



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

HONORABLE ROSLYNN R. MAUSKOPF  
*Secretary*

October 23, 2023

MEMORANDUM

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

From: Judge Roslynn R. Mauskopf *Roslynn R. Mauskopf*  
Secretary

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

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

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

Attachments

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE<sup>1</sup>**

1 **Rule 107. Illustrative Aids**

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

9 **(b) Use in Jury Deliberations.** An illustrative aid is not  
10 evidence and must not be provided to the jury during  
11 deliberations unless:  
12 **(1) all parties consent; or**  
13 **(2) the court, for good cause, orders otherwise.**

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

- 14 **(c) Record.** When practicable, an illustrative aid used at  
15 trial must be entered into the record.
- 16 **(d) Summaries of Voluminous Materials Admitted as**  
17 **Evidence.** A summary, chart, or calculation admitted  
18 as evidence to prove the content of voluminous  
19 admissible evidence is governed by Rule 1006.

#### Committee Note

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term “illustrative aid” is used instead of the term “demonstrative evidence,” as that latter term has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. “Demonstrative evidence” is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the trier of fact thus fall into two categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room during deliberations and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as “illustrative aids,” have also been described as “pedagogical devices” and sometimes (and less helpfully) “demonstrative presentations”—that latter term being unhelpful because the purpose for presenting the information is not to “demonstrate” how an event occurred but rather to help the trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 107.

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence or argument. *Cf.* Fed. R. Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must

weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the trier of fact, the trial court should prohibit the use of—or order the modification of—the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. *Cf.* Rule 105.

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

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk that the jury may unduly emphasize the testimony of a witness with whom it was used, or otherwise misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations.

If the court does allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

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

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

1 **Rule 613. Witness's Prior Statement**

2 \* \* \* \* \*

3 **(b) Extrinsic Evidence of a Prior Inconsistent**  
 4 **Statement.** Unless the court orders otherwise,  
 5 Extrinsic evidence of a witness's prior inconsistent  
 6 statement is admissible only if may not be admitted  
 7 until after the witness is given an opportunity to  
 8 explain or deny the statement and an adverse party is  
 9 given an opportunity to examine the witness about it,  
 10 ~~or if justice so requires.~~ This subdivision (b) does not  
 11 apply to an opposing party's statement under  
 12 Rule 801(d)(2).

**Committee Note**

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *before* the introduction of extrinsic evidence of the statement. This requirement of a prior foundation is consistent with the common law approach to impeachment with prior inconsistent statements. *See, e.g., Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521 (11th Cir. 1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching

statement.”). The existing rule imposes no timing preference or sequence and thus permits an impeaching party to introduce extrinsic evidence of a witness’s prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness’s availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges’ efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court’s discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness’s opportunity to explain or deny a prior inconsistent statement in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness’s statement was not discovered until after the witness testified.



1 **Rule 801. Definitions That Apply to This Article;**  
2 **Exclusions from Hearsay**

3 \* \* \* \* \*

4 **(d) Statements That Are Not Hearsay.** A statement  
5 that meets the following conditions is not hearsay:

6 \* \* \* \* \*

7 **(2) *An Opposing Party's Statement.*** The  
8 statement is offered against an opposing  
9 party and:

10 **(A)** was made by the party in an  
11 individual or representative capacity;

12 **(B)** is one the party manifested that it  
13 adopted or believed to be true;

14 **(C)** was made by a person whom the party  
15 authorized to make a statement on the  
16 subject;

17 **(D)** was made by the party's agent or  
18 employee on a matter within the

19 scope of that relationship and while it  
20 existed; or

21 (E) was made by the party's  
22 coconspirator during and in  
23 furtherance of the conspiracy.

24 The statement must be considered but  
25 does not by itself establish the declarant's  
26 authority under (C); the existence or scope of  
27 the relationship under (D); or the existence of  
28 the conspiracy or participation in it under (E).

29 If a party's claim, defense, or  
30 potential liability is directly derived from a  
31 declarant or the declarant's principal, a  
32 statement that would be admissible against  
33 the declarant or the principal under this rule  
34 is also admissible against the party.

#### **Committee Note**

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's

principal, hearsay statements made by the declarant or principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered. The rule does not apply, however, if the statement is admissible against the agent but not against the principal—for example, if the statement was made by the agent after termination of employment. This is because the successor's potential liability is derived from the principal, not the agent.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

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

4 \* \* \* \* \*

5 **(b) The Exceptions. \* \* \***

6 **(3) *Statement Against Interest.*** A statement that:

7 **(A)** a reasonable person in the declarant's  
8 position would have made only if the  
9 person believed it to be true because,  
10 when made, it was so contrary to the  
11 declarant's proprietary or pecuniary  
12 interest or had so great a tendency to  
13 invalidate the declarant's claim  
14 against someone else or to expose the  
15 declarant to civil or criminal liability;  
16 and

17 **(B)** if offered in a criminal case as one  
18 that tends to expose the declarant to  
19 criminal liability, is supported by

20 corroborating circumstances that  
21 clearly indicate its trustworthiness, ~~if~~  
22 ~~offered in a criminal case as one that~~  
23 ~~tends to expose the declarant to~~  
24 ~~criminal liability—~~after considering  
25 the totality of circumstances under  
26 which it was made and any evidence  
27 that supports or undermines it.

\* \* \* \* \*

#### **Committee Note**

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by “corroborating circumstances that clearly indicate its trustworthiness,” the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it. While most courts have considered evidence independent of the statement, some courts have refused to do so. The rule now provides for a uniform approach and recognizes that the existence or absence of independent evidence supporting the statement is relevant to, but not necessarily dispositive of, whether a statement that tends to expose the declarant to criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the

timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. The court must also consider information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that undermines the declarant's account.

Although it utilizes slightly different language to fit within the framework of Rule 804(b)(3), the amendment is consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. The amendment is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). *See* 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like *Donnelly v. United States*, 228 U.S. 243 (1913), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

1 **Rule 1006. Summaries to Prove Content**

2 **(a) Summaries of Voluminous Materials Admissible**

3 **as Evidence.** The ~~proponent~~ court may admit as  
4 evidence ~~use~~ a summary, chart, or calculation  
5 offered to prove the content of voluminous  
6 admissible writings, recordings, or photographs that  
7 cannot be conveniently examined in court, whether  
8 or not they have been introduced into evidence.

9 **(b) Procedures.** The proponent must make the  
10 underlying originals or duplicates available for  
11 examination or copying, or both, by other parties at  
12 a reasonable time and place. And the court may  
13 order the proponent to produce them in court.

14 **(c) Illustrative Aids Not Covered.** A summary, chart,  
15 or calculation that functions only as an illustrative  
16 aid is governed by Rule 107.

**Committee Note**

Rule 1006 has been amended to correct misperceptions about the operation of the rule by some

courts. Some courts have mistakenly held that a Rule 1006 summary is “not evidence” and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the rule has been amended to clarify that a party may offer a Rule 1006 summary “as evidence.” The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings—or a portion of them—*have been* admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, however, the summary may be admitted in addition to the underlying documents.



A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

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

Although Rule 1006 refers to materials too voluminous to be examined “in court” and permits the trial judge to order production of underlying materials “in court,” the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of voluminous admissible information offered to prove a fact, and illustrations offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 107.

**REPORT OF THE JUDICIAL CONFERENCE**

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 6, 2023. All members participated.

\* \* \* \* \*

**FEDERAL RULES OF EVIDENCE**

***Rules Recommended for Approval and Transmission***

The Advisory Committee on Evidence Rules recommended for final approval proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Evidence Rule 107. The Standing Committee unanimously approved the Advisory Committee’s recommendations with minor changes to the text of Rules 107, 804, and 1006, and minor changes to the committee notes accompanying Rules 107, 801, 804, and 1006.

New Rule 107 (Illustrative Aids)

The distinction between “demonstrative evidence” (admitted into evidence and used substantively to prove disputed issues at trial) and “illustrative aids” (not admitted into evidence but used solely to assist the trier of fact in understanding evidence) is sometimes a difficult one to draw, and the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards. The proposed amendment, originally published for public comment as a new subsection of Rule 611, would

<p style="text-align: center;"><b>NOTICE</b> NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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## **Excerpt from the September 2023 Report of the Committee on Rules of Practice and Procedure**

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

### Rule 613 (Witness’s Prior Statement)

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

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

The proposed amendment to Rule 801(d)(2) would resolve the dispute in the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against the declarant’s successor-in-interest. The Advisory Committee reasoned that admissibility is fair when the successor-in-interest is standing in the shoes of the declarant because the declarant is in substance the party-opponent.

## Excerpt from the September 2023 Report of the Committee on Rules of Practice and Procedure

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

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide “corroborating circumstances that clearly indicate the trustworthiness” of the statement. There is a dispute in the courts about the meaning of the “corroborating circumstances” requirement. The proposed amendments to Rule 804(b)(3) would require that, in assessing whether a statement is supported by corroborating circumstances, the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it. This proposed amendment would help maintain consistency with the 2019 amendment to Rule 807, which requires courts to look at corroborating evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under the residual exception.


### Rule 1006 (Summaries to Prove Content)

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

**Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rules 613, 801, 804, and 1006, and new Rule 107, as set forth in Appendix D, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

\* \* \* \* \*

Respectfully submitted,



John D. Bates, Chair

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

\* \* \* \* \*

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

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

**JOHN D. BATES**  
CHAIR

**H. THOMAS BYRON III**  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**JAY S. BYBEE**  
APPELLATE RULES

**REBECCA B. CONNELLY**  
BANKRUPTCY RULES

**ROBIN L. ROSENBERG**  
CIVIL RULES

**JAMES C. DEVER III**  
CRIMINAL RULES

**PATRICK J. SCHILTZ**  
EVIDENCE RULES

**MEMORANDUM**

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

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

**RE:** Report of the Advisory Committee on Evidence Rules

**DATE:** May 10, 2023

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**I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met in Washington, D.C., on April 28, 2023. At the meeting the Committee discussed and gave final approval to five proposed amendments that had been published for public comment in August 2022. The Committee also tabled a proposed amendment.

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

The Committee made the following determinations at the meeting:

- It unanimously approved proposals to add a new Rule 107 and to amend Rules 613(b), 801(d)(2), 804(b)(3), and 1006, and recommends that the Standing Committee approve the proposed rules amendments and new rule.

\* \* \* \* \*

## II. Action Items

### A. New Rule 107, for Final Approval

At the Spring 2022 meeting, the Committee unanimously approved a proposal to add a new rule to regulate the use of illustrative aids at trial. The distinction between “demonstrative evidence” (admitted into evidence and used substantively to prove disputed issues at trial) and “illustrative aids” (not admitted into evidence but used solely to assist the trier of fact in understanding other evidence) is sometimes a difficult one to draw, and is a point of confusion in the courts. Similar confusion exists in distinguishing a summary of voluminous evidence, covered by Rule 1006, and a summary that is not evidence but rather presented to assist the trier of fact in understanding evidence. In addition, the standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards.

The proposed amendment, published for public comment as a new Rule 611(d), allowed illustrative aids to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. The pitch of that balance was left open for public comment --- whether the negative factors would have to *substantially* outweigh the usefulness of the aid (the same balance as Rule 403), or whether the aid would be prohibited if the negative factors simply outweighed the usefulness of the aid.

Because illustrative aids are not evidence, adverse parties do not receive pretrial discovery of such aids. The proposal issued for public comment would have required notice to be provided, unless the court for good cause orders otherwise. This notice requirement was most controversial when applied to the use of illustrative aids on opening and closing --- leading the Committee to exclude openings and closings from the proposal as issued for public comment.

Lawyer groups (such as bar associations) and the Federal Magistrate Judges’ Association submitted comments in favor of the proposed amendment. But most practicing lawyers were critical. Most of the negative public comment went to the notice requirement; the commenters argued that a notice requirement was burdensome and would lead to motion practice and less use of illustrative aids. Other comments questioned the need for the rule. Others argued (in the face of contrary case law) that the courts were having no problems in regulating illustrative aids.

In light of the public comment, as well as comments from the Standing Committee and those received at the symposium on the rule proposal in the Fall of 2022, the Committee unanimously agreed on the following changes: 1) deletion of the notice requirement; 2) extending the rule to openings and closings (reasoning that after lifting the notice requirement, there was no

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

reason not to cover openings and closings, especially because courts already regulate illustrative aids used in openings and closings and it would be best to have all uses at trial covered by a single rule); 3) providing that illustrative aids can be used unless the negative factors *substantially* outweigh the educative value of the aid (reasoning that it would be confusing to have a different balancing test than Rule 403, especially when the line between substantive evidence and illustrative aids may sometimes be difficult to draw); 4) specifying in the text of the rule that illustrative aids are not evidence; 5) adding a subdivision providing that summaries of voluminous evidence are themselves evidence and are governed by Rule 1006; and 6) relocating the proposal to a new Rule 107 (reasoning that Article VI is about witnesses, and illustrative aids are often used outside the context of witness testimony).

Because illustrative aids are not evidence, the proposed rule provides that an aid should not be allowed into the jury room during deliberations, unless the court, for good cause, orders otherwise. The committee note specifies that if the court does allow an illustrative aid to go to the jury room, the court must upon request instruct the jury that the aid is not evidence.

Finally, to assist appellate review of illustrative aids, the rule provides that illustrative aids must be entered into the record, unless it is impracticable to do so.

The Committee strongly believes that this rule on illustrative aids will provide an important service to courts and litigants. Illustrative aids are used in almost every trial, and yet nothing in the rules specifically addresses their use. This amendment rectifies that problem.

*At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed new Rule 107. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.*

\* \* \* \* \*

### **B. Proposed Amendment to Rule 1006, for Final Approval<sup>1</sup>**

Evidence Rule 1006 provides that a summary can be admitted as evidence if the underlying records are admissible and too voluminous to be conveniently examined in court. The courts are in dispute about a number of issues regarding admissibility of summaries of evidence under Rule 1006 --- and much of the problem is that some courts do not properly distinguish between summaries of evidence under Rule 1006 (which are themselves admitted into evidence) and summaries that are illustrative aids (which are not evidence at all). Some courts have stated that summaries admissible under Rule 1006 are “not evidence,” which is incorrect. Other courts have stated that all of the underlying evidence must be admitted before the summary can be admitted; that, too, is incorrect. Still other courts state that the summary is inadmissible if any of the underlying evidence *has* been admitted; that is also wrong.

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<sup>1</sup> This rule is taken out of numerical sequence because it is of a piece with the proposed amendment on illustrative aids.



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

After extensive research and discussion, the Committee unanimously approved an amendment to Rule 1006 that would provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006.

The proposal to amend Rule 1006 dovetails with the proposal to establish a rule on illustrative aids, discussed above. These two rules serve to distinguish a summary of voluminous evidence (which is itself evidence and governed by Rule 1006) from a summary that is designed to help the trier of fact understand admissible evidence (which summary is not itself evidence and would be governed by new Rule 107). The proposed amendment to Rule 1006 would clarify that a summary is admissible whether or not the underlying evidence has been admitted. The Committee believes that the proposed amendment will provide substantial assistance to courts and litigants in navigating this confusing area.

The rule proposal for public comment received only a few public comments, largely favorable.

*At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 1006. The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.*

\* \* \* \* \*

### **C. Proposed Amendment to Rule 613(b) for Final Approval**

The common law provided that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. The existing Rule 613(b) rejects that “prior presentation” requirement. It provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity to explain or deny the statement at some point in the trial. It turns out, though, that most courts have retained the common law “prior presentation” requirement. These courts have found that a prior presentation requirement saves time, because a witness will often concede that she made the inconsistent statement, and that makes it unnecessary for anyone to introduce extrinsic evidence. The prior presentation requirement also avoids the difficulties inherent in calling a witness back to the stand to give her an opportunity at some later point to explain or deny a prior statement that has been proven through extrinsic evidence.

The Committee has unanimously determined that the better rule is to require a prior opportunity to explain or deny the statement, with the court having discretion to allow a later opportunity (for example, when the prior inconsistent statement is not discovered until after the witness testifies). The amendment will bring the rule into alignment with what appears to be the practice of most trial judges --- a practice that the Committee concluded is superior to the practice described in the current rule.

The rule published for public comment provides that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny

the statement. It gives the court the discretion to dispense with the requirement, in order to allow flexibility. The default rule brings the courts into uniformity and opts for the rule that provides more fairness to the witness and a more efficient result to the court. The rule received only a few public comments, largely favorable.

*At the Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 613(b). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.*

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#### **D. Proposed Amendment to Rule 801(d)(2) Governing Successors-in-Interest, for Final Approval**

Rule 801(d)(2) provides a hearsay exemption for statements of a party opponent. Courts are split about the applicability of this exemption in the following situation: a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another (either by agreement or by operation of law), and it is the transferee that is the party-opponent. Some circuits would permit the statements made by the declarant to be offered against the successor as a party-opponent statement under Rule 801(d)(2), while others would foreclose admissibility because the statement was made by one who is technically not the party-opponent in the case.

The Committee has determined that the dispute in the courts about the admissibility of party-opponent statements against successors should be resolved by a rule amendment, because the problem arises with some frequency in a variety of predecessor/successor situations (most commonly, decedent and estate in a claim brought for damages under 42 U.S.C. § 1983). The Committee unanimously determined that the appropriate result should be that a hearsay statement would be admissible against the successor-in-interest. The Committee reasoned that admissibility was fair when the successor-in-interest is standing in the shoes of the declarant --- because the declarant is in substance the party-opponent. Moreover, a contrary rule results in random application of Rule 801(d)(2), and possible strategic action, such as assigning a claim in order to avoid admissibility of a statement. The Committee approved the following addition to Rule 801(d)(2):

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

The proposed committee note emphasizes that to be admissible against the successor, the declarant must have made the statement before the transfer of the claim or defense. It also specifies that if a statement made by an agent is not admissible against a principal, then it is not admissible against any successor to the principal.

The rule as published for public comment received only a few comments, largely favorable.

*At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 801(d)(2). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.*

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### **E. Proposed Amendment to the Rule 804(b)(3) Corroborating Circumstances Requirement, for Final Approval**

Rule 804(b)(3) provides a hearsay exception for declarations against interest. In a criminal case in which a declaration against penal interest is offered, the rule requires that the proponent provide “corroborating circumstances that clearly indicate the trustworthiness” of the statement. There is a dispute in the courts about the meaning of the “corroborating circumstances” requirement. Most federal courts consider both the inherent guarantees of trustworthiness underlying a particular declaration against interest as well as independent evidence corroborating (or refuting) the accuracy of the statement. But some courts do not permit inquiry into independent evidence --- limiting judges to consideration of the inherent guarantees of trustworthiness surrounding the statement. This latter view --- denying consideration of independent corroborative evidence --- is inconsistent with the 2019 amendment to Rule 807 (the residual exception), which requires courts to look at corroborative evidence, if any, in determining whether a hearsay statement is sufficiently trustworthy under that exception. The rationale is that corroborative evidence can shore up concerns about the potential unreliability of a statement --- a rationale that is applied in many other contexts, such as admissibility of co-conspirator hearsay, and tips from informants in determining probable cause.

The Committee believes that it is important to rectify the dispute among the circuits about the meaning of “corroborating circumstances” and that requiring consideration of corroborating evidence not only avoids inconsistency with the residual exception, but is also supported by logic and by the legislative history of Rule 804(b)(3).

The proposal published for public comment provided as follows:

#### **Rule 804(b)(3) Statement Against Interest.**

A statement that:

- (A) A reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and
- (B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it is supported by corroborating circumstances that clearly indicate trustworthiness --- after considering the

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

totality of circumstances under which it was made and evidence, if any, corroborating it, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

There were only a few public comments to the rule, and all were favorable about requiring consideration of corroborating evidence. But there was some confusion about the two different uses of the word “corroborating” in the rule. What is the difference between “corroborating circumstances” and “corroborating evidence”? The answer is that “corroborating circumstances” is a term of art --- an undeniably confusing one, because it combines the notion of corroborating evidence and circumstantial guarantees of trustworthiness. In contrast, “corroborating evidence” refers to independent evidence that supports the declarant’s account --- under the proposal, that kind of information must be considered in assessing whether “corroborating circumstances” are found.

In using the term “corroborating evidence” the Committee was intending to use the exact language that was adopted in the residual exception, Rule 807, in 2019. But after considerable discussion at the Spring 2023 meeting, the Committee concluded that the better result would be to use a different word than “corroborating”; the deviation from the Rule 807 language is justified by the fact that Rule 807 refers to “trustworthiness” --- not “corroborating circumstances” --- so use of “corroborating” in that rule is not confusing. The Committee determined that it could reach the same result with different terminology.

The proposal unanimously approved by the Committee, for which it seeks final approval, reads as follows:

**Rule 804(b)(3) Statement Against Interest.**

A statement that:

- (A) A reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability; and
- (B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it is supported by corroborating circumstances that clearly indicate trustworthiness --- after considering the totality of circumstances under which it was made and any evidence that supports or contradicts it. ~~if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.~~

A major advantage of this revision is that (freed from uniformity with Rule 807) it can specifically require the court to consider both evidence supporting the statement and evidence that contradicts it.

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

*At its Spring 2023 meeting, the Committee unanimously gave final approval to the proposed amendment to Rule 804(b)(3). The Committee recommends that the proposed amendment, and the accompanying Committee Note, be approved by the Standing Committee.*

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## **ERRATA**

April 2024: Before this package was sent to Congress, corrections were made to correct scrivener's errors in Bankruptcy Rule 1007(c)(4)(B) at page 1013 and Bankruptcy Rule 1007(c)(5) at page 576.

## Basics of Cross Examination<sup>1</sup>

### I. IN GENERAL

- A. Scope is limited (the so called “American” or “restrictive” view) to matters that:
  - 1. Are raised on direct
  - 2. Affect credibility, or
  - 3. Are otherwise allowed in the discretion of the court
- B. Judges frequently allow, within reason, things outside the scope of direct to avoid having to recall the witness. Saves time. Leading v. Non-leading questions should be clarified. Depends on length of exam, adversity of witness. FRE 611(c)(3)

### II. THE PURPOSES

- A. Discredit the witnesses testimony (Impeachment).
- B. Prove your points to the jury.
- C. If you can't do A or B pass the witness.

### III. BEST PRACTICES

- A. Have a plan. Be organized. Don't jump all over.
- B. All leading questions. Don't let witness explain. Control the W.
- C. Be Brief- hit and run. Jury just sat through a typically long direct. Note, Jury Attention is waning.
- D. Don't rehash the direct.

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- E. Don't ask if you don't know the answer already.
- F. Don't impeach on silly or trivial points. Don't impeach endlessly.
- G. Know the methods and proper ways to impeach.
- H. Don't beat up witnesses just because you can.
- I. Know when to stop. Don't let the witness off the hook by explaining away their testimony
- J. Don't argue with the witness. They will rarely agree they are wrong and you won't convince them otherwise. Make your points and then later argue their inconsistencies and inaccuracies.
- K. Stop on a high note. Also your exit strategy for when things fall apart.

#### IV. KEY AREAS OF IMPEACHMENT

- A. Perception. FRE 602.
- B. Recollection.
- C. Communication. Choice of language, terms used, maybe someone else's words.
- D. Conviction of a Crime. FRE 609.
- E. Bad Acts. Must bear on credibility/honesty. FRE 404(b) and 608(b)(1).
- F. Impeachment of a character witness on another witness's character for truthfulness. FRE 608(b)(2).
- G. Prior Inconsistent Statements. Contrast with Refreshing Recollection. (Which actually helps or "credits" the witness). FRE 613 and 612. Must be exact-no paraphrasing.
- H. Reputation. Truthfulness/untruthfulness. Needs a 3dP Witness. FRE



608

- I. Bias, Interest, Corruption, Prejudice.
- J. Rebuttal witness to a character witness. FRE 608 and 405.
- K. Contradictory evidence.

V. TECHNOLOGY

- A. Needs to be immediately available for use. Co-counsel or A/V techs are helpful here.
- B. Needs captioning on Video and transcript on Audio.
- C. Documents can be cropped to their essence.
- D. Always have a hard copy back up.



## Cross Examination

By Anthony J. Battaglia, U.S. District Judge© 2014

### Why Do We Do It?

1. To discredit the witness.
2. To gain a few favorable bits of evidence where not otherwise available.

### Scope of Cross Examination

1. FRE 611. “The American or Restrictive Rule”, that Cross should be limited to the subject matter of the direct exam and matters affecting the credibility of the witness.
2. Court may permit inquiry into additional matters as if on direct.

### Discrediting the Witness (Impeachment: calling into question the credibility of a witness)

1. The Oath FRE 603
2. Flawed perception (no personal knowledge). FRE602
3. Witnesses memory is partial or incomplete or untrustworthy
4. Witness’s ability to communicate is so weak as to render unreliable.
5. Bias, Prejudice, interest, corruption.
6. Conviction of crime. FRE 609
  - a. Any Felony or other crime whose elements required proof of dishonesty or false statement.
  - b. Fact of conviction typically
7. Prior Inconsistent Statement.
  - a. FRE 613
  - b. Get witness to commit to contrary statement
  - c. Don’t have to show the witness first.
  - d. Do it in something important and selectively.
  - e. Contrast with refreshed recollection
8. Character Witness. FRE 608(a)and (b) and 405 (methods of proof).

Elements of  
Competence

9. Bad Acts. Conduct probative of the character for truthfulness or untruthfulness. Cross exam of character witness. FRE 608(b)
10. Contradictory evidence.

### **Other Thoughts**

1. Keep it short.
  - a. Have a short list of objectives.
  - b. Use Leading Questions.
  - c. Don't emphasize or reiterate adverse testimony you can't discredit.
  - d. Don't do a chronological review of direct.
  - e. Don't ask questions when you do not know what the answer will be.
2. Don't ask questions where you do not know what the answer will be.
3. Don't argue with the witness trying to prove them wrong. Save argument for the jury.
4. Technology.
  - a. Use it!
  - b. Needs to be immediately available for use. Paper back up recommended.
  - c. Video needs captioning and audio needs a transcript.
  - d. Crop to their essence, redact what you must.
5. Pace is important.
6. End on a high note!