TRANSCRIPT OF PROCEEDINGS

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IN THE MATTER OF:              )
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PROPOSED AMENDMENTS TO THE     )
FEDERAL RULES OF EVIDENCE      )
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ADMINISTRATIVE OFFICE OF THE U.S. COURTS

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO THE)
FEDERAL RULES OF EVIDENCE)
)

Suite 206
Heritage Reporting
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1220 L Street, N.W.
Washington, D.C.

Friday,
January 27, 2023

The parties met remotely, pursuant to the notice, at 9:00 a.m.

Committee Members:

HON. PATRICK J. SCHILTZ
PROF. DANIEL J. CAPRA
HON. JOHN D. BATES
HON. ROBERT J. CONRAD, JR.
JAMES P. COONEY, III, ESQ.
HON. SHELLY DICK
HON. M. HANNAH LAUCK
HON. MARK S. MASSA
MARSHALL L. MILLER, ESQ.
PROF. LIESA RICHTER
HON. THOMAS D. SCHROEDER
ARUN SUBRAMANIAN, ESQ.
HON. RICHARD J. SULLIVAN
PROF. CATHERINE STRUVE
RENE L. VALADARES, ESQ.

Witnesses:

RYAN BABCOCK, The Babcock Law Firm, P.C.
MARK LANIER, Lanier Law Firm
WILLIAM ROSSBACH, Rossbach Law Firm
BRIAN SANFORD, Sanford Firm
TAD THOMAS, Thomas Law Offices
TIEGA-NOEL VARLACK, Varlack Legal Services

1 P R O C E E D I N G S

2 (9:00 a.m.)

3 JUDGE SCHILTZ: All right. Good morning,
4 everyone. I think we'll get started. This is a
5 hearing sponsored by the Advisory Committee on the
6 Federal Rules of Evidence on the proposed amendments
7 that have been published for comment and, in
8 particular, on the proposal to add a new subsection
9 (d) to Rule 611 to govern illustrative aids.
10 We have a number of witnesses to testify.
11 I'm sorry about the early starting time of this. I'm
12 in trial this week, and I wanted to be able to hold
13 this hearing and still get into trial, not delay my
14 trial.
15 So, the first witness on the list is Mr.
16 Ryan Babcock. Mr. Babcock, are you there?
17 MR. BABCOCK: Yes, I'm here.
18 JUDGE SCHILTZ: Good morning. We'd be happy
19 to hear from you.
20 MR. BABCOCK: Okay. Thank you so much.
21 Good morning, Mr. Chairman and Members of
22 the Committee. Thank you for the opportunity to
23 testify regarding the proposed amendments to Rule 611.
24 I represent plaintiffs in injury cases, and before
25 starting my own firm, I defended such cases and worked

1 as a federal judicial law clerk for several years.
2 The use of visual aids at trial assists with
3 effective advocacy and it ultimately aids the truth-
4 finding function of the jury, which the current Rule
5 611 recognizes as a prime consideration of the trial
6 process.
7 I start from the position that trials should
8 be a user-friendly process for the jury, and they have
9 a difficult job to do. They play a crucial role in
10 the justice system and society, and expert testimony
11 especially can be boring or difficulty for a lay jury
12 to follow.
13 It's crucial that we keep our jurors
14 engaged. Advocates use visual aids based on the
15 belief that many jurors will have a better recall of
16 key facts when deliberating if the evidence is
17 presented using additional methods of presentation
18 apart from oral testimony. That can include the use
19 of all senses, for example, the physical touch of an
20 anatomical model or an injured body part of the
21 plaintiff.
22 As a threshold matter, the rule, in my view,
23 will likely create confusion as it does not define the
24 term "illustrative aid," and it's a term that would
25 prove difficult to define or describe comprehensively.

1 Now, with respect to the notice provision,
2 I'm concerned that it would prove unworkable in
3 practice. Trials are dynamic, and many visuals may
4 not be prepared a great deal of time in advance.
5 There may be unexpected events at trial based on the
6 statements or conduct of any number of participants
7 that might suggest a visual aid to use at trial that
8 would be beneficial to employ.
9 As I read it, the proposed rule would act as
10 a prior restraint on the contemporaneous use of a flip
11 chart during trial, which I would view as a step
12 backward for jury understanding in trial practice and
13 a rule change that would undo generations of prior
14 acceptable trial conduct.
15 We know that teachers write important
16 concepts on the blackboard, and trial lawyers
17 sometimes emulate that practice during trial. They
18 understand it will help jurors remember those ideas.
19 Likewise, I've had the experience of
20 preparing a PowerPoint presentation to be used during
21 closing to help illustrate my argument. When I do so,
22 I can guarantee that my draft will substantially
23 change during the trial and I will add key slides late
24 the night before or early the morning of closing
25 argument. The proposed rule would make it difficult,

1 if not impossible, to use that technology to help make
2 such presentations at trial.
3 Further, at least in some courts, I believe
4 it’s unclear to what extent materials used for
5 impeachment must be disclosed pretrial as exhibits.
6 In a federal criminal trial where I was
7 appointed to represent a defendant, I made the
8 strategic decision to not use a document as an
9 exhibit, and without prior disclosure to the federal
10 government, I used a printout of a cooperating
11 witness's Facebook posts in an effort to impeach his
12 testimony. I did not move to admit the same into
13 evidence because I was happy to use the document
14 solely for demonstrative purposes as a matter of trial
15 strategy. I’m concerned the proposed rule as drafted
16 could interfere with the ability to make such
17 strategic decisions.
18 Regarding the admissibility of illustrative
19 aids, I would submit that certain types of visuals
20 would routinely be admissible and considered by the
21 jury during deliberations, including many photographs,
22 for example. You know whether those visuals are
23 actually offered into evidence should be within the
24 discretion of counsel and whether they’re admitted
25 within the sound discretion of the trial judge.

1 In a past car wreck trial, for example, I've
2 offered into evidence photographs of the wrecked
3 vehicles after the crash, but I may only show a
4 photograph of the plaintiff lifting her young child at
5 the playground to help illustrate testimony that she
6 could no longer do such important daily activities
7 like that after the crash. I would not offer a
8 photograph like that or similar photographs into
9 evidence simply as a matter of strategy, and I'm
10 concerned the proposed rule would foreclose that
11 approach.
12 Finally, when examining an expert, I have on
13 occasion written key phrases from an expert's
14 testimony on a flip chart during the testimony. I
15 might return to that paper as an illustrative aid
16 during closing to remind the jury of what I view as
17 important testimony in the case, but I don't believe
18 that paper ought to be or need be routinely admitted
19 into evidence or go back with the jury.
20 For these reasons, I oppose the adoption of
21 the proposed amendment. Thank you very much.
22 JUDGE SCHILTZ: Thank you, Mr. Babcock.
23 Does either Professor Capra or any member of
24 the Committee have any questions for Mr. Babcock?
25 (No response.)

1 JUDGE SCHILTZ: All right. Seeing if you do
2 have any questions today, I'll need you to turn your
3 camera on and either raise your hand or put your
4 little thumb up, but I don't see any right now.
5 So, Mr. Babcock, thank you. We appreciate
6 your testimony.
7 MR. BABCOCK: Thank you very much.
8 JUDGE SCHILTZ: Let's see. The next witness
9 is Mark Lanier. Mr. Lanier, are you with us? There
10 you are. Good morning, sir.
11 MR. LANIER: Good morning. I want to thank
12 also the Committee not just for the chance to appear
13 but thank you all for your hard work. I don't think
14 any of you get paid extra for doing this, but it makes
15 our world a better place and our courtrooms a better
16 forum for seeking justice, and that's really what
17 we're about.
18 One of the things that has evolved in my
19 life of 38 years of doing this is the opportunity for
20 some of the cases to become a little more complex, and
21 most of everything I've got to say I put in writing to
22 you all. I know you all are diligent. You've looked
23 at that. I don't see a need to repeat what I put into
24 writing, and I won't waste your time with that. I'll
25 simply direct you to my comments and those of many

1 others. Professor Bailey's comments I thought
2 especially astute.
3 But I do have a concern here, and my concern
4 is rooted in 611. I have looked also at the other
5 rules that you're looking to change, Rule 1006. 1006
6 summaries, to me, are a much different ball of wax and
7 they need to be done carefully. They're important.
8 Those are summaries. When I tried the opioid case in
9 front of Judge Polster last year, one of our big
10 problems was how do you get the prescription data into
11 a form that can go in front of the jury when all it is
12 is ones and zeroes of computer data.
13 Well, we need 1006 summaries. Those have
14 got to be explored by both sides. They've got to be
15 right. They've got to be carefully done and approved
16 by the court ahead of time. But 611, the way it's
17 been written, especially with the Summary Draft
18 Committee notes, I think runs very dangerous of taking
19 the jury trial backwards instead of forwards.
20 And here's what I mean. We do recognize now
21 with neuroscience, functional MRIs, there's just
22 replete knowledge of how our brains are wired to
23 understand things by metaphors, by anchoring to other
24 concepts. We know by visuals that we see. That's
25 more and more true with the internet generation that's

1 now populating our juries.
2 And so it is critical as a trial lawyer to
3 be able to put things visually for people to see.
4 Some of that can be shown ahead of time because it’s
5 right and proper to do so. I think we always show our
6 opening PowerPoints to the other side and expect them
7 to do the same with plenty of time to object. But
8 some of those are spontaneous, and some of those, even
9 if planned ahead of time, are trial-strategic. I’ll
10 give you two examples and then sum up.
11 Example Number 1, I will very often in
12 cross-examination of a witness have three or four or
13 five questions written out where the question is very
14 clear and can be read along while I ask it. I can put
15 that question on the projection device, ELMO, IPEVO,
16 Wolf, Vision, whatever kind it is. I can put that
17 down so that the jury can read that question while I’m
18 asking that question.
19 And it’s got a great power at forcing a
20 witness to answer a question. I do it especially with
21 those witnesses that have proved themselves adept at
22 dodging a question and rambling on and on and on. So
23 I will have that. I’ll know that witness from another
24 trial or I’ll know that witness from a deposition, and
25 I’ve got that ability.

1 Now, if I’ve got to give that up before
2 trial or before that witness takes the stand such that
3 the other side's got a chance to woodshed and prepare
4 that witness, that’s not truth-seeking. That’s not
5 the American way as far as the judicial system and
6 trials should be going.
7 A second example, though, are demonstrations
8 that arise. I’ve tried cases where a witness is on
9 the stand and the witness is trying to explain
10 something. And I’m able to explain it better if I
11 take two of the cups that are right there on the
12 counsel table next to the water pitcher and I take
13 those cups, and in one of them, I’ll start putting
14 paper clips because I’ve got them nearby. In the
15 other one, I’m putting binder clips because I’ve got
16 them nearby. And I’m comparing the amounts that go
17 into each one and using it as an illustration.
18 That’s an illustrative aid. And these are
19 the illustrative aids that not only we have the rule
20 to worry about, but the Advisory Committee notes that
21 you all put out with those rules last August
22 specifically include in the rule blackboard drawings,
23 photos, diagrams, charts, et cetera. Those types of
24 illustrative aids that are spontaneously drawn that
25 are notes made or that are used for strategic purposes

1 should be encouraged, not discouraged.
2 That's my two cents' worth, but I say it
3 with gratitude in my heart that you guys are trying to
4 all make this a better format for truth and justice
5 and for educating juries so that they make informed
6 decisions. I've spoken my piece and thank you.
7 JUDGE SCHILTZ: Thank you, Mr. Lanier.
8 Let's see, Judge Conrad, you had a question?
9 You need to turn on your mic. You need to turn on
10 your mic. You're muted.
11 JUDGE CONRAD: I'm a high-tech judge. I see
12 you're in your home library today.
13 JUDGE SCHILTZ: It's not as impressive as
14 yours if that is, in fact, your library behind you.
15 JUDGE CONRAD: You recognize some form of
16 illustrative aid or demonstrative aid, such as those
17 being used in opening statement, that ought to get
18 prior approval from the court before you use, and then
19 you talk about illustrative aids that are
20 spontaneously created during the trial process.
21 Do you have any suggestion as to how the
22 rule could distinguish between the two so that there
23 is judicial approval of the things that ought to be
24 shown ahead of time versus what you think are the
25 cross-examiner's prerogative during trial?

1 MR. LANIER: Judge Conrad, I thought long
2 and hard about that because I recognize that some
3 language needs to be put in there that takes care of
4 this, and, candidly, I don't have that, that silver
5 bullet right now. I will submit -- I will try hard to
6 script some better language and submit it subsequent
7 to this in a post-haste manner.
8 I would add that, you know, it's interesting
9 on opening PowerPoints, for example. Right now, every
10 judge I've ever appeared in front of literally coast
11 to coast, north to south, has put out there the
12 question, do you want to give your opening PowerPoints
13 to each other? I always do if I'm the plaintiff
14 because I'd love to see what the defendants are going
15 to argue because it will shape my opening knowing
16 what's coming up afterwards. Usually, the defendants
17 do not want to share the opening PowerPoint because
18 they don't want me to do that.
19 It's an interesting twist of how that goes.
20 And my view ultimately is I don't care. I'll share
21 them. I'll not share them. To me, openings need to
22 be carefully sculpted. We have motions in limine to
23 protect openings, and all of that's appropriate.
24 I just get nervous about cross-examination
25 especially and direct examination and the aids that

1 can be used there. Closings, that's also a problem,
2 as the previous witness discussed. But, again, I
3 don't mind showing my closing slides beforehand. I'm
4 not into hide-the-ball, but I am also not into letting
5 a trial be scripted or inhibiting the lawyer's ability
6 to educate a jury in real time without shutting down
7 the efficiency of the trial.
8 JUDGE SCHILTZ: Thank you.
9 Any more questions for Mr. Lanier?
10 (No response.)
11 JUDGE SCHILTZ: I don't see any. Thank you,
12 Mr. Lanier. We appreciate your testimony today.
13 MR. LANIER: Yes, sir.
14 JUDGE SCHILTZ: Next is William Rossbach.
15 Mr. Rossbach, I see you there. Good morning, sir.
16 Thank you for joining us.
17 MR. ROSSBACH: Thank you. Good morning,
18 members of the Committee and Professor Capra. Thank
19 you for giving me the opportunity to comment on the
20 proposed amendments to Rule 611.
21 I've been a trial lawyer for 40 years and
22 have collectively months in courtrooms across the West
23 trying scientific, engineering, environmental, and
24 medical cases. My comments here focus on some very
25 small changes in the language that will have subtle

1 but important consequences in the critical use of
2 illustrative aids.
3 There are two facts of trial life that are
4 the foundation of my testimony, and I think both of
5 the prior witnesses touch on this. First, trial
6 judges have ample inherent authority to manage the use
7 of illustrative aids with the unquestioned discretion
8 to prohibit or limit their use when prejudice
9 outweighs their value to the finder of fact. Trial
10 judges certainly have the authority and have used such
11 authority for a century at least to determine when a
12 particular illustrative aid must be evaluated in
13 advance and whether and how it can be used.
14 With questions of admissibility of probative
15 evidence, documents or testimony during trial, upon
16 objection, the trial judge must often make immediate
17 decisions whether to sustain or overrule objection to
18 probative evidence in order to prevent unfair
19 prejudice. If for any reason more time is needed to
20 evaluate the evidence, the trial judge has the tools
21 she needs to do that before admitting the evidence.
22 I submit that there is really no difference
23 in procedure or inherent authority for a trial judge
24 between admitting an illustrative aid and admitting a,
25 a probative evidence. They often have to make

1 immediate decisions and have in tools inherent
2 authority to make sure that that evidence is evaluated
3 in advance if needed.
4 Second, while trial lawyers want to script
5 their trials like a play in which they are the emcee,
6 that never happens. You can never totally anticipate
7 every statement that might come out or every piece of
8 evidence that might come in.
9 A fundamental and critical skill of a trial
10 lawyer is to think on our feet, to be able to respond
11 spontaneously to those surprises and ad lib as it
12 were, often by use of illustrative aids that you have
13 to come up with spontaneously and create them live in
14 the courtroom. There is no way that such aids can be
15 reviewed in advance, but that does not mean the judge
16 and counsel cannot prevent or manage their use if it
17 is unfair prejudice.
18 The use of a variety of illustrative aids
19 mentioned in the Committee note and some of the
20 comments filed here is not something that is exclusive
21 to either plaintiff lawyers or defense lawyers. Both
22 plaintiff and defense lawyers use them in similar
23 ways. Both use many now that were unheard of when I
24 started practice. But the same discretionary
25 authority and tools used when I started are available

1 and sufficient today to the trial judge.
2 With these principles and facts of trial
3 life in mind, let me turn to a few subtle changes that
4 I think would have important and valuable consequences
5 for lawyers from opposing sides of the case.
6 As described in the Committee note to these
7 amendments, the proposed rule is modeled on Maine
8 Evidence Rule 616. I'm going to use Maine Rule 616
9 and compare it to the proposed rule today to point out
10 that there are differences in the language of Proposed
11 Rule 611 that create big differences in how and when
12 trial courts will have to evaluate illustrative aids.
13 In effect, the Proposed Rule 611 imposes
14 added burdens on the party seeking to use illustrative
15 aids and reverses the procedures that are imposed on
16 them. Maine Rule 616 implies and assumes that
17 illustrative aids can be used essentially per se. The
18 languages doesn't reference the court at all in the
19 first sentence of -- first paragraph or section of
20 that Maine rule. It says simply, "Otherwise
21 inadmissible objects or depictions may be used to
22 illustrate witness testimony or counsel's arguments."
23 In contrast, Rule 611 makes the court a
24 preliminary gatekeeper to limit or prohibit use. The
25 first language there is "the court may allow." While

1 this may seem minor, the consequences could well be
2 major depending on how courts interpret it, and this
3 shift is unnecessary.
4 I urge the court to consider removal of that
5 first word and let me suggest an amendment. Instead
6 of saying, "A court may allow a party to present an
7 illustrative aid," I see, I think, and I urge the
8 court, the Committee to consider language instead that
9 says, "A party may present an illustrative aid to help
10 the finder of fact understand evidence." And then it
11 provides the limitation if it's a utility in
12 assisting, et cetera.
13 In other words, take out, "the court" in the
14 first sentence, "the court as a gatekeeper." The
15 court is always a gatekeeper, and the language there
16 shows how it is. But Rule 616 in Maine basically
17 makes the admission of illustrative aid assumed unless
18 it is unfair prejudice.
19 The second amendment that I urge the court
20 to consider is the requirement, and Judge Conrad
21 brought this up, and let me make a suggestion. Rule
22 16 only requires advance opportunity to object if the
23 aid is prepared before trial. I think this is a very
24 practical, sensible, and easily enforceable
25 requirement and does not prohibit or limit traditional

1 use in the courtroom of spontaneous illustrative aids
2 that could not have been anticipated or created in
3 advance.
4 By removing the -- by putting the limitation
5 on advance evaluation to those that are created before
6 trial, it creates an easily enforceable process that,
7 as Mr. Lanier and Mr. Babcock both suggested, those
8 kinds of exhibits can be shared, can be evaluated in
9 advance.
10 Exhibits that -- illustrative aids that are
11 created on the fly in the courtroom cannot be
12 evaluated in advance, but the court, just like
13 evaluating testimony that's coming in live, can
14 evaluate a flip chart, a blackboard, or something
15 similar to that as it comes in live.
16 Finally, my last comment is I very much
17 commend the Committee on using the term "illustrative
18 aids" instead of demonstrative exhibits. I think that
19 is a very important distinction.
20 However, I urge the court to consider -- I
21 urge the Committee to consider using a definition.
22 The agenda book says that the rule sets forth a
23 distinction between illustrative aids and
24 demonstrative exhibits. But I don't see that in the
25 language.

1 I suggest that the court -- excuse me -- the
2 Committee look at how illustrative aids, how
3 demonstrative evidence, how probative evidence, how
4 those words are used otherwise in the Rules of
5 Procedure or the Rules of Evidence and come up with a
6 definition of "illustrative aids" that can be used
7 throughout the rules and one that makes clear what the
8 difference between regular probative evidence,
9 testimony, exhibits, et cetera, and illustrative aids
10 so that courts having to make these decisions know
11 which ones Rule 611 applies to and which ones they
12 don't.
13 Thank you for giving me the opportunity, and
14 I'm happy to consider additional questions. Thank
15 you. I can't hear --
16 JUDGE SCHILTZ: I'm sorry. I was calling on
17 Professor Capra. I apologize.
18 PROF. CAPRA: About the Maine thing, about
19 the Maine rule, you put up the first part of the Maine
20 rule, but then the very next sentence is, "But the
21 court may exclude if it finds that it's not helpful."
22 So what's the difference between that? It's
23 really stylistic. It's really stylistic whether you
24 start with "the court" or do you end with "the court."
25 The court has to be doing something in that rule, and

1 the Maine rule takes the court as the second part of
2 that, whereas this is the first part of that. But
3 that’s really, to my mind, a stylistic issue.
4 And I guess I would say the other thing I
5 might just add is, how would this square with all the
6 other evidence rules which focus on what the court
7 does?
8 MR. ROSSBACH: Well, I understand that, but
9 I think that putting the court first versus the court
10 in the second paragraph has a very -- that’s what I
11 said. It’s a subtle but I think that it’s an
12 important difference.
13 I think that the Maine rule, and if you
14 remove "the court" in the first section of 611 and --
15 because, as you noted, clearly, the second section of
16 611 says "the court," its utility assisting and
17 provides a standard.
18 The Maine rule does exactly the same thing,
19 but it’s also in the second section. I know this
20 seems subtle and I know it seems stylistic, but when I
21 read this rule and looked at it, the first thing that
22 jumped out at me was that the court is a gatekeeper
23 before you can even start.
24 I don’t know how to explain it any better
25 than that. But, if I’m a judge looking at this rule,

1 it looks to me like I get to decide before. There is
2 no assumption, in other words, that the illustrative
3 aid could be used. That’s my concern, is that a court
4 may very well decide that --
5 PROF. CAPRA: But, if that were true, there
6 would be no assumption that any evidence could be used
7 because all evidence like Rule 403 follows this same
8 structure, the court may admit it or the court may
9 exclude it.
10 MR. ROSSBACH: I understand, but my
11 experience is, is that you’re there in court. You
12 have to all of a sudden pull out a flip chart or a
13 whiteboard or a blackboard and start, you know,
14 spontaneously using it.
15 If you have to go and submit to advance
16 review, letting the court allowing it, I just think
17 it’s a procedural difference that changes suddenly the
18 burden. And it may be stylistic, and I appreciate
19 your concern, Professor Capra, that it may be
20 stylistic. All I know as a trial lawyer, when I first
21 read this rule, I said, oh, my goodness, this is going
22 to make me jump through an extra hoop to be able to
23 use this when I’m in trial live making my argument or
24 cross-examining a witness. That’s all.
25 PROF. CAPRA: I just had one -- I'm sorry.

1 If I may, I had one further question, and that is
2 about the definition. I mean, there is a definition
3 essentially. Instead of just setting it out as a
4 definition, doesn't it say -- it says basically
5 helping the finder of fact understanding admitted
6 evidence. I mean, you might change that to admitted
7 evidence or argument. That's something that the
8 Committee has to discuss. But isn't that actually the
9 definition of "illustrative aid"?
10 MR. ROSSBACH: I think it is, but I think,
11 if it were more specifically stated as a definition an
12 illustrative aid is blah, blah, blah, that it just
13 makes it clearer.
14 And there's other places in the rules that I
15 think we may want to bring to your attention where
16 there seems to be some confusion about the two. And I
17 think it's important to find a consistent definition
18 that can be used throughout, and I think it would be
19 helpful to the trial court and helpful to the lawyer
20 to have a definition, to say this is the definition.
21 That's all. That may be my stylistic change.
22 JUDGE SCHILTZ: Thank you.
23 Mr. Cooney, do you have a question?
24 MR. COONEY: Yes. The consistent theme
25 throughout all the comments is the concern that

1 somehow spontaneous diagrams or drawings or writing on
2 a flip chart would be barred by this rule. And I keep
3 tripping over that because the rule says reasonable
4 notice. Obviously, something spontaneous, you're
5 giving all the notice you can because you're
6 generating it right there.
7 And there's also an exception for good cause
8 by the trial judge, and I think it would be hard for
9 me to imagine a trial judge being affirmed, let alone
10 ruling, that because you didn't show a spontaneous,
11 which by definition, you know, couldn't have existed
12 until you were doing it, demonstrative in advance to a
13 party, that somehow that should be excluded.
14 And I keep tripping over this idea that as a
15 witness is talking you can't write down a word that
16 the witness says at that time or write down the answer
17 to a question or, you know, do a diagram that the
18 witness then validates in some way as being barred
19 because of a lack of advance notice. I'm perplexed a
20 little bit by why you read the rule that way.
21 MR. ROSSBACH: Well, because it says that.
22 It says that the party must be given a reasonable
23 opportunity to object. When you're writing something
24 on the flip chart, what is a reasonable opportunity?
25 In advance, you can't do that. You're writing it on

1 the flip chart.

2 All I'm saying is, is that I think it's a
3 reasonable and practical distinction to say, if you
4 make up the illustrative aid before trial or in
5 advance of coming into the courtroom, the court has
6 the discretion to require you to review it.

7 Otherwise, you can do it live and
8 spontaneous. How does a live and spontaneous give the
9 opposing party a reasonable opportunity to object?
10 There's no opportunity to object. You're immediately
11 writing something on the blackboard.

12 I think, you know, in that context, it's no
13 different than a lawyer asking a question of a witness
14 that the opposing party can get up and object to.
15 Once the person starts writing on the flip chart,
16 opposing counsel can stand up and object of the flip
17 chart. But doing it in advance is impossible in that
18 context. That's all I'm saying. There is a very
19 fundamental difference.

20 And I will say this. In 40 years, I don't
21 know whether anybody has really attempted to object or
22 limit my use of a flip chart or writing something on
23 the blackboard because, you know, they can very well
24 object after it's up there, but they can't object in
25 advance. That's all. It's just procedurally not

1 possible to do, and I think it will confuse the trial
2 court on what is a reasonable opportunity to object.
3 MR. COONEY: What strikes me on a
4 spontaneous demonstrative like that, the reasonable
5 opportunity is the contemporaneous opportunity, and
6 that's the reasonable -- I mean, you can't write, as
7 the witness is testifying, you cannot write on a flip
8 chart "you're lying." I mean, we would all find that
9 to be objectionable. It's an illustrative aid and
10 would be objectionable because of all the dangers on
11 the weighing process, but you've got an opportunity at
12 that point to object. You turn it around if you need
13 to have argument. And I don't understand how you read
14 the rule to prevent that.
15 MR. ROSSBACH: I just think it -- I just
16 think there's a -- it would be easier for everyone in
17 the courtroom if there were a clear blue line that
18 says "in advance." If you have it in advance, you
19 give the other side and the court the opportunity to
20 review. If it's not in advance, you don't have to
21 have -- I mean, what is a reasonable opportunity? I
22 just think it's confusing and doesn't create a bright
23 line, practical and sensible distinction. I'm trying
24 to make it easier for the court and counsel to know
25 that they have that kind of flexibility in a

1 spontaneous illustrative aid.
2 JUDGE SCHILTZ: All right. Any more
3 questions? Judge Schroeder?
4 JUDGE SCHROEDER: I have one. What we say
5 in the note, just to follow up, we say in the note
6 material, "The timing of notice will be dependent on
7 the nature of the illustrative aid. Notice as to an
8 illustrative aid that’s been prepared well in advance
9 of trial will differ from the notice required with
10 respect to a handwritten chart prepared in response to
11 a development at trial. The trial court has
12 discretion to determine when and how notice is
13 provided."
14 I guess my question would be, why does that
15 not address this issue? I know it’s in the note, but
16 we can’t put everything in the rule.
17 MR. ROSSBACH: I understand that, but here’s
18 my concern about not putting everything in the rule.
19 In court, it’s not always true that everybody has a
20 copy of the notes in front of them. You may have the
21 rule but not the note.
22 Secondly and even more importantly in my
23 view, a vast majority of these rules in federal court
24 are going to get incorporated into state court rules.
25 That’s what happens. I mean, you know that, we all

1 know that. State courts make their amendments
2 consistent with federal rules. Often, and it happens
3 in my state, and it’s happened in many other states
4 that I’ve talked to lawyers, the notes don’t get
5 incorporated also. It’s only the rule that gets
6 incorporated into state law. The notes are not a part
7 of that.
8 So something that's as important as this,
9 and I think the Committee note provides exactly the
10 kind of definition of what is advance notice and what
11 is reasonable notice. I think something like that,
12 that’s why I wanted to draw the sort of blue-line
13 distinction between advance and not advance. I think
14 the language of the Committee note is great, but that
15 Committee note may not be in the courtroom when the
16 question comes up and the judge has to make that
17 decision.
18 That’s all I know. Certainly, in state
19 court, I think we looked at this one time in another
20 rule that less than 70 percent or some number like
21 that, the notes do not get incorporated into state
22 rules. That’s all. I think it’s a practical thing.
23 I know you don’t want to load up the rule with lots of
24 other language, but I think the notice and opportunity
25 to object is one of the critical issues in this

1 matter. That’s all.
2 And I think it’s worth -- that’s why I like
3 the Maine rule that you asked Mr. -- Judge Conrad
4 asked Mr. Lanier about that, and I think the Maine
5 rule provides that kind of bright-line distinction.
6 That’s all, advance or not advance. And I think it’s
7 pretty reasonable and easy to understand what's in
8 advance and what’s not.
9 JUDGE SCHILTZ: All right. Any other
10 questions?
11 (No response.)
12 JUDGE SCHILTZ: I’m not seeing any. Thank
13 you, Mr. Rossbach.
14 MR. ROSSBACH: You’re welcome. Thank you
15 for giving me the opportunity.
16 JUDGE SCHILTZ: Our next witness is Brian
17 Sanford. There you are. Welcome, Mr. Sanford. Be
18 happy to hear from you.
19 MR. SANFORD: All right. Thank you. All
20 right. So I just have three quick points that are
21 similar to the other speakers. First point is we’re
22 not dealing with anything new. The second, if we’re
23 going to deal with notice, we’ve got to be very
24 careful, and the presumption should always be on the
25 use.

1 So illustrative aids must have been used in
2 the very first trials. The Bible speaks of an outdoor
3 trial of a woman caught in adultery, and Jesus was
4 called upon to speak about the case. He drew
5 something in the dirt with his finger, and the woman's
6 life was saved by a simple illustrative aid.
7 Federal judges already have and use
8 authority over the use of illustrative aids at trial.
9 I just tried a case in federal court a few months ago
10 with a favorable verdict in which the judge prohibited
11 the use of all demonstrative and illustrative aids.
12 The federal rules apply to all 50 states.
13 If there is a concern that a more specific rule should
14 apply to these kinds of trials, I suggest we allow the
15 states further time to experiment. We only have one
16 state's experience with adopting a specific rule, and
17 my suggestion is to wait and see how other states and
18 courts deal with the Maine rule. If not, then we
19 should be very careful about notice and presumption.
20 These kinds of trial aids are intertwined
21 into direct examination and cross-examination.
22 Requiring notice of an aid is requiring notice of part
23 of an examination. If we don't require notice of
24 examination questions or outlines or even topics, we
25 should not require notice of trial aids, or there

1 should be extreme room in the notice requirements.
2 Attorneys using notice is itself dangerous,
3 as Mr. Rossbach has been talking about. As I said, we
4 don’t give reasonable notice of our examination
5 questions.
6 The spontaneousness of putting reasonable
7 notice in a rule is giving opportunity for objections
8 that don’t need to be made. And maybe the law can be
9 developed and a bright-line rule can somehow be made.
10 But I will tell you that my spontaneous
11 illustrative aids are many times well thought out in
12 advance and are pre-drawn by me. If I’m drawing an
13 org chart on a flip chart, if I’m doing a diagram,
14 I’ve already thought about that diagram. If I’ve
15 thought about it, the other side knows I’ve thought
16 about it, "Objection. Why didn’t we see this before,
17 Your Honor?" And then there's delay and injustice.
18 So it’s very -- the reasonableness itself
19 has danger itself, and any rule should presume the
20 ability to use the aid unless improper. And I agree
21 with Mr. Rossbach. The first time I read it, it
22 jumped out to me, hey, it does feel like the
23 presumption is not used unless the judge says okay,
24 rather than, oh, it may be used unless prohibited.
25 The Maine rule does have that feel about it. And so

1 the presumption should be use and not the other way
2 around. So I do thank you for your work and
3 considering my comments.
4 JUDGE SCHILTZ: Thank you, Mr. Sanford.
5 Professor Capra, you have a question?
6 You're muted.
7 PROF. CAPRA: With regard to the presumption
8 of either admissibility or inadmissibility of
9 illustrative aids, how would you feel if -- you see in
10 the proposal that the term "substantially" is
11 bracketed. If you lift those brackets out, then
12 doesn't that do exactly what you want it to do, have a
13 presumption of admissibility for illustrative aids?
14 MR. SANFORD: Well, the --
15 PROF. CAPRA: In other words, it looks just
16 like 403 where there's a presumption of admissibility
17 of probative evidence.
18 MR. SANFORD: I like the language that says,
19 "may be prohibited by the judge." Right? I like that
20 language because it gives the sense that it's admitted
21 unless prohibited.
22 PROF. CAPRA: Okay. Thank you.
23 JUDGE SCHILTZ: Any other questions for Mr.
24 Sanford?
25 (No response.)

1 JUDGE SCHILTZ: I don’t see any. Thank you,
2 Mr. Sanford, for your testimony.
3 Next, we’ll go to Tad Thomas. Mr. Thomas,
4 good morning.
5 MR. THOMAS: Good morning. Thank you for
6 the opportunity to provide some public comment on
7 illustrative aids. My name's Tad Thomas. I am the
8 president of the American Association for Justice,
9 which is the country’s largest plaintiff-oriented
10 trial bar with a core mission to protect the Seventh
11 Amendment right to trial by jury.
12 I am also a trial lawyer. I’ve tried civil
13 jury trials on subjects ranging from routine motor
14 vehicle collisions to complex medical negligence and
15 nursing home neglect and abuse cases.
16 To say that our members are not excited
17 about this proposed rule would be an understatement.
18 They truly believe that judges are capable of
19 determining a party’s use of illustrative aids in
20 their courtrooms and that a one-size-fits-all rule
21 does not fit all trials.
22 As you’ve heard, some trials are complex,
23 they’re long in duration, have large numbers of
24 experts. Others are short and may involve a dispute
25 over only a single aspect of a case. And an

1 illustrative aid developed well in advance of trial
2 obviously differs from one that's developed on the
3 spot, as we've already discussed today.
4 While AAJ is not opposed to the rule, we do
5 recommend several changes to ensure that there is
6 flexibility for both parties and judges.
7 First, I would echo the comments of Mr.
8 Rossbach and the prior speakers. We do believe that
9 this rule differs from Maine Rule of Evidence 616.
10 We've spoken with our Maine practitioners, and the
11 crucial aspect of an illustrative aid can be used at
12 trial as defined under the Maine rule versus the
13 proposed federal rule, which says, "the court may."
14 We do believe that that is a material
15 difference between the two rules and that the
16 Committee should take that into consideration. We
17 believe that it shifts the burden onto the party
18 seeking admission or seeking to use the illustrative
19 aid and it places a higher burden, and it makes more
20 work for the court, frankly. You know, yes, the Maine
21 rule can limit the use of illustrative aids, but we
22 believe that the Maine rule language is preferable to
23 the proposed rule that the Committee is looking at.
24 Moving on, we also agree that the notice
25 requirement should be removed. You know, the judges'

1 scheduling orders, if they want to require disclosure
2 of illustratives in advance, can address this issue as
3 part of routine exhibit exchange.
4 We would note also, I think Mr. Lanier
5 mentioned this earlier, that the original Maine rule
6 had a notice requirement as it was adopted in 1993,
7 but that was removed in 2015 and we think for good
8 reason.
9 For example, many illustrative aids are very
10 expensive to produce. And for plaintiff-side
11 practitioners, we will prepare those as close to trial
12 as possible. It’s especially important for us on the
13 plaintiff’s side to avoid unnecessary trial-related
14 expenses when a case may resolve because trial-related
15 expenses will diminish our client’s recovery, and we
16 have a responsibility ultimately to the clients.
17 We would also note, as has been discussed
18 here, that FRE 1006 is in its formal comment period.
19 We do, AAJ does support the proposed rule change
20 there, and we would also note, as Mr. Rossbach pointed
21 out, that there is a definition of voluminous
22 summaries in that proposed rule, and we would suggest
23 a short list of illustrative aids be outlined in
24 611(b) as well.
25 We’ve submitted in our comments a version of

1 the rule that we think accomplishes the Committee’s
2 goals while ensuring flexibility. We’ll be filing
3 more extensive public comment.
4 But I would also note before I conclude my
5 remarks, we also recommend removing the word
6 "disputed" before the word "fact" in each instance
7 where it appears. There are many instances where a
8 fact needs to be established at trial, but it may not
9 actually be "disputed." For example, in a damages
10 trial, there may not be a dispute about the underlying
11 claim and the facts of the underlying claim, but
12 establishing those facts is necessary to establish
13 future medical costs that are disputed, for example.
14 So, thank you also. I agree. Thank you all
15 for your work on the rules, and I’m happy to answer
16 any questions.
17 JUDGE SCHILTZ: Thank you, Mr. Thomas.
18 Professor Capra? You’re still muted.
19 PROF. CAPRA: I would ask the same question
20 I asked the last speaker. Doesn’t taking the brackets
21 off of "substantiate" actually do the job you want,
22 which is to say that these are essentially
23 presumptively admissible if they’re at all helpful,
24 and in a way, that is more, I guess, in tune with the
25 way the other federal rules are drafted?

1 MR. THOMAS: Yeah. Thank you for your
2 question, Professor. We would agree with the way that
3 the Maine rule is written. We think that is
4 preferable to the language that you suggest because it
5 does -- it creates the presumption that it comes in in
6 front of the jury as opposed to create this test that
7 the judge has to look at in advance.
8 PROF. CAPRA: But with -- okay. Fine.
9 Thanks.
10 JUDGE SCHILTZ: Judge Schroeder, you had a
11 question?
12 JUDGE SCHROEDER: I do. I'm a little
13 confused by the proposed language. You give a
14 proposed rule, but it says right out of the box "the
15 court may allow a party to use." Others have objected
16 to "the court may allow" language, and I understand
17 your argument about permissiveness versus -- you know,
18 there ought to be a permissive rule, an assumption it
19 could be used. It seems to me that that's problematic
20 given some of the other comments we've had if that's
21 the goal. So, are you saying that that language is
22 permissive?
23 MR. THOMAS: Yeah, Judge, I'll have to go
24 back and look and see what we submitted. We would
25 agree with the Maine language that it's permissive as

1 opposed to creating a balancing test in advance.
2 JUDGE SCHILTZ: Mr. Cooney, did you have a
3 question?
4 MR. COONEY: Judge Schroeder beat me to it,
5 as he usually does.
6 JUDGE SCHILTZ: Okay. Okay. Let me just
7 see, any other questions from the Committee?
8 (No response.)
9 JUDGE SCHILTZ: I don't see any. Thank you,
10 Mr. Thomas, for joining us this morning.
11 MR. THOMAS: Thank you.
12 JUDGE SCHILTZ: And our last witness is
13 Tiega-Noel Varlack. Let's see. Ms. Varlack, good
14 morning. I'm sorry if I pronounced your name wrong.
15 MS. VARLACK: It's Tiega. No worries.
16 JUDGE SCHILTZ: Tiega. I'm sorry. I left
17 out a syllable. Good morning. Thank you for joining
18 us. We'll be happy to hear from you this morning.
19 MS. VARLACK: Thank you for having me. Yes,
20 good morning. My name is Tiega Varlack, and I'm a
21 lawyer here in California. I'm a member of the
22 Northern District, Eastern District, Central District
23 courts, and the Ninth Circuit Court of Appeals. I
24 have been a practicing attorney since 2006. And in
25 2005, I was a student member of the D.C. Bar. I have

1 tried both civil and criminal cases to verdict, and in
2 my practice, I come across evidentiary rules every
3 day.
4 My position on the proposed amendment to
5 Rule 611 is that I believe the word "may" takes the
6 creativity as well as the spontaneity out of the trial
7 lawyer’s toolbox because we’re already in an
8 adversarial process by the time we get to trial, and
9 by changing the presumption that the illustrative aid
10 is to be presented to a maybe can take away from the
11 lawyer’s ability to plan ahead.
12 Specifically, when you are doing an opening
13 statement, yes, those PowerPoints are usually
14 exchanged ahead of time and discussed and objected to
15 before the jury ever takes its seat.
16 However, in other examples, such as like
17 using Google Maps and diagrams as you go along or
18 maybe if you need to use it as an impeachment tool,
19 you may not want to have that shown to the defendant
20 ahead of time. And so, in those instances, I believe
21 putting the word "may" into the equation takes away
22 from the opportunity to just go ahead and do what you
23 have already prepared to do before asking the court's
24 permission.
25 I also take issue with the word "admitted"

1 in front of the word "evidence" because, again, if the
2 evidence is not yet admitted, I think you can still
3 use an illustrative aid, such as in an opening
4 statement or depending on if the particular witness
5 calls for that type of presentation.
6 I think that we also do not need to put in
7 any further gatekeeping rule because the way that
8 things have been done up until now have allowed the
9 court to control the proceedings.
10 And even looking at Rule 611 as it’s written
11 today, the very beginning of the rule tells you that
12 it’s up to the court to control itself, and it gives
13 some directives as to how that can be done to avoid
14 wasting time and to protect the witnesses from
15 harassment and undue embarrassment.
16 And then we also have Rule 403 still there.
17 So, I don’t even think we need to write in another
18 mini-403 into this rule. I think that it’s good how
19 it is without that. And, additionally, I think that
20 if you look at Rule 402, the presumption is that
21 relevant evidence is admissible. And so, if an
22 illustrative aid is actually just there to assist the
23 fact-finder in understanding evidence, then that also
24 should be admissible just by what Rule 402 says.
25 So, my suggestion of how the rule should be

1 written is as follows: I think that it should say,
2 "Illustrative aids may be used to help the finder of
3 fact understand evidence if all parties are given a
4 reasonable opportunity to object."
5 I think that that is a very simple way of
6 showing the court and the litigants how to use an
7 illustrative aid and what its utility is, and it
8 doesn’t go so far as to create another set of
9 procedural rules when the court already has everything
10 at its disposal that it needs in order to control the
11 court and prevent prejudice to either side. So, with
12 that, I do thank you for allowing me to testify.
13 JUDGE SCHILTZ: Thank you, Ms. Varlack.
14 Mr. Cooney, you have a question?
15 MR. COONEY: Yes, I do have one question. I
16 take your point about the tie to "admitted evidence"
17 may create problems in opening statements in which no
18 evidence by definition has been admitted except
19 perhaps by stipulation.
20 But I don’t know how your proposed rule
21 solves that problem. I think somebody else had talked
22 about perhaps use of illustrative aids to help the
23 jury understand evidence admitted or to be admitted or
24 to understand argument, to give that flexibility in
25 opening statement. But can you explain how your

1 proposed change would erase the opening statement
2 problem?
3 MS. VARLACK: Yes. So let me look at my
4 note again. So, I think that it says, "Illustrative
5 aids may be used to help the fact-finder understand
6 evidence." So I think that in your opening, if you're
7 using an illustrative aid to summarize evidence that
8 you know is going to come out or to diagram a car
9 accident or the anatomy of the spine or something like
10 that, I think that that still is a -- I don't want to
11 use the word "summary," but I think that is still a
12 demonstration of evidence or is still a mode of
13 communication that can help the fact-finder understand
14 the concept.
15 So, I think that my rule would still not
16 necessarily get rid of the problem of the opening
17 statement not having admitted evidence, but I think
18 that it kind of encompasses a broader category of what
19 could be considered to be the foundation for an
20 illustrative aid if that makes sense.
21 JUDGE SCHILTZ: All right. Any other
22 questions? Yes, Judge Conrad?
23 JUDGE CONRAD: We've had six presentations,
24 all very helpful, none of which dealt with the subpart
25 dealing with use of illustrative aids in jury

1 deliberations. I would have thought that there would
2 have been more controversy with that provision or at
3 least discussion, but it seems unobjectionable.
4 MS. VARLACK: No, that’s not correct, Your
5 Honor. So, what happened was, in my letter, I did
6 write that I think that they should definitely be put
7 in the record when the jury wants to see them during
8 deliberations. I apologize if that’s something you
9 wanted to hear about, but I didn’t say -- I just
10 didn’t want to go over my time. But I definitely
11 think that a record should be as robust as possible.
12 So, with the illustrative aid, if it is used
13 during the trial, and assuming the jury comes back and
14 asks a question and would like to see it again, I
15 think that that’s definitely something that should be
16 in the record.
17 And I’m not opposed to illustrative aids
18 going back to the jury room as long as both sides
19 agree. That would be a place where I think that both
20 sides should agree before it being able to go back
21 because, for example, if it’s a reenactment or
22 something that’s more involved than maybe just a flip
23 chart for writing out a witness's testimony, I think
24 that’s something that can be manipulated. So, I would
25 seek agreement on that before allowing it to go back

1 to the jury.
2 JUDGE CONRAD: It is a subpart that is to be
3 read in conjunction with the 1006 summary language
4 where the summary itself is substantive evidence, and
5 the illustrative exhibit is something other than that.
6 And the distinction between taking back to the jury or
7 not is a very important one on a practical level for
8 trial courts.
9 MS. VARLACK: I agree with that statement.
10 JUDGE SCHILTZ: All right. Any more
11 questions for Ms. Varlack?
12 (No response.)
13 JUDGE SCHILTZ: I don't see any on my
14 screen. Thank you very much, Ms. Varlack, for
15 testifying today.
16 MS. VARLACK: Thank you.
17 JUDGE SCHILTZ: And with that, we'll bring
18 our hearing to a close. I want to thank again all of
19 the witnesses for taking the time to submit written
20 comments and to join us here this morning. Please be
21 assured that we will give careful consideration to
22 everything that you've said, and, again, we appreciate
23 your time. So, this will bring the hearing to a
24 close, and thank you, everyone, for joining us.
25 //

1 (Whereupon, at 10:00 a.m., the meeting in
2 the above-entitled matter adjourned.)
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REPORTER'S CERTIFICATE

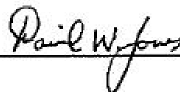
CASE TITLE: Proposed Amendments to the Federal Rules of Evidence

HEARING DATE: January 27, 2023

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: January 27, 2023



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