

From: Sai
To: RulesCommittee Secretary
Subject: FRE suggestions to replace the word "over" re objections
Date: Thursday, April 11, 2024 9:28:27 AM

Dear FRE Committee,

The word 'over' is used in the following FRE:

1. to indicate topic (e.g. "controversy over", "control over"): FRE 611 & notes to FRE 104, 401, 404, 408, 502, 605, 611, 702, 1008, & 1101
2. in "over the telephone": FRE 901(b)(6)(B) & its notes
3. to indicate contrast (e.g. "preferred over"): notes to FRE 609, & 804
4. about time (e.g. "over the years"): notes to FRE 607, 609, 803, 804, & 902
5. to mean "notwithstanding": FRE 106 & 612(b)

I believe that the two in #5 are ambiguous:

FRE 106 If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part — or any other statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

(Note that the last sentence (including "over") 106 was introduced in 2020.)

FRE 612(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

These are ambiguous because the word "over", in both cases though more strongly in 106, can mean "about".

This is the primary way you use the term "over" - see item 1 in my list above - and it is textually consistent. Neither FRE 106 nor 612 has committee notes about these clauses, so although https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_-_august_2021_0.pdf makes clear that the rule is intended to mean "notwithstanding a hearsay objection", that intent is not a permissible textual consideration.

For instance, 106 can be read to say that the adverse party may introduce other parts & other statements if and only if it that evidence is about a hearsay objection. That means both

- a. being able to introduce second-order evidence about a first-order hearsay objection (even if there's no objection to the second-order evidence), and
- b. not being able to introduce second-order evidence relevant to the underlying issue (even if there was a hearsay objection to it) because the second-order evidence isn't about or caused by whether or not something was hearsay, but rather about the underlying issue (such as the example you gave when passing this, "I used to own the murder weapon but I sold it before the murder" - "but I sold it before the murder" is not itself about the hearsay, it's about ownership).

I suggest a simple change that would fix this: in both FRE 106 and 612(b), replace "over" with either "notwithstanding", "despite", or "regardless of". Those replacements are synonymous with your intended meaning, and unlike "over" they do not permit the unintended meaning "about".

Alternatively, you could edit them somehow to use "overruling", but I think that would either be stilted or introduce a different ambiguity (e.g. a simple replacement "the adverse party may do so overruling a hearsay objection" suggests that the party, by introducing that evidence, gets to override a hearsay objection themselves).

This could perhaps be issued as a quick style change, since there is no change to an intended meaning (although it is a change to remove an unintended meaning).

Sincerely,
Sai