

[5] 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, the equities are in favor of admissibility of a hearsay statement against a party whose claim or defense is directly derived from the claim or defense of the declarant or the declarant's principal.

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 statement is offered against a party-opponent whose claim or defense is derived from the declarant or the declarant's principal. 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-attribution) claim or defense. The justification for admissibility is that the party-opponent stands in the shoes of the declarant or the principal. 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 successors); *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 debtor's 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 have been admissible against the board as a party, 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)(D). 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, hearsay 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 debtor on a promissory note, and the court admitted statements by the debtor's agent 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 was derived directly from the debtor.

In a law review article evaluating these bankruptcy cases,[6] 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.

[6] 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.

But it turns out that the concern expressed in the law review is highly questionable. As it happens, 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. 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 a strong 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 Professor Gibson 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 arisen in the published decisions. 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 at that time as being a party-opponent.[7] In the next section, this question is addressed in the draft Committee Note.

III. Draft Amendment

As discussed in previous memoranda, it is a challenge to draft language to cover the relationship that is required for admissibility against the declarant (or the declarant's principal) to be the ground for admissibility against a successor. The language has to cover a fairly wide variety of successor-predecessor situations. It surely would not do to try to list the relationships (decedent-estate, assignor-assignee, etc.) because there is a risk of under-inclusion, and the rule would become overlong.

So there needs to be a single description that covers a variety of predecessor-successor relationships. Here are some possibilities:

1. The declarant and the party are in "privity." As discussed previously, the term "privity" is a fuzzy term that is unlikely to cover all the relationships that should be covered. As Cathie Struve, the Reporter to the Standing Committee, stated in an email: "I think we might not be able to refer simply to 'privity' and expect that everyone will understand what we mean." It is notable that the Supreme Court has avoided the use of the term "privity" as vague and imprecise:

> 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).

Essentially, 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. Moreover, the amendment will have to go through the Supreme Court, and the Court itself has called the term confusing.

[7] Hawaii treats the post-transfer problem as follows:

> "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."

2. *The declarant is the party's "predecessor-in-interest."*

It might be thought that "predecessor-in-interest" would be a solution, as 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 with a similar motivation to what would exist if the declarant could be cross-examined now. 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 (or that of their principal) 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) (and the courts' broad interpretation of that term), 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:* At the last meeting, the Committee adopted the approach of *describing 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. It also tentatively approved a Committee Note that specified 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 proposed amendment, beginning on the next page, uses the "directly derived" terminology.

Text of Proposed 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 party's claim or defense is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Reporter's Notes:

1. The amendment is placed at the end of the rule because it has to apply to all the subdivisions. The statement offered against the successor might not have been made by the

predecessor himself, but instead may have been adopted by the predecessor, or made by the predecessor's agents. (This is especially so in corporate situations, in which the statement is made by an agent of the corporate principal.) If the predecessor's own statements are admissible against the successor, it would be irrational 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. Reference to the "declarant's principal" mucks up the text a bit, but the reference is necessary because in many of the cases, the statement is made by a declarant and admissible against the predecessor party under Rule 801(2)(C) or (D). So the successor is not standing in the shoes of the *declarant, but rather 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.

Draft Committee Note

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

TAB 8

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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: April 1, 2022

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 propose an amendment to Rule 804(b)(3) to authorize the use of corroborating evidence in the corroborating circumstances inquiry. Rule 804(b)(3) is an action item for this meeting.

This memorandum proceeds in four parts. Part I explains the origins of the corroborating circumstances requirement in Rule 804(b)(3) and the reason that some courts limit their inquiry to inherent guarantees of trustworthiness and eschew corroborating evidence in applying the Rule. Part II describes the cases on both sides of the existing circuit split. Part III examines the rationale for amending Rule 804(b)(3) to resolve the split of authority and explains 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 draft language for an amendment and an accompanying Committee note.

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

[1] Fed. R. Evid. 804(a) (requiring unavailability for all Rule 804(b) hearsay exceptions).

because a person is unlikely to say something that damages his own interests unless it is true.[2] 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.[3] 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 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.[4]

When Rule 804(b)(3) was enacted, it permitted statements against a declarant's penal interests to be admitted through the exception.[5] 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 show "corroborating circumstances" that clearly indicate the trustworthiness of the statement. The Advisory Committee Note states:

> The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.[6]

This extra showing was required of criminal defendants only (and was not applicable to prosecutors using the same hearsay exception) due to the drafters' concerns about phony

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[2] *See* Advisory Committee's note to Rule 804(b)(3) ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.").

[3] *Id.* ("The common law required that the interest declared against be pecuniary or proprietary").

[4] Advisory Committee's note to Rule 804(b)(3) as enacted in 1975. Note that the risk of the witness making up the statement is not a hearsay problem. The risk that the declarant is confessing to a crime that he did not admit is a hearsay problem.

[5] *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").

[6] *See* Advisory Committee's note to Rule 804(b)(3). The Committee's original draft of Rule 804(b)(3) required "corroboration" of a statement against interest. *See* Friedman & Deahl, Federal Rules of Evidence: Text and History, p. 423 (West 2015) (noting that 1972 Supreme Court draft of Rule 804(b)(3) prohibited statements exculpating the accused "unless corroborated"). Congress modified the language to require "corroborating circumstances that clearly indicate the trustworthiness of the statement" out of concern that a defendant's profession of innocence alone could be seen to "corroborate" a third party's against-interest confession to his crime. *Id.* at 425-426 (noting that the House Subcommittee altered the language of the corroboration requirement due to this concern in 1973).

confessions being offered to exculpate defendants.[7] 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.[8] 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.[9]

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.[10] 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."[11] 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*; trial judges were to look only at circumstantial guarantees of reliability in assessing the admissibility of the statement for purposes of the Sixth Amendment.[12] 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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[7] *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).

[8] *See United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against penal-interest statements offered by the government).

[9] 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.").

[10] *Ohio v. Roberts*, 448 U.S. 56 (1980).

[11] *Id.*

[12] 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.[13] 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.[14] 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 inherent 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 making of the statement, as well as independent corroborative evidence in determining whether the declarant's statement is supported by corroborating circumstances.

It is a minority of courts holding that independent corroborative evidence (or the lack of it) is irrelevant to the requirement of corroborating circumstances, and that the court must focus only on the circumstances under which a particular 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:

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[13] *See, e.g.*, *United States v. Mitchell*, 145 F.3d 572, 578-79 (3d Cir. 1998) (trial court's reliance on corroborating evidence to evaluate admissibility violated both the requirements of the residual exception and the Confrontation Clause).

[14] *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.").

> 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 clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made.[15]

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.[16]

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.[17]

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.[18]

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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[15] *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.").

[16] 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)).

[17] *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.").

[18] 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.[19] 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*.[20]

In defining "corroborating circumstances," the majority of circuits do explicitly consider whether independent evidence supports or contradicts the declarant's statement. 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.[21] The court relied, in part, on the fact that 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.[22] 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.[23]

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.[24] 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." Such a close relationship between the declarant and the defendant that gives the declarant a motivation to falsely exonerate the defendant undermines the guarantees of trustworthiness inherent in a statement.[25] But the Ninth Circuit upheld the district court's finding

[19] 134 F.3d 340 (6th Cir. 1998).

[20] *Id.*

[21] 260 F.3d 150 (2d Cir. 2001).

[22] 894 F.2d 403 (4th Cir. 1990); *see also United States v. Chang*, 999 F.3d 1059, 1070 (7th Cir. 2021) (independent evidence that conflicted with declarant's statement also undermined corroborating circumstances).

[23] 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).

[24] 114 F.3d 928 (9th Cir. 1997).

[25] The *Paguio* case illustrates the danger of ignoring independent corroborative evidence in favor of inherent guarantees of trustworthiness. Due to the declarant's inherent motivations to protect his son from culpability and to shoulder the blame himself, his statement exonerating his son would likely have been excluded in a jurisdiction focusing exclusively on inherent guarantees. By expanding the inquiry to include independent evidence, the court was able to obtain a more complete picture of the statement's reliability.

that corroborating circumstances supported the trustworthiness of the father's statement that the defendant had "nothing to do with it" because the loan officers, 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).

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.[26] 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).[27]

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.

A. The Minority Rule is Based Upon Defunct Sixth Amendment Precedent

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.[28] *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.[29]

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[26] 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).

[27] *See United States v. Lora*, No. 20-33, 2022 WL 453368, at *2 (2d Cir. Feb. 15, 2022) ("We have divided that inquiry into 'corroboration of the *truth* of the declarant's statement,' which '*focus[es] on whether the evidence in the record supported or contradicted the statement'*; and 'corroboration of the declarant's trustworthiness,' which 'focus[es] on [the] declarant's *reliability when the statement was made.* '") (emphasis added).

[28] *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)).

[29] *Crawford v. Washington*, 541 U.S. 36 (2004).

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.

B. Limiting Trial Judges in Deciding Preliminary Questions of Admissibility is Inconsistent with Rule 104(a)

Decisions that limit the information that trial judges may consider in ruling on the admissibility of a hearsay statement under Rule 804(b)(3) appear to be inconsistent with Rule 104(a) and the Supreme Court's interpretation of it in *Bourjaily v. United States*.[30] Rule 104(a) provides that trial judges are "not bound by evidence rules, except those on privilege" in deciding preliminary questions regarding the admissibility of evidence.[31] Prior to the enactment of the Federal Rules of Evidence, federal courts prohibited trial judges from relying upon a proffered hearsay statement itself in determining whether a conspiracy existed between the declarant and the defendant for purposes of evaluating the statement's admissibility under the co-conspirator exception to the hearsay rule.[32] At common law, reliance upon the hearsay statement itself was rejected as improper "bootstrapping" that could permit a hearsay statement to lift itself (by its own bootstraps) to admissibility.[33] Many courts continued to enforce this prohibition on the consideration of a hearsay statement in evaluating its admissibility under the co-conspirator exception after enactment of the Rules.[34] The Supreme Court in *Bourjaily* held that Rule 104(a), by its plain language, eliminated the common law ban on bootstrapping.[35] Imposing a limitation on the information a trial judge could consider in deciding admissibility under the co-conspirator exception was contrary to the plain language and clear intent of Rule 104(a) to place *no limits* (except for privilege) on the information a trial judge could take into consideration in deciding preliminary questions of admissibility. The "corroborating circumstances" requirement in Rule 804(b)(3) -- like the "co-conspirator" requirement in Rule 801(d)(2)(E) -- is a preliminary question regarding admissibility to which Rule 104(a) applies. Limiting the information that a trial judge

[30] 483 U.S. 171 (1987).

[31] Fed. R. Evid. 104(a).

[32] *See Glasser v. United States*, 315 U.S. 60 (1942), *overruled by Bourjaily v. United States*, 483 U.S. 171 (1987).

[33] *Id.; see also United States v. Nixon*, 418 U.S. 683, 701 (1974) ("Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, *by independent evidence*, of a conspiracy among one or more other defendants and the declarant.") (emphasis added). Ironically, this was because courts found that a focus on the hearsay statement alone was insufficient and the "independent evidence" was necessary to support a finding that the declarant and defendant were "co-conspirators."

[34] *Bourjaily*, 483 U.S. at 177 ("The Courts of Appeals have widely … held that in determining the preliminary facts relevant to co-conspirator's out-of-court statements, a court may not look at the hearsay statements themselves.").

[35] *Id.* at 178-79 (Rule 104(a) "on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege.").

may consider in deciding that preliminary question would seem to be at odds with the language of Rule 104(a) and the Supreme Court's interpretation of it in *Bourjaily*. Thus, the courts that prohibit consideration of independent corroborating information in evaluating the corroborating circumstances requirement appear to be improperly restricting the trial court in contravention of Rule 104(a). An amendment to Rule 804(b)(3) that removes this limitation in the jurisdictions that impose it, would therefore be consistent with Rule 104(a) and Supreme Court precedent.

C. Corroborating Information Adds Reliability and Symmetry with Rule 807

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. 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.[36] 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 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).[37] 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.

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[36] 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*).

[37] 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).

D. Rule 804(b)(3) Already Demands Inherent Guarantees of Trustworthiness in its Specific Against-Interest Requirement

Although it is understandable that courts once focused their inquiry on inherent circumstantial guarantees of trustworthiness under the residual exception, such a limit makes little 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. [38] First, it applies only to 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.[39] Thus, it makes sense that the corroborating circumstances requirement is about *more than inherent reliability* and contemplates independent corroborating evidence as well.

[38] 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 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.).

[39] 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, e.g.*, *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.").

E. Independent Evidence Responds to the Historic Skepticism of Against-Interest Statements

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 to protect against this possibility. 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.

Indeed, it appears that Congress had independent corroborating evidence in mind when it altered the language of Rule 804(b)(3) to require "corroborating circumstances clearly indicating trustworthiness." The House Subcommittee Report on this new language explained that "[i]t was contemplated that the result in such cases as *Donnelly v. United States,* 228 U.S. 243 (1912), *where the circumstances plainly indicated reliability*, would be changed."[40] In *Donnelly*, a criminal defendant sought to introduce the statement of one "Joe Dick" who had since died of consumption, confessing to the murder for which the defendant was on trial.[41] The Court upheld the exclusion of the third-party confession due to the common law prohibition on statements against criminal liability, notwithstanding evidence presented by the defendant that: Dick lived in the vicinity of the crime and knew the habits of the victim; footprints leaving the scene of the crime traveled in the direction of Dick's home and away from defendant's; and the perpetrator stopped to rest in soft sand as Dick would have had to do due to his consumption.[42] All of the factors supporting the reliability of the Dick confession in *Donnelly* relate to *independent corroborating evidence*; there is no mention in *Donnelly* of the circumstances surrounding the third-party confession or its inherent trustworthiness. And the House Committee that added the "corroborating circumstances" language that remains in the Rule today stated that it would be satisfied on the facts of *Donnelly*. 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, is inconsistent with legislative intent.

[40] *See* Friedman & Deahl, Federal Rules of Evidence: Text and History, p. 426 (West 2015) (emphasis added).
[41] 228 U.S. 243 (1912).
[42] *Id.* at 272.

F. The Meaning of "Corroborate": Plain Language as Supportive of Independent Evidence

The terminology employed by Rule 804(b)(3) also supports the use of independent evidence suggesting that a statement is accurate. The Rule requires *corroborating* circumstances that clearly indicate the trustworthiness of a statement. Further, the original Advisory Committee note to Rule 804(b)(3) explained the need for "corroboration":

> The requirement of *corroboration* should be construed in such a manner as to effectuate its purpose of circumventing fabrication.[43]

"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 the term "corroborating" 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.

G. The Time May Be Right

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 forego 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

[43] *See* Advisory Committee's note to Rule 804(b)(3) (emphasis added). Though Congress changed the language of the Rule to require "corroborating circumstances" as opposed to simple "corroboration," Congress retained the modifier "corroborating" which, as explained above, signifies independent verification.

circumstances in the text or Committee Note to the proposed amendment. One member dissented.

In 2009, the Committee predicted that the courts on the wrong side of the issue would eventually see the error of their ways. But courts have not corrected course in the 13 years since 2009. The circuits rejecting corroborating evidence are the First, Sixth and Eighth. The First Circuit has held fast to its position.[44] 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 by another was inadmissible as a declaration against penal interest.[45] 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. Thus, the law in the Eighth Circuit remains unclear as to whether independent evidence may be considered in evaluating the corroborating circumstances requirement. As to the Sixth Circuit, there is nothing in the interim to indicate that it has altered its view.[46] These circuits may be unlikely to reassess the limitation on Rule 804(b)(3) notwithstanding the uniform recognition that *Ohio v. Roberts* has been overruled. This is because the limitation originally derived from *Ohio v. Roberts* has now been fully incorporated into each circuit's Rule 804(b)(3) precedent. 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 – in addition to circumstantial guarantees of trustworthiness -- may be advisable.

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[44] *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.'").

[45] 766 F.3d 893 (8th Cir. 2014).

[46] *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).

IV. A Draft Amendment

An amendment to Rule 804(b)(3) to allow consideration of the presence or absence of corroborating evidence and an accompanying Advisory Committee's note could read as follows:

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

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

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 its 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. It is also supported by the legislative history of the corroborating circumstances requirement. *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "unless corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like Donnelly v. United States, 228 U.S. 243 (1912) that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

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. as justifications for the decision to include corroboration in the Rule 807 calculus. One question for the Committee, if it wishes to proceed with an amendment to Rule 804(b)(3), is whether to include more policy discussion in the note or whether to keep it brief and consistent with Rule 807.

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: April 1, 2022

The Committee is considering a possible amendment to Rule 613(b) governing extrinsic evidence of a witness's prior inconsistent statement. The existing Rule promises the impeached witness an opportunity to explain or deny the prior inconsistency at some point in time during the trial if extrinsic evidence of the statement is to be introduced (unless the trial judge decides to dispense with such an opportunity in the interests of justice). But the current Rule does not specify *when* the witness must get that opportunity. An impeaching party may confront the witness with her prior inconsistent statement on cross-examination and provide the requisite opportunity *prior* to offering extrinsic evidence of the statement. But because there is no timing requirement in Rule 613(b), a party might offer extrinsic evidence of a witness's prior inconsistent statement first, and offer the witness an opportunity to explain or deny the statement thereafter.

Despite the flexible timing built into Rule 613(b), several federal courts have imposed their own timing requirement and have held that a witness *must* receive an opportunity to explain a prior inconsistent statement *before* extrinsic evidence may be offered. Other federal courts acknowledge the flexible timing afforded by Rule 613(b), 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. Therefore, the flexible timing authorized by Rule 613(b) has been rejected by some federal courts that impose the very timing limitation the rule rejects. Perpetuating such a disconnect between the Rules and practice undermines the efficacy and integrity of the Rules, creating a hidden requirement not reflected in rule text. Indeed, having a rule that tells lawyers that 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.

At its Fall 2021 meeting, the Committee unanimously agreed to consider a proposed amendment to Rule 613(b) to rectify the conflict between the timing flexibility built into the Rule and the practice followed by some federal courts. All Committee members also agreed that the pre-Rules practice of requiring a prior foundation during cross-examination of a witness before

extrinsic evidence of his prior inconsistency may be introduced is a superior approach (so long as the trial judge retains discretion to relax a prior foundation requirement in appropriate circumstances). Therefore, the Committee agreed to consider a proposed amendment to Rule 613(b) that would impose a prior foundation requirement and that would bring the Rule into alignment with the practice in many federal courts.

This memorandum proceeds in four parts. Part I describes the common law requirements for impeaching a witness with a prior inconsistent statement and the alteration of those requirements in Rule 613. Part II explains the federal precedent interpreting Rule 613(b) and the enforcement by many courts of the prior foundation requirement for presenting extrinsic evidence, notwithstanding the timing flexibility intentionally built into the Rule. (Parts I and II are largely taken from the Fall 2021 memorandum and are included here for convenience). Part III examines the advantages of amending Rule 613(b) to conform to practice in most of the federal courts. Part IV closes with draft amendment language and a draft Committee note for the Committee's consideration. The proposed amendment to Rule 613(b) is an action item for this meeting.

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 asking the witness about 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. 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," and provides 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

[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.").

> 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]

Thus, 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 the two subsections of Rule 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 Rule explained that it 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 extrinsic evidence of a prior inconsistent statement to be admitted 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, necessitating her recall. There may be disagreement as to which party bears the burden of recalling her to afford her the opportunity to explain or deny her prior statement. The witness may even have become unavailable by the time the extrinsic evidence of her prior inconsistent statement is offered. This creates the possibility that extrinsic evidence of a prior inconsistent statement will be admitted, but

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[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 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").

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 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]

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[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.").

[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.").

Likewise, the Eleventh Circuit in *Wammock v. Celotex Corp.* explained that extrinsic evidence should be admissible 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] Thus, many federal courts implement Rule 613(b) as intended by its drafters.

Some 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 acknowledged 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

[13] 793 F.2d 1518, 1522–23 (11th Cir. 1986); *see also United States v. Hudson*, 970 F.2d 948, 956 (1st Cir. 1992) ("it would resurrect the now-discredited procedure laid down in *Queen Caroline's Case*… if we excluded James Hudson's statement on the ground of an inadequate evidentiary foundation when the district court acted without any evaluation of the availability of the witness sought to be impeached or, alternatively, without any expressed consideration of whatever delay or inconvenience might have been caused by defense counsel's failure to confront James Hudson, on cross-examination, with his allegedly inconsistent statement.").

[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 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.").

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, 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 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] Indeed,

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[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. Devine*, 934 F.2d 1325, 1344 (5th Cir. 1991) ("Proof of such a statement may be elicited by extrinsic evidence only if the witness on cross-examination denies having made 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 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) (same); *United States v. Devine*, 934 F.2d 1325, 1344 (5th Cir. 1991) ("Proof of such a statement may be elicited by extrinsic evidence only if the witness on cross-examination denies having made the statement.").

[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)).

in concurring in *Hudson*, Judge Selya characterized the common-law prior foundation requirement as the majority approach to Rule 613(b).[21]

Thus, there is 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 common law confrontation of the witness on cross-examination *prior* to the introduction of extrinsic evidence of a prior inconsistency in all cases, in contravention of Rule 613(b).

III. *Amending Rule 613(b) to Require a Prior Foundation*

The Committee is considering amending Rule 613(b) to reinstate the prior foundation requirement for extrinsic evidence of a prior inconsistent statement. There appear to be very few downsides associated with such an amendment. Perhaps the biggest criticism of such an amendment might be that it is a solution in search of a problem. Rule 613(b) is not an evidence rule that receives frequent appellate consideration. And although there is conflict in the cases concerning the proper timing for affording a witness an opportunity to explain or deny a prior inconsistent statement, courts and litigants seem to be navigating prior inconsistent statement impeachment on a daily basis without too much difficulty. On the other hand, impeachment by prior inconsistent statement happens daily in federal courts across the country. An amendment that would bring Rule 613(b) into alignment with the practice in many federal courts and that would clarify the timing issue by instituting a prior foundation requirement (with a discretionary escape valve) offers several advantages.[22]

A. Consistent with Current Practice

First, many federal courts appear to require, or at least to prefer, a prior foundation on cross before admitting extrinsic evidence of a prior inconsistent statement.[23] And most litigants follow this practice. This is because laying the foundation while the witness is on the stand testifying will

[21] *United States v. Hudson*, 970 F.2d 948, 959 (1st Cir. 1992) ("Since that time, most (though not all) of the circuits have rejected [timing flexibility], deciding instead that the adoption of Rule 613(b) did not abolish the traditional common law requirement of laying a suitable foundation prior to the introduction of impeachment evidence.") (Selya, J. concurring).

[22] Although amendments often seek to correct misapplication of a provision by the courts (*see, e.g.* Proposed amendment to Rule 702 to bring practice into alignment with the Rule), 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 Rule 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 Rule 606(b) codified the exception that several courts had found for clerical errors.

[23] *See supra* n. 16-17 and accompanying text. At the Fall 2021 Committee meeting, all the trial judges present stated that they require a prior foundation.

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 is risky to dispense with a prior foundation, because the 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.[24] 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.[25]

B. Fairness: Eliminating a Trap for the Unwary Litigator

Second, an amendment expressly requiring a prior foundation would eliminate the potential trap for unwary litigants created by the sub rosa prior foundation requirement that exists under the current Rule in many courts. The existing language of Rule 613(b) and its accompanying Advisory Committee note instruct litigants that timing is not important and that an opportunity to explain or deny a prior inconsistent statement may come *after* extrinsic evidence of it is offered.[26] In reliance

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[24] *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)).

[25] 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.).

[26] *See* Advisory Committee's note to Fed. R. Evid. 613(b) ("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 on the prior statement, *with no specification of any particular time or sequence*.") (emphasis added).

on this flexibility, a less experienced trial lawyer may decline to ask a witness about a prior inconsistent statement during cross-examination, thinking that he may offer extrinsic evidence first and circle back later to offer the witness an opportunity to explain. He may learn that the *trial court* requires a prior foundation on cross only when he seeks to offer the extrinsic evidence. By that time, it will be too late to comply with the prior foundation requirement. An amendment that *requires* a prior opportunity to explain or deny in rule text (with a discretionary exception) will clearly instruct even the neophyte that he must first afford the witness an opportunity to explain or deny a prior inconsistent statement or risk losing the chance to offer extrinsic evidence.

C. A Prior Foundation Requirement is Efficient

Third, requiring that a witness receive an opportunity to explain or deny a prior inconsistent statement before admitting extrinsic evidence of the statement reduces costly inefficiencies. When confronted with a prior inconsistent statement on cross-examination, a witness may fully and freely admit the prior inconsistency. As noted above, extrinsic evidence of a prior inconsistent statement is subject to Rule 403.[27] 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. In the vast majority of cases, there will be no need to present extrinsic evidence of the statement that the witness has already conceded. Requiring prior cross-examination regarding an inconsistent statement as a baseline, therefore, has the virtue of conserving resources consumed by unnecessary extrinsic proof. Requiring a prior foundation will also eliminate the need to recall a witness -- who has already testified in the current proceeding – for the sole purpose of affording her an opportunity to explain or deny prior inconsistent statements. There may also be time-wasting disputes about *which party* has the obligation to recall the witness.[28] Making a prior opportunity to explain or deny the baseline in Rule 613(b) thus promises to make impeachment by prior inconsistent statement more efficient. Judge Selya, concurring in *United States v. Hudson*, has summarized the virtues of the common-law approach as follows:

> [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

[27] *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).

[28] *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.").

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.[29]

D. An Amendment Would Preserve Flexibility

By retaining a trial judge's discretion to dispense with a prior foundation in appropriate cases, an amendment to Rule 613(b) can preserve needed flexibility. The original Advisory Committee eliminated the common law requirement of a prior foundation because it recognized circumstances in which a prior foundation would not be appropriate or possible. For example, the Advisory Committee note to Rule 613(b) explains that flexible timing allows "several collusive witnesses" to be examined "before disclosure of a joint prior inconsistent statement."[30] Further, courts have recognized that a party might discover a witness's inconsistent statement only after cross-examination is concluded, making a prior opportunity to explain impossible. Finally, a party might inadvertently fail to confront a still-available witness with a prior inconsistency on cross-examination. The flexible timing embodied in existing Rule 613(b) permits a party to present extrinsic evidence before giving any opportunity to explain in such circumstances.

However, these potential problems may also be remedied by an amendment that requires a prior opportunity for the witness to explain or deny a prior inconsistent statement, but preserves the trial court's discretion to dispense with the traditional foundation requirement in appropriate circumstances. If there were an inadvertent failure to lay a foundation with a still-available witness who might easily be recalled, 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.[31] A trial court also could permit a party to examine several collusive witnesses before confronting any of them with a prior inconsistent statement under an amended Rule 613(b); the party would simply need to ask for *permission* to do this rather than the *forgiveness* authorized by the existing provision. Still an amended 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.

E. Symmetry with the Scope of Direct Rule in 611(b)

An amendment to Rule 613(b) that requires a prior opportunity for the witness to explain or deny a prior inconsistency -- with discretion for the trial judge to dispense with a prior

[29] 970 F.2d 948, 959 (1st Cir. 1992).

[30] Advisory Committee's note to Fed. R. Evid. 613(b).

[31] *See 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.'").

foundation in appropriate cases -- 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.[32] 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.[33] 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."[34] 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 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.[35] 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.

The draft amendment and Committee Note are set forth on the next page.

[32] *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).

[33] *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.").

[34] Fed. R. Evid. 611(b).

[35] *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 and Committee Note

The following draft amendment and Committee note are based upon the discussion at the Fall 2021 meeting, as well as comments received following the meeting.

Rule 613

(b) Extrinsic Evidence of a Prior Inconsistent Statement.

Extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, unless the court orders otherwise ~~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. This requirement of a prior foundation is consistent with the traditional approach to proof of prior inconsistent statements for impeachment. *See, e.g.,* Wammock v. Celotex Corp., 793 F.2d 1518, 1521 (11th Cir. 1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement."). The existing rule imposes no timing preference or sequence and permits an impeaching party to introduce extrinsic evidence of a witness's prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems if the witness is not available to be recalled, and can lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find the cost of proving 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. *See* United States v. Hudson, 970 F.2d 948, 959 (1st Cir. 1992) (prior foundation requirement "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.") (concurring opinion). Of course, the amendment preserves the trial court's discretion to delay a witness's opportunity to

explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether.

The amendment brings the rule into alignment with Rule 611(b), which retains the traditional limit on the scope of cross-examination, with trial court discretion to broaden the scope in appropriate cases. Rule 613(b) now imposes the traditional prior foundation requirement for extrinsic evidence of prior inconsistent statements, with trial court discretion to relax that limit.

Nothing in this amendment is intended to alter Rule 613(a). A party is free to examine a witness about a prior statement without showing it to the witness. But before extrinsic evidence of the statement can be admitted, the witness must be provided an opportunity to explain or deny.

Memorandum To: Advisory Committee on Evidence Rules, Members and Liaisons

From: Daniel Capra, Reporter

Re: Suggested changes to the Committee Note to Rule 702 from Judge Kuhl (and a responsive addition from the Chair and Reporter)

Date: May 2, 2022

Judge Kuhl has suggested a few changes to the Committee Note to Rule 702, and I think it would be useful and efficient for people to review these in advance of Friday's meeting. This memo also discusses a proposal to resolve the dispute about whether to reinsert "the court finds" into the proposed amendment.

Suggested Changes to the Committee Note Related to "Preponderance of the Evidence"

The changes suggested are in response to the proposal that the term "preponderance of the evidence" that is in the current draft should be changed to "more likely than not." Judge Kuhl approves of the textual change, but suggests that similar changes should be made to the Committee Note. She also suggests referring back to the 2000 Committee to quote *In re Paoli R.R. Yard PCB Litigation*. She thinks the quotation is an excellent, brief, statement of the relationship between the "requirement of reliability" and "the merits standard of correctness" – defining the scope of the judge's and the jury's responsibilities.

As to taking out the references to a preponderance in the Committee Note: My thought for keeping them in the Note was that "preponderance" is a well-known standard that courts are currently using under Rule 104(a). My other rationale is that it would emphasize that the change in the text to "more likely than not" was not intended to alter --- was intended to be the same as --- the preponderance standard currently applied. That said, the Chair and I do not have an objection to Judge Kuhl's proposed changes. We do suggest, however, that the citations to the basic standard at the beginning of the note---which talk about a preponderance --- should be beefed up. We note that the proposed quotes come from Supreme Court cases, so they cannot be subject to legitimate criticism.

What follows on the next page is the Committee Note in the agenda book with: 1) changes in red, already in the book, which are changes suggested in the Reporter's memo from the version issued for public comments; 2) changes from what is in the book suggested by Judge Kuhl, which are in blue; and 3) the change suggested by the Chair and the Reporter, in green.

We hope you can follow the colors!

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~~. First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless a court finds it more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *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, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); Huddleston v. United States, 485 U.S. 681, 687 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard"). 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~~ it more likely than not ~~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 it more likely than not that the admissibility requirement ~~to be~~ has been 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~~ Rule 104(a) 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. "[P]roponents 'do not

have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.'" Advisory Committee Note to the 2000 amendment to Rule 702, quoting In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994).

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, due to lack of background knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also ~~be unable to assess~~ lack the background knowledge to determine whether 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.~~

Suggested Change to Text Relating to "the Court Finds"

As you are aware, a number of Committee members have expressed concern with any reference in the text to the court making a finding of reliability. As a result of those concerns, the proposal released for public comment provides that expert testimony is admissible "if the proponent has established" the reliability requirements. The problem with that language, as indicated in the Reporter's memo, is that it doesn't make explicit that it is the court, and not the jury, that is to act as the gatekeeper.

In thinking about this problem, the Reporter and the Chair have come up with compromise language that will clarify that the admissibility decision is for the court, without referring to the court having to make a finding. Here is that proposal (together with the "more likely than not" adjustment discussed in the Reporter's mem)o:

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 demonstrates **to the court** that it is more likely than not that:

We believe that this "to the court" addition sends a sufficient signal that Rule 702 is the court's responsibility, without any textual requirement that the court make a finding. Please consider this proposal, as it will be one of the votes that will be taken at the meeting.

If the Committee agrees with the proposal, then an adjustment will have to be made to the first paragraph of the Committee Note that is on page 151 of the Agenda Book. That paragraph was designed to implement a "court finds" alternative. If the Committee accepts the compromise above, then the first paragraph of the Committee Note would look like this:

> Rule 702 has been amended in two respects. First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets

the admissibility requirements set forth in the rule. [The rest of this paragraph will be unchanged.]

Memorandum To: Advisory Committee on Evidence Rules, Members and Liaisons

From: Liesa L. Richter, Academic Consultant

Re: Suggested changes to the Committee Note to Rule 804(b)(3) from Judge Schroeder

Date: May 4, 2022

Judge Schroeder has suggested two modest, but helpful changes to the Committee Note to Rule 804(b)(3). This supplemental memorandum is being circulated to allow review of those suggested changes in advance of Friday's meeting. The proposed language for the rule text has not changed and the language in red in the rule below reflects the changes from the current rule already reviewed by the Committee. The new language in the draft Committee note reflects changes from the version of the note included in the Agenda Book that are responsive to Judge Schroeder's comments. There are some additional minor changes also reflected in red. Judge Schroeder made two suggestions: 1) new language for the first sentence of the note describing the amendment that is clearer and more direct and 2) an example in the note illustrating how the court should consider the admissibility of declarations against penal interest in criminal cases under the amendment. Both have been implemented below.

Rule 804(b)(3) Statement Against Interest.

A statement that:

(A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

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

Draft Committee Note

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by corroborating circumstances that clearly indicate its trustworthiness, the court ~~to~~ consider not only the totality of the circumstances under which the statement was made, but also any evidence corroborating it.~~evidence in evaluating whether a statement is supported by "corroborating circumstances that clearly indicate its trustworthiness."~~ While ~~M~~most courts have ~~required the~~ consider~~edation of~~ corroborating evidence, ~~though~~ some courts have refused to do so~~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. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances like the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. It must also consider corroborating information, if any, supporting the statement, such as fingerprint evidence or eyewitness testimony placing the third party in the vicinity of the crime.

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. It is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "unless corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like Donnelly v. United States, 228 U.S. 243 (1912) that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).