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

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

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

Also present were:
Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. Robert J. Conrad, Jr., Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Bridget M. Healy, Counsel, Rules Committee Staff
Shelly Cox, Administrative Analyst, Rules Committee
Brittany Bunting, Rules Committee Staff
Burton DeWitt, Rules Clerk

Present Via Microsoft Teams
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Hon. Roslynn R. Mauskopf, Director Administrative Office of the Courts
Timothy Lau, Esq., Federal Judicial Center
Reshmina William, Federal Judicial Center
Andrew Goldsmith, Esq., Department of Justice
Sri Kuehnlenz, Esq., Cohen & Gresser LLP
Amy Brogioli, Associate General Counsel American Association for Justice
Abigail Dodd, Senior Legal Counsel Shell Oil Company
Alex Dahl, Strategic Policy Counsel
John G. McCarthy, Esq., Federal Bar Association
Susan Steinman, Senior Director of Policy & Sr. Counsel American Association for Justice

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

I. Opening Business

Announcements

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

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

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

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

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

Approval of Minutes

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

II. Rules 106, 615 and 702 Published for Comment

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

A. Rule 106

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

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

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

B. Rule 615

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

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

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

C. Rule 702

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

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

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

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

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

III. Rule 407

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

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

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

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

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

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

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

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

A. Illustrative Aids and Rule 611

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

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

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

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

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

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

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

B. Rule 1006 Summaries

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

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

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

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

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

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

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

V. Jury Questions: Safeguards and Procedures

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

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

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

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

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

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

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

VI. Party Opponent Statements Made by Predecessors in Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

X. Closing Matters

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

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

Respectfully Submitted,

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Daniel J. Capra