Advisory Committee on Evidence Rules
Minutes of the Meeting of May 6, 2022
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on May 6, 2022 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Committee were present:
Hon. James P. Bassett
Hon. Thomas D. Schroeder
Elizabeth J. Shapiro, Esq., Department of Justice
Arun Subramanian, Esq.
Hon. Richard J. Sullivan
Rene Valladares, Esq., Federal Public Defender

The following members of the Committee were present Via Microsoft Teams:
Hon. Patrick J. Schiltz, Chair
Traci L. Lovitt, Esq.

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. 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
Andrew Goldsmith, Esq., Department of Justice
Bridget M. Healy, Counsel, Rules Committee
Scott Myers, Rules, Counsel, Rules Committee
Brittany Bunting, Rules Committee Staff
Allison Bruff, Rules Committee
Burton Dewitt, Rules Clerk
Timothy Lau, Esq., Federal Judicial Center

Present Via Microsoft Teams:
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Joe Cecil, Berkeley Law School
Sri Kuehnlenz, Esq., Cohen & Gresser LLP
Abigail Dodd, Senior Legal Counsel Shell Oil Company
Alex Dahl, Strategic Policy Counsel
John G. McCarthy, Esq., Federal Bar Association

Lee Mickus, Esq., Evans Fears & Schuttert LLP
Mark Cohen, Esq., Cohen & Gresser LLP
Leah Lorber, Esq., GSK
John Hawkinson, Freelance Journalist
Joshua B. Nettinga, Lt. Colonel, Judge Advocate General's Group
Nate Raymond, Reuters Legal Affairs
James Gotz, Esq., Hausfeld

I. Opening Business

Announcements

The Chair welcomed everyone to the meeting and stated that he wished he could be present but that he was recovering from COVID. He thanked the Reporter and the Academic Consultant for the extraordinarily high caliber of the materials in the agenda book. The Chair then invited all participants to introduce themselves.

After the introductions, the Chair noted that two members of the Committee were rotating off of the Committee after six years of devoted service. He thanked Justice Bassett and Traci Lovitt for their invaluable contributions to the work of the Committee and invited each to share remarks. Justice Bassett thanked the Chair and the Committee for the opportunity of a lifetime to contribute to the work of the Committee. He stated that he wished every judge and lawyer could witness the careful deliberative process of the Committee and the thought and attention to detail that goes into every word chosen for a rule or committee note. He further noted the importance of comity between federal and state courts and the importance of including state court judges in the work of the Committee. Traci Lovitt stated that it was a sincere honor to be a part of the Committee's work. She praised the intellectual firepower around the table and stated that she was in awe of the extraordinary work that goes into the rulemaking process.

The Chair then gave a brief report on the January, 2022 Standing Committee meeting, explaining that the Evidence Rules Advisory Committee had only informational items regarding work on several potential amendments to share with the Standing Committee. He noted that there was a great deal of interest in proposals regarding illustrative aids and safeguards for juror questions.

Approval of Minutes

A motion was made to approve the minutes of the November 5, 2021 Advisory Committee meeting. 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 that had been released for public comment, explaining that the public comment period had closed in February, 2022. He explained that the issue for the Committee was whether to approve the three proposed amendments to be transmitted to the Standing Committee and the Judicial Conference.

A. Rule 106

The Reporter called the Committee's attention to the published proposal to amend Rule 106, the rule of completeness. That proposal appeared on page 98 of the agenda book. He reminded the Committee that the proposal would make two changes to the existing rule. First, it would allow completion of all statements in any form. This would be a change from the current rule that applies only to written or recorded statements and would permit completion of unrecorded, oral statements. He noted that many jurisdictions already permit completion of oral statements through Rule 611(a) and the common law and that the amendment would bring completion of all statements under one rule. Second, the Reporter reminded the Committee that the amendment to Rule 106 would allow completion over a hearsay objection because a party who presents a portion of a statement in a manner that distorts the meaning of that statement forfeits the right to object to completion based upon hearsay. He lauded the Committee for its unanimous approval of an amendment to Rule 106 after many years of work.

The Reporter explained that there were few public comments on the proposed amendment to Rule 106, but that the comments that were received were largely positive. Even so, the Committee decided to make small changes to the language of the rule text that was published for comment. First, the published amendment would have covered "written or oral statements." But it was pointed out that some statements may be neither written nor oral. Assertive conduct is considered a statement and American Sign Language represents a form of communication that contains assertive statements that are not oral or written, but that should be subject to completion. For that reason, the Committee at its last meeting determined to remove the modifiers "written or oral" from the text of the amendment, such that Rule 106 would cover "statements" in any form. The Reporter noted that a version of the amendment deleting "written or oral" from rule text appeared on page 106 of the agenda book. The Reporter further noted that some corresponding changes would need to be made to the committee note to reflect that alteration. He directed the Committee's attention to page 107 of the agenda book where the language of the paragraph that began "Second, Rule 106 has been amended" had been revised to reflect that the amendment would apply to statements "in any form – including statements made through conduct or sign language." A Committee member noted that the modifiers "written or oral" would also need to be deleted from line 180 on page 108, and the Reporter made the change. Another Committee member inquired whether the modifier "oral" should also be deleted from line 140 on page 107 of the agenda book that read "Second, Rule 106 has been amended to cover all statements, including oral statements that have not been recorded." The Reporter responded that the modifier "oral" should remain in that sentence of the note as an example of what the amendment would permit. He noted that the completion of oral statements through Rule 106 was a principal innovation of the amendment and that, while it was important to include assertive conduct, the amendment would be used much more commonly to allow completion of oral statements. The Chair agreed that he would prefer to leave the word "oral" in line 140 on page 107 of the committee note to reflect the fact that most of the practical impact of the expansion to all statements would be with respect to the coverage of oral statements.

The Reporter suggested one additional change to the committee note. He proposed deleting a sentence in the committee note on page 100 of the agenda book that stated that "the results under this rule as amended will generally be in accord with the common-law doctrine of

completeness at any rate." The Reporter explained that this sentence was unnecessary to explain the operation of the amended rule and that the common law included various iterations of the rule of completeness before it was codified in Rule 106. Thus, he recommended deleting the entire sentence. By consensus, the Committee agreed with the recommendation.

The Chair then sought the Committee's vote on whether to approve an amendment to Rule 106 and the accompanying note reflecting these changes (appearing on pages 106-108 of the agenda book), with the added change to line 180 on page 108 to delete the words "written or oral." Participating Committee members unanimously approved the proposed amendment to Rule 106 and the accompanying note.

B. Rule 615

Next, the Reporter called the Committee's attention to the proposal to amend Rule 615, the rule of witness sequestration. He explained that there was a deep division in the courts about the scope of a Rule 615 order. Some courts hold that a Rule 615 order extends only to the courtroom doors and does not protect against witness access to testimony outside the courtroom. The Reporter explained that this is problematic because sequestration is not effective if witnesses may access testimony from outside the courtroom. For that reason, other courts hold that a Rule 615 order automatically extends beyond the courtroom to control witness access to information. The Reporter explained that this approach is also problematic because Rule 615 does not extend so far on its face. For this reason, the Committee published a proposed amendment to Rule 615 that would clarify that a Rule 615 order automatically covers only access to testimony inside the courtroom, but that a trial judge may extend protection outside the courtroom in her discretion. The proposal also addressed a subsidiary issue regarding how many representatives an entity party may designate as exempt from sequestration under Rule 615(b). While the vast majority of courts recognize that an entity party may designate only one representative under Rule 615(b) to provide parity with individual parties, some courts allow multiple designations. The proposed amendment would clarify that an entity party may designate only one representative as of right under subsection (b) and must show that any additional exempt witnesses are "essential to presenting the party's claim or defense" under Rule 615(c).

The Reporter explained that public comment on the proposal was sparse but positive and that the Magistrate Judge's Association thought the amendment would be a useful addition. The Reporter asked that the Committee consider two minor changes to the committee note based on the public comment. First, he explained that the AAJ helpfully suggested that all references to an "agent" in the committee note should be changed to "representative" to track the text of the rule. He called the committee's attention to page 117 of the agenda book to see the proposed change. He further noted that the NACDL suggested elimination of the citation to the *Arayatanon* case in the committee note. The Reporter explained that the case did support the proposition for which it was cited -- that a court may approve multiple exemptions from sequestration for witnesses "essential" to prove a party's case – but that the case also suggested that the opponent of the exemption had to disprove essentiality. Because the burden of proof is on the party seeking the exemption, including this citation in the committee note could muddle the proper burden of proof. The Reporter recommended deletion of the citation for that reason.

The Chair then sought the Committee's approval of the proposed amendment to Rule 615 with no changes to the rule text and two minor changes to the note – to replace the word "agent" with the word "representative" and to eliminate the case citation. Participating Committee members unanimously approved the proposed amendment to Rule 615. The Reporter opined that the amendment was a perfect one for the Committee to advance because the courts are deeply divided and because the amendment will offer concrete and practical clarification for courts and litigants.

C. Rule 702

The Reporter reminded the Committee that it had been considering clarifying amendments to Rule 702 since 2016 and that the project had culminated in two proposals. First, the proposed amendment published for comment would seek to limit overstatement by testifying experts by emphasizing that trial judges must determine that the opinions expressed by an expert reflect a reliable application of the expert's principles and methods to the facts of the case. Second, the amendment would emphasize that Rule 104(a) applies to Rule 702, requiring a trial judge to find the admissibility requirements satisfied by a preponderance of the evidence before submitting expert opinion testimony to the trier of fact over objection.

The Reporter explained that there was a large volume of public comment. Although there was substantial support for the amendment, a large volume of public comments were negative. Upon close inspection, many of the comments appeared to be "cut and paste" comments quoting identical phrases and talking points. The Reporter further noted that the negative comments were reminiscent of – and sometimes virtually identical to -- the comments received in opposition to the 2000 amendment to Rule 702. Predictably, the comments fell along party lines. The defense bar generally favors the amendment, and the plaintiffs' bar generally opposes it. He explained that a division of opinion about an amendment along party lines does not necessarily suggest that an amendment should not be approved so long as the amendment is the product of sound and neutral rulemaking principles. The Reporter noted that many successful amendments, such as the recent amendment to the notice provision of Rule 404(b), were favored by one side and not the other. Finally, the Reporter noted that the negative commentary about the proposed amendment usurping the role of the jury actually demonstrates the need for the amendment, as such comments reflect a fundamental misunderstanding that a jury decides the admissibility of expert opinion testimony. Rule 104(a) already applies to the admissibility requirements of Rule 702, demanding that the judge alone determine whether those requirements are satisfied. Comments arguing for a role for the jury reflect the very misunderstanding that underscores the need to emphasize the applicable Rule 104(a) standard. The Reporter nonetheless noted that several minor changes to the rule text and committee note could be considered to address some of the concerns raised in the public comment.

The Reporter explained that the negative public commentary took issue with the use of the phrase "preponderance of the evidence" in the text of the proposed amendment. He noted that the requirements of Rule 702 are undoubtedly preliminary questions of admissibility governed by Rule 104(a). He further noted that it was the Supreme Court in *Bourjaily v. United States* that held that the "preponderance of the evidence" standard applies to the judge's Rule 104(a)

findings. So, the preponderance of the evidence standard already governs. And the point of the amendment is to emphasize and clarify that fact for the courts that have missed it.

Still, the Reporter explained that many of the commenters opined that the preponderance of the evidence standard carries with it a connotation of fact-finding by the jury. The Reporter suggested that the phrase "more likely than not" describes the preponderance of the evidence standard and could be employed in rule text instead. The Chair noted that some commenters also expressed concern that "preponderance of the evidence" language could suggest that the trial judge is limited to admissible evidence in considering the requirements of Rule 702, which is inconsistent with Rule 104(a). He explained that it was not necessary to trade "preponderance of the evidence" language for "more likely than not" language, but that it could be beneficial to avoid what appeared to be a term that was a lightning rod for negative public comment. Some Committee members suggested that there was no need to make a change because all competent lawyers and judges understand that the preponderance of the evidence standard is not restricted to juries. If the public comment on the point appeared to be a "talking points campaign" rather than constructive feedback, perhaps there is no need to modify accurate rule language in response to it. Another Committee member suggested that the amendment might require a finding "by a preponderance" and avoid the remainder of the phrase "of the evidence." The Reporter suggested that such language might be too abrupt and may not satisfy the commenters concerned about "preponderance" language in any event. The committee consensus was to change the language in the text of the amendment from "preponderance of the evidence" to "more likely than not." Though the Committee felt that this change was unnecessary and would not alter the standard of review employed by the trial court in evaluating the admissibility of expert testimony, the Committee ultimately concluded that there was value in making a modification to respond to the public comment.

Some Committee members expressed concern that the change might be interpreted to signal a substantive change in the governing standard when no change is intended because the "preponderance of the evidence" standard and the "more likely than not" standard are equivalent. The Reporter responded that changes could be made in the Advisory Committee's note to ensure that the change would not be misconstrued. The Chair noted that several changes to the note suggested prior to the meeting would actually increase the risk of a misunderstanding, as they eliminate virtually all references to "preponderance of the evidence." He argued that, if the phrase "preponderance of the evidence" was replaced by "more likely than not" in the rule text, then the committee note should be crystal clear that the two phrases were equivalent. The Reporter noted that the note includes a citation to the Supreme Court's decision in *Bourjaily* that does articulate the preponderance of the evidence standard, but he suggested that the Committee might wish to add a sentence to the note directly stating that "more likely than not" means a "preponderance of the evidence." The Chair proposed adding the following sentence to the first paragraph of the note immediately after the citation to Rule 104(a): "This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules." Committee members agreed that this sentence should be added to avoid any inference that the Committee intended to alter the applicable standard by switching the language of the text from "preponderance of the evidence" to "more likely than not." Judge Kuhl explained that she had suggested switching to "more likely than not" in the note to avoid using the term "by a preponderance" without "of the evidence." She agreed that using "preponderance

of the evidence" in the note was appropriate. She also pointed out that she had suggested a citation in the note to the 2000 committee note to Rule 702 that cited the Supreme Court's opinion in *In re Paoli* to distinguish the court's preliminary findings regarding the admissibility of an expert from merits findings with respect to the expert's opinion.

One Committee member queried whether the second paragraph of the note was superfluous in light of the added sentence equating the more likely than not standard with the preponderance of the evidence standard. The Reporter responded that the second paragraph of the note was important to eliminate any negative inference about the application of the Rule 104(a) standard to other evidence rules that do not explicitly reference it. Rule 104(a) applies to preliminary findings of admissibility without being articulated in every evidence rule. An amendment to Rule 702 articulating the standard expressly was necessary because courts were failing to apply it in this context.

Next, the Reporter explained that there were several public comments urging the Committee to reinsert the language "if the court finds" into the text of the amendment. These comments noted that the reason for the amendment is confusion about the respective roles of judge and jury in deciding admissibility of expert testimony. These commenters argued that the text of the amendment should specify that it is "the court" that must "find" the requirements of Rule 702 satisfied before submitting the opinion to the jury, lest courts continue to defer to juries about the sufficiency of an expert's basis and the reliable application of principles and methods to the facts of the case even after the amendment. The Reporter explained that some Committee members had concerns about the language "the court finds" and that an alternative that would achieve the same purpose could be to require that "the proponent demonstrates <u>to the court</u> that it is more likely than not that." One Committee member stated that the amended text should not require the proponent to demonstrate the Rule 702 requirements in every case because no demonstration is necessary in the absence of an objection from the other side. The Committee member suggested that such language could be read as a pre-clearance requirement for all expert testimony even without any objection and that this would be an unintended change in well-established practice. The Reporter stated that it is implicit in all of the evidence rules that the court is not required to rule in the absence of objection and that no pre-clearance requirement would be inferred due to that fundamental norm. Still, he noted that language might be added to the committee note clarifying that no finding would be necessary in the absence of objection.

Judge Bates inquired whether adding the caveat requiring an objection would make a substantive change to the amended rule in the note. The Reporter explained that the caveat in the note about an objection would not change the text of the rule but would instead underscore a generally applicable principle. The Reporter for the Standing Committee concurred that it is important to avoid adding substantive material to notes but agreed with the Reporter that this particular addition to the note would simply bring to light an underlying assumption, and that such a change would be appropriate. A Committee member then suggested a sentence in the note clarifying that there is no gatekeeping obligation in the absence of objection. Several judges objected, noting that plain error review requires a level of gatekeeping in all circumstances – even in the absence of an objection. They argued that it would be more accurate to state that *the amendment* does not require the court to make findings of reliability in the absence of objection, rather than to say that judges have no obligation whatsoever to consider whether expert

testimony is reliable in the absence of an objection. The Committee ultimately decided to add a sentence to the second paragraph of the note stating that: "Nor does the rule require that the court make a finding of reliability in the absence of objection." This sentence avoids any notion that the rule imposes a pre-clearance requirement without undermining a court's duty to avoid plain error.

The Chair then asked the Committee whether all members were supportive of the proposed changes discussed thus far: 1) a change to the text of the rule to state: "if the proponent demonstrates to the court that it is more likely than not that"; 2) a new sentence in the first paragraph of the note equating the preponderance of the evidence standard and the more likely than not standard; and 3) a new sentence in the second paragraph of the note clarifying that the amendment does not require the court to make findings in the absence of objection. All Committee members agreed to these changes.

The Reporter next called the Committee's attention to the paragraph in the note describing the reason for the change to Rule 702(d) to avoid expert overstatement. He explained that some of the public comment suggested that the note language was insulting to jurors because it stated that jurors "may be unable to evaluate" and "unable to assess" expert methodology and conclusions. The Reporter explained that there was certainly no intent to insult jurors and suggested that the note might provide that jurors lack the "background knowledge" necessary to assess expert methodology and conclusions. Another participant queried whether "background knowledge" was the best terminology to describe jurors' ability to assess expert methodology. He suggested using the term "specialized" knowledge as that language is already used in Rule 702 to describe the type of knowledge that experts possess and laypersons do not. The Committee agreed to use the term "specialized" knowledge in the seventh paragraph of the note.

The Reporter then noted that additional changes to the first two sentences of the seventh paragraph of the note regarding overstatement had been suggested to emphasize the trial judge's "ongoing" gatekeeping authority with respect to the opinions expressed by an expert witness during trial testimony. Other Committee members questioned whether a trial judge has an "ongoing" obligation with respect to Rule 702 after finding expert testimony admissible. The Reporter explained that this was the purpose of the amendment to Rule 702(d) – to emphasize the trial judge's ongoing obligation to prevent an admitted expert from testifying to unsupported overstatements like a "zero error rate." The Chair suggested combining the first and second sentences of the seventh paragraph of the note – which essentially say the same thing – and avoiding the term "ongoing." The combined sentence would read: "Rule 702(d) has also been amended to emphasize that each expert's opinion must stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology." All agreed that this was a constructive change. The Committee also agreed to remove the word "extravagant" from the final sentence of the note. The Chair also proposed deleting the words "of course" from the third paragraph of the note and adding numbers 1) and 2) to the sections of the note discussing the two features of the amendment. Another Committee member suggested that the third paragraph of the note should say that: "the fact that the expert has not read every single study that exists *may* raise a question of weight" instead of "*will* raise a question of weight."

A Committee member then moved to approve the amendment to Rule 702 with the changes to the rule text and note agreed upon at the meeting. The rule text would be changed to read "if the proponent demonstrates to the court that it is more likely than not that" with corresponding changes to the note to equate the "more likely than not" standard with the "preponderance of the evidence" standard. The note would also include a sentence clarifying that the amendment does not require findings of reliability in the absence of objection. It would use "specialized knowledge" to describe the foundation that jurors lack. It would add organizing numbers, would condense the first two sentences of the seventh paragraph, and eliminate the words "of course" from the note. It would also eliminate the word "extravagant" and include a citation to the 2000 Advisory Committee's note to Rule 702. The motion was seconded and unanimously approved by all participating Committee members. The Reporter reminded the Committee of the almost six years of work on the amendment to Rule 702 and recognized its approval as a breathtaking moment. He thanked Committee members and liaisons for their important and helpful contributions. The Chair agreed, stating that the amendment would leave evidence law better than the Committee found it.

III. Proposed Amendments for Publication

The Reporter explained that there were several proposals to publish amendments for notice and comment before the Committee.

A. Rule 611(d)/Rule 1006

The Reporter introduced proposals to amend Rule 611 to add a new subsection (d) and to update Rule 1006, explaining that the Committee would be voting on whether to approve these amendments for publication. He reminded the Committee that the amendment to Rule 611 would add a provision regulating the use of illustrative aids at trial, noting that illustrative aids are used routinely but that no provision regulates them specifically. He explained that the separate companion amendment to Rule 1006 would help resolve court confusion about the difference between summaries used as illustrative aids and summaries offered into evidence to prove the content of voluminous records.

1. Illustrative Aids

The Reporter called the Committee's attention to the proposed amendment to Rule 611 appearing on page 234 of the agenda book to note two minor suggested changes to the draft previously reviewed by the Committee. The term "jury" in proposed Rule 611(d)(1)(A) would be changed to "factfinder" because the factfinder might be the judge and not a jury in a bench trial, which would also be governed by the new rule. The verb "are" in line 44 on page 235 of the agenda book would be changed to "is" to conform to the singular tense used earlier in the sentence. A Committee member suggested that the term "trier of fact" be used in subsection (d)(1)(A) instead of factfinder to track the use of that language in Rule 702 and all agreed.

The Reporter explained that there were questions raised at the Standing Committee meeting about the notice provision in the rule that would require advance disclosure of an illustrative aid to the opposing party. The concern was that some lawyers would object to

showing the power point presentation to be used in their closing arguments to their opponents in advance. The Reporter noted that the notice provision was a flexible one that might make 5-minute advance notice adequate in a circumstance such as that, but queried whether the Committee wanted to make notice discretionary to allow the judge to dispense with notice altogether in certain circumstances. He also suggested that the Committee might publish the proposal with the existing notice provision to collect public input on the appropriate notice for illustrative aids. The Reporter also highlighted the bracketed material in the sixth paragraph of the committee note discussing notice "at a jury trial" and queried whether the Committee wished to so limit the reach of the rule. The Chair noted that notice would be appropriate in a bench trial as well and suggested deleting the bracketed material. The Chair also noted that line 82 of the note on page 236 of the agenda book discussed "use of the aid by the jury" and proposed changing it to "consideration of the aid by the jury."

Another participant asked why subsection (d)(3) of the proposed rule would require that an illustrative aid be marked as an exhibit when it is not evidence. The Chair responded that having illustrative aids in the record is crucial for appellate review in case the appellant argues that the trial judge erred by allowing use of the illustrative aid. The participant asked how a trial judge should handle impermanent aids like chalks or dry erase boards or layered aids that change as testimony comes in. She queried how a trial judge would mark aids such as these to be included in the record. The Chair observed that there would be a notice problem with illustrative aids that were created in "real time" (such as writing on a dry erase board), as well as a problem marking them for the record. The Reporter suggested modifying Rule 611(d)(3) to read: "Where practicable, an illustrative aid that is used at trial must be entered into the record." This would allow flexibility for developing aids such as chalk or dry erase drawings. He noted that lines 87-88 of the committee note on page 236 of the agenda Book would also need to be modified to read: "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 where practicable."

For the same reason, the Reporter opined that the text of the notice provision in Rule 611(d)(1)(b) should also be altered to read: "all parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use, unless the court for good cause orders otherwise." He also noted that the committee note would need to be changed as well, such that lines 65-67 of the note on page 236 of the agenda book would now provide: "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 unless the court for good cause orders otherwise." The Chair noted that line 30 of the note on page 235 of the agenda book needed a comma inserted after "to study it" and that line 39 should read "a source of evidence" and not "another source of evidence" (as an illustrative aid is not evidence). The Chair also questioned the reference in the note to use of an aid as substantive evidence as "the most likely problem" with illustrative aids, suggesting that misleading the jury might be a bigger problem. The Reporter responded that use of illustrative aids as substantive evidence is certainly a significant problem that the amendment is seeking to correct and suggested that the note say "one problem being" instead of "the most likely problem." Another Committee member pointed out that line 75 of the note on page 236 of the agenda book incorrectly stated that illustrative aids are "admissible only in accompaniment with testimony" when illustrative aids aren't admissible

evidence at all. All agreed that the note should say that illustrative aids are "used only in accompaniment with testimony."

Judge Bates asked whether the amendment as drafted would require lawyers to reveal their closing argument power point presentations to opposing counsel in advance. He explained that his sense was that different judges currently handle that issue differently and inquired whether the rule change would now require all judges to order disclosure. The Reporter suggested that lawyers will still be able to argue about whether a power point is an illustrative aid regulated by the rule. The Chair opined that the amendment would set forth general principles but that it was inevitable that trial judges would differ in the way they interpreted and applied those guiding principles. A Committee member asked whether the term "argument" in the rule text might be interpreted to require advance notice of a closing argument power point. He suggested that such a power point is argument and that perhaps it should not be subject to the guidelines imposed by the amendment. The Reporter observed that such a power point would still qualify as an "illustrative aid" even if it illustrated the closing argument only. The Committee member responded that illustrative aids used with witnesses should be subject to notice, but that lawyers should be able to use a power point in closing without advance clearance. Judge Bates commented that he shared the same concern and did not think that the good cause flexibility added to the notice requirement would be sufficient to address that circumstance.

The Reporter queried whether the Committee wanted to remove the language "or argument" in the text of the rule and the committee note. The Chair noted that the Committee could include the words "or argument" in the amendment published for comment in brackets to solicit input on how best to handle the problem of aids used to illustrate argument. Another Committee member opined that the Committee should determine in advance of publishing the amendment what it is intended to regulate. He stated a preference for eliminating "argument" from the proposal so that it would cover aids used with witnesses but not aids used in opening or closing. The Reporter noted that a visual aid used during closing might summarize evidence and still be regulated by the amendment even if the words "or argument" are eliminated. The Chair agreed, pointing out that something that is an illustrative aid when exhibited to a witness does not cease being an illustrative aid when it is exhibited to the jury during a closing argument. Ultimately, the Committee agreed to take out the words "or argument" and concluded that public comment could help the Committee be more specific in distinguishing illustrative aids that are subject to the rule and summaries of argument that are not.

A Committee member then moved to approve Rule 611(d) for publication with all of the modifications agreed upon. The motion was seconded and unanimously passed.

2. Rule 1006 Summaries

Professor Richter then introduced the proposed amendment to Rule 1006 that would serve as a companion to the amendment to Rule 611 by clarifying the foundation necessary for admitting a summary as evidence of writings, recordings, or photographs too voluminous to be conveniently examined in court. She reminded the Committee that courts often conflate the principles applicable to summaries used only to illustrate testimony or other evidence and those applicable to Rule 1006 summaries that are admitted to prove the content of voluminous records.

Professor Richter called the Committee's attention to the proposed amendment to Rule 1006 on page 256 of the agenda book that would seek to correct the confusion in the cases. She highlighted changes to the draft rule and questions for the Committee. She explained that the Chair and Reporter had agreed that the word "substantive" should be deleted from Rule 1006(a), such that the amendment would simply provide that Rule 1006 summaries are to be admitted "as evidence." She noted that the modifier "substantive" remained in the committee note due to the common use of that term to differentiate evidence offered for a limited purpose from evidence offered to prove a fact. Professor Richter also explained that the proponent of a Rule 1006 summary must demonstrate that it "accurately" conveys the content of the underlying voluminous materials and that it is not argumentative or prejudicial in order to earn an exception to the best evidence rule – a rule that typically requires originals or duplicates of writings, recordings, or photographs to be admitted to prove their content. The terms "accurate and non-argumentative" were included in the text of the proposed amendment because some courts confused Rule 1006 summaries with illustrative summaries and allowed argumentative and inaccurate content. Professor Richter noted that a comma would need to be added after the words "in court" in the final line of proposed Rule 1006(a). Professor Richter also pointed out minor changes to the committee note to eliminate the bracketed paragraph regarding the use of symbols or shortcuts in Rule 1006 summaries and to add the correct tense to the final paragraph of the note.

The Chair stated that he was uneasy about the inclusion of the terms "accurate and non-argumentative" in the text of the amendment due to the concern that they would increase disputes about the admissibility of Rule 1006 summaries. For example, almost all Rule 1006 summaries are "argumentative" in the sense that the proponent summarizes only some, and not all, of the underlying data. The Chair opined that Rule 403 could serve to control the admission of an inaccurate or argumentative Rule 1006 summary. Another Committee member opined that the term "accurate" would introduce a new standard of uncertain meaning to Rule 1006 and that the terms "accurate and non-argumentative" should be removed from rule text and that language about Rule 403 should be added to the committee note. Professor Richter explained that Rule 1006 is a powerful one that permits a "summary" of voluminous writings, recordings, or photographs to be introduced in lieu of originals or duplicates. She noted that the proper foundation for admission of a Rule 1006 summary in the caselaw has long included the requirements that the summary be accurate and non-argumentative. While there may be arguments for judges to resolve in evaluating those elements of the foundation, they are part of the foundation necessary to earn an exception to the best evidence rule and not simply a Rule 403 issue. The Federal Public Defender agreed that Rule 1006 is a potent rule and opined that language should be included in the committee note at the very least to emphasize the proper foundation. The Chair stated that that the terms "accurate and non-argumentative" should be cut from the text of the rule, but that language should be added to the committee note emphasizing that Rule 403 may keep out an inaccurate or prejudicial summary.

A Committee member next inquired about the language of proposed Rule 1006(c), suggesting that its reference to a "summary" that is regulated only by Rule 611(d) seemed circular in a rule about the admission of summaries. Committee members noted that the purpose of subsection (c) was to convey that if a summary does not meet the standards set forth in Rule 1006(a), it is an illustrative aid covered by Rule 611(d). The Chair suggested that subsection (c)

should read: "A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d)." Committee members agreed that this language better conveyed the intent of the provision.

A Committee member pointed out that the proposed draft would require a "written" summary and questioned whether that would include a photographic summary. The Reporter explained that Rule 101(b)(6) provides that any reference to any kind of "written" material or any other medium includes electronically stored information. The Committee member queried whether this would capture photographs.

The Department of Justice representative asked whether limiting Rule 1006 to written summaries would prevent testimony by a case agent helping to organize a case and suggested additional language in the committee note addressing the proper use of a summary witness. Professor Richter pointed out the limited purpose of a Rule 1006 summary to prove the content of material too voluminous to be considered in court. The amendment would prohibit a witness from orally describing voluminous underlying documents to prove their content to the jury and would require a chart or spreadsheet or some sort of accompanying writing to demonstrate that content. Any other use of a summary witness is not regulated by Rule 1006 and would not be regulated under the amendment. Professor Richter explained that litigants often point to Rule 1006 to support other uses of summary witnesses, however, simply because it is the only provision in the existing rules that expressly permits a "summary." The draft amendment was designed to eliminate the use of Rule 1006 for such purposes. She further noted that a writing summarizing voluminous content would likely be more effective than oral testimony about that content alone and could easily be created to comply with a "written" limitation. The Chair suggested that the Committee could publish the proposal with the "written" limitation to determine whether there would be any unforeseen consequences to adding such a restriction. The Reporter suggested that the word "written" might be published in brackets to invite commentary about it.

Another Committee member added that the committee note should discuss the proper use of a summary witness. Judge Bates inquired what the intent of the amendment would be regarding summary witnesses and whether the amendment would change the status quo. He expressed concern that the amendment might foreclose testimony from summary witnesses that is now routinely admitted. A Committee member disagreed that an amendment to Rule 1006 would make any summary witness inadmissible. It would simply provide that a purely testimonial summary could not be offered to prove the content of voluminous documents without a writing and that any other use of a summary witness would have to be justified under other provisions. He opined that this was a helpful clarification. After this discussion, the Chair proposed eliminating the "written" limitation in the draft amendment due to the Committee's concerns, and Committee members agreed.

The Chair then raised the fact that Rule 1006 does not require advance disclosure of the summary to the opponent. The provision requires production of the underlying voluminous materials but not the summary itself, which presumably the opponent needs to review before it is presented. The Chair noted that the lack of notice in Rule 1006 is arguably at odds with the notice requirement in proposed Rule 611(d) governing illustrative aids. One Committee member

suggested that a Rule 1006 summary would have to be disclosed in advance when all trial exhibits are disclosed anyway. The Reporter also suggested that Rule 1006 summaries are different than illustrative aids – because Rule 1006 summaries are "evidence," they will be disclosed when mere aids will not. The Chair pointed out that trial exhibits are often exchanged on the eve of trial, which might give an opponent two days to verify the accuracy of a summary of 500,000 documents. The Reporter stated his preference not to add a new notice provision to Rule 1006 because notice provisions in the evidence rules are generally reserved for significant matters such as Rule 404(b) evidence. The Chair relented.

Judge Bates queried whether the reference to production of the "originals or duplicates" in subsection (b) of the proposed amendment referred to the underlying voluminous documents or the summary. The Reporter responded that it referred to the underlying documents and noted that this had become less clear after the production obligation was put into a new subsection (b). The Reporter suggested adding the term "underlying" to subsection (b) to clarify the "originals or duplicates" intended. The Committee agreed.

A Committee member moved to approve the amendment to Rule 1006 for publication with the deletion of "substantive," "accurate and non-argumentative," and "written" from the text of the rule; with the addition of "underlying" to subsection (b); and with subsection (c) to read: "A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d)." The Committee member also moved to approve a committee note reflecting those changes. The committee note would eliminate any discussion of "accurate and non-argumentative" summaries in favor of language stating that: "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." The note would also eliminate any discussion of limiting Rule 1006 to "written" summaries and would eliminate the bracketed paragraph about symbols and shortcuts. The motion was seconded and unanimously approved.

B. Safeguards for Jury Questions: Rule 611(e)

The Reporter introduced the proposal to add a new subsection (e) to Rule 611 to provide procedures and safeguards for judges who wish to allow jurors to pose questions for witnesses. He noted that the practice of allowing juror questions has been somewhat controversial and that the amendment would take no position on whether a judge should allow the practice. Instead, the rule would offer uniform procedures and safeguards that would apply whenever a judge chose to allow juror questions. The Reporter directed the Committee's attention to the working draft of the rule on page 266 of the agenda book. He explained that subsection (e)(1) would better capture the intent of the rule if it stated: "If the court allows jurors to submit questions for witnesses…" instead of "If the court allows jurors to ask questions of witnesses…" This is because the rule would not allow jurors to question witnesses directly and would require that the court or counsel pose the questions. Subsection (e)(1)(C) would also be changed to conform. ("the court may rephrase or decline to ask a question *submitted* by a juror"). The Reporter also noted that lines 45-46 of the committee note on page 269 of the agenda book would prohibit the court from disclosing to the parties or to the jury which juror submitted a particular question. He

explained that there had been a question raised about whether counsel should be permitted to learn which juror asked a particular question. The Reporter voiced concerns that this could lead to mischief and stated his preference to leave the note intact. Finally, the Reporter explained that the new provision regarding illustrative aids would appear in Rule 611(d) and that the safeguards and procedures for jury questions would appear below it in Rule 611(e). He explained that this order is appropriate given how commonly illustrative aids will be used and the relative rarity of juror questions.

One participant at the meeting opined that it would be obvious to all in the courtroom which juror asked a question, such that the prohibition on disclosure in the committee note would mean little. The Chair suggested that whether it is obvious which juror asked a question depends upon how the trial judge handles juror questions; some of his colleagues allow jurors to submit questions in a way that preserves anonymity. The Reporter also suggested that the committee note cautions against disclosure of a questioning juror's identity by the court even if the parties are able to infer that identity on their own.

The Chair suggested several small changes. He suggested that a comma be added after the word "rephrased" in subsection (e)(1)(D). He suggested that the word "neutral" be inserted before the word factfinders in subsection (e)(1)(F). He also voiced concern that the words "appropriate under these rules" in subsection (e)(2)(A) were too imprecise (what is "appropriate"?) and suggested new language stating: "the court must, outside the jury's hearing: (A) review the question with counsel to determine whether it should be asked, rephrased, or not asked."

A Committee member then moved to approve the amendment to add a new subsection 611(e) for publication, with all of the agreed-upon changes to the rule and accompanying committee note. The motion was seconded and unanimously approved.

C. Party Opponent Statements offered against Successors/ Rule 801(d)(2)

The Reporter introduced the proposal to amend Rule 801(d)(2), the hearsay exemption for party opponent statements. The Reporter explained that party opponent statements admissible against a declarant or the declarant's principal are sometimes excluded when a successor party stands in the shoes of the declarant or the declarant's principal due to an assignment of a claim. He offered the example of an individual suing for personal injuries whose own statements would be admissible against her. If the individual dies before trial and her estate pursues the personal injury claim on her behalf, some courts would exclude the decedent declarant's statements when offered against the estate. The amendment would make the statements admissible against a party who stands in the shoes of the declarant or the declarant's principal. The Reporter explained that the amendment would appear at the bottom of Rule 801(d)(2), noting that the style consultants had approved the placement despite their typical disdain for hanging paragraphs.

The Reporter called the Committee's attention to the draft amendment providing for admissibility when "a party's claim or defense is directly derived from a declarant or a declarant's principal." He noted that the Reporter to the Standing Committee had raised a question about the word "defense" in the amendment and invited Professor Cathie Struve to

elaborate. Professor Struve explained that a successor party -- who should be bound by the statements of the predecessor -- might have an independent defense to the claims, such as the successor liability defense. She suggested that the amendment should replace the term "defense" with the terms "potential liability" to provide for admissibility of predecessor statements even in circumstances in which the successor enjoys an independent defense. The Reporter noted that the committee note would not need to be changed if this alteration were made. Committee members agreed to use the terms "potential liability" instead of "defense." The Committee thereafter unanimously voted to approve the amendment to Rule 801(d)(2) as modified for publication.

D. Rule 804(b)(3) and Corroborating Circumstances

Professor Richter introduced the proposal to amend Rule 804(b)(3). The amendment would clarify that, in assessing whether corroborating circumstances clearly indicate the trustworthiness of a statement against penal interest, courts should consider not only the totality of the circumstances under which the statement was made, but also any other evidence corroborating it. She called the Committee's attention to the draft of the proposal circulated in a supplemental memorandum. She explained that the restylists had suggested replacing "corroborating the statement" in subsection (B) of the amendment with "corroborating it." She further noted that Judge Schroeder had suggested a helpful modification to the first sentence of the committee note to make it more direct. Finally, Professor Richter explained that an example had been added to the note to illustrate the type of information the court should consider in evaluating the corroborating circumstances requirement under the amendment.

The Chair pointed out that a judge should consider *all* independent evidence about the credibility of a declarant's statement – i.e., not only evidence that corroborates it, but also evidence that undermines it. He suggested adding language to the first sentence of the note so that it would instruct a judge to consider evidence "corroborating or contradicting" a statement. The Chair also suggested stating in the note that the "court *must* consider not only the totality of circumstances…" He also asked to change "like" in the example in the note to "such as." Judge Bates noted that a comma should be inserted after the citation to the *Donnelly* case in the note. One Committee member suggested that the opening phrase of subsection (B) of the rule text is awkward because it begins with the caveat that a statement must be one that exposes the declarant to criminal liability and must be offered in a criminal case to trigger the corroborating circumstances requirement. The Reporter explained that there was no other place to put that caveat that would make the rule read more smoothly.

The Committee unanimously voted to approve the proposed amendment and committee note to Rule 804(b)(3) as modified for publication.

E. Rule 613(b) and a Prior Foundation for Extrinsic Evidence of a Prior Inconsistent Statement

Professor Richter directed the Committee's attention to the proposal to amend Rule 613(b) to require a prior foundation on cross-examination of a witness before offering extrinsic evidence of the witness's prior inconsistent statement. She explained that the proposed amendment would require a prior foundation but would retain the trial court's discretion to delay

or forgo the foundation under appropriate circumstances. Professor Richter noted that a supplemental draft of the proposal had been circulated that added illustrations of circumstances that might justify departure from the prior foundation requirement in the committee note.

The Federal Public Defender suggested that his only concern with the proposal might be one raised in Professor Richter's Agenda memo that the amendment could be a solution in search of a problem. The Reporter responded that public comment would help clarify that point. And Professor Richter noted that the amendment could help the neophyte trial lawyer who reads the current rule to allow flexible timing for a witness's opportunity to explain or deny a prior inconsistent statement, only to learn after cross-examination has concluded that the trial judge requires a prior foundation. The Chair agreed, noting that every one of the federal judges whom he had asked about this issue reported requiring a prior foundation despite the flexible timing allowed under current Rule 613(b). Judge Bates suggested deleting "Of course" from the second and final paragraph of the committee note. He also recommended deleting the bracketed "in the interests of justice" language in the second paragraph of the note. Finally, Judge Bates expressed concern about citing a concurring opinion in the committee note. The Reporter responded that the concurring opinion cited was the clearest and most persuasive explanation of the virtues of the prior foundation rule and had been included for that reason. The Reporter then suggested that the note could employ a similar defense of the prior foundation requirement without citing the concurrence directly. The Committee agreed to that solution.

The Committee voted unanimously to approve the proposed amendment to Rule 613(b) and accompanying note with the agreed-upon modifications for publication.

IV. Closing Matters

The Chair thanked the Committee and all participants for their patience and for their contributions. He announced that the fall meeting would take place on October 28, 2022 in Phoenix, Arizona.

Respectfully Submitted,

Liesa L. Richter