FORDHAM

University School of Law

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 611(a)
Date: April 1, 2021

Rule 611(a) provides trial courts with discretion to manage evidence presented at trial. The rule provides as follows:

> **(a) Control by the Court; Purposes.** The court should exercise reasonable control over the **mode and order** of examining witnesses and presenting evidence so as to:
>
> **(1)** make those procedures effective for determining the truth;
>
> **(2)** avoid wasting time; and
>
> **(3)** protect witnesses from harassment or undue embarrassment.

Rule 611(a) thus sets forth two permissible types of actions: control of (1) mode and (2) order. And there are three goals to which the court's actions can be directed: (1) determining the truth, (2) avoiding waste of time, and (3) protecting witnesses from harassment or embarrassment.

Courts appear to invoke Rule 611(a) whenever they deal with an evidence question that is not covered by another rule --- and sometimes even when another rule applies. While any particular action in the name of Rule 611 may be reasonable and appropriate, there is a possibility that some actions taken by a court under the rubric of Rule 611(a) may not actually be within the text of the rule. It appears that some actions taken in the name of Rule 611(a) involve neither "mode" or "order." And even when a court's action involves "mode" or "order", the court invoking Rule 611(a) might be pursuing a goal that is not described in subdivisions (1), (2), and (3).

The Chair asked the Reporter to determine whether courts have, in the name of Rule 611(a), undertaken actions that are outside the text of the rule. If so, then the Committee might consider an amendment to Rule 611(a) to allow those actions (assuming such actions are proper on the merits). The Supreme Court Fellow to the Administrative Office, Kathleen Foley, conducted extensive research into the uses of Rule 611(a) over the past five years.[1] This memo sets forth that research and analyzes whether the invocations of Rule 611(a) have ever gone beyond the language of the Rule.

[1] The Reporter is very grateful for Ms. Foley's outstanding work.

Part One of this memo sets forth the research on court invocations of Rule 611(a), and analyzes whether these actions fit within the language of Rule 611(a).[2] Part Two discusses possible amendments that would 1) broaden the language of Rule 611(a), and 2) add protective provisions on a particular practice that has been sanctioned under Rule 611(a) --- allowing jurors to ask questions during the trial.

It should be emphasized that this memo is not making a recommendation that Rule 611 should be amended. In fact there are a number of questions that would be raised by an amendment expanded to cover some of the current actions that appear to be outside the text of the rule. Here are two questions that might give one pause:

1. While it appears to be true that Rule 611(a) has been used beyond the textual grant of discretion, if nobody is having a problem with that, why amend the rule? Usually a rule is amended because the language of the rule has created a problem in practice, or there is a conflict in the courts. But there doesn't appear to be a problem in practice from courts interpreting Rule 611(a) in the broadest fashion --- essentially as a tool to manage the trial. Nor does there appear to be a conflict in the courts about a broad interpretation of the rule.[3] This is not at all to say that there is no value in codifying the Rule 611(a) case law that goes beyond the current text. But there is a question of what problem that codification would solve.

2. Besides the authority granted in Rule 611(a), the trial court has inherent authority to control the courtroom and the court proceedings in the interests of justice. It is hard to know where Rule 611(a) ends and inherent authority begins. Obviously there is an overlap. It is hard to know what will be gained by amending Rule 611(a), given the court's inherent authority, in any event, to run the courtroom. In many of the cases below, the court invokes both Rule 611(a) and its inherent authority, to do what it needs to do.

I. How Has Rule 611(a) Been Used by the Courts?

The following is a list of actions that courts have taken under the authority of Rule 611(a). After each action, an analysis is provided on whether it fits within the language of the Rule. The actions are divided into parts --- those that are clearly within Rule 611(a) and those that might not be.

It should also be noted that the research indicates a number of examples in which the invocation of Rule 611(a) has resulted in tension (if not outright conflict) with another Evidence Rule. Where that has occurred, the analysis points that out.

---

[2] Of course a look into the reported case law will undercount the uses of Rule 611(a) by a trial court. One possible way to supplement the information provided by the reported case law is to prepare a survey for federal judges. This Committee has twice before conducted a survey of federal judges on the use of an evidence rule --- with the substantial assistance of the FJC. Both times, however, the Committee was pretty far along in the amendment process, so that the costs of a survey could be more easily justified.

[3] Of course it is true that a court might abuse its discretion under Rule 611(a). For example, a court that, without any reason, excludes a witness or bars cross-examination or reverses the order of proof would probably violate Rule 611(a). But the goal of an amendment to Rule 611(a) could not possibly be intended to describe when an abuse of discretion occurs in any particular case. Rather the goal would have to be the kinds of acts that the court can do, subject to an abuse of discretion standard that is inherent in the rule.

A. Actions within the textual authority of Rule 611(a)

1. Controlling the order of presentation

Many courts invoke Rule 611(a) when they find it appropriate to alter the parties' order of proof. Some examples are:

- Taking witnesses out of order.[4]
- Directing a specific order for calling witnesses.[5]
- Allowing the anticipation of the opposing party's arguments on direct, in opening statement, or in the case-in-chief.[6]
- Changing the order of proof.[7]
- Sequencing the questioning of a witness.[8]

---

[4] *United States v. Robertson*, 2016 WL 3397725, at *15 (D. Ariz. June 21, 2016) (taking witnesses out of order to accommodate one witness's medical emergency); *Accident Ins. Co., Inc. v. U.S. Bank Nat'l Ass'n*, 2020 WL 1910096, at *1 (D.S.C. Apr. 20, 2020); *Phillips & Jordan, Inc. v. McCarthy Improvement Co.*, 2020 WL 5793377, at *2 (D.S.C. Sept. 29, 2020).

[5] *Hassoun v. Searls*, 467 F. Supp. 3d 111, 124 (W.D.N.Y. 2020) (ordering Respondent to call Petitioner last, if it called him at all, so he could assess if and how to invoke his Fifth Amendment privilege); *United States v. Okoroji*, 2018 WL 9708257, at *2 (N.D. Tex. June 6, 2018) (allowing expert to testify on a date certain, potentially after the rest of the trial had concluded).

[6] *United States v. DeLeon*, 2018 WL 4184235, at *1 (D.N.M. Apr. 12, 2018) ("Nothing in the Federal Rules of Evidence requires parties to wait to introduce impeachment evidence until after a witness testifies; on the contrary, those rules commit "the mode and order of examining witnesses and presenting evidence" to the Court's discretion. Fed. R. Evid. 611. Accordingly, the Court will permit J. Gallegos to use the Lujan recordings and transcripts in his opening if he intends to offer them as impeachment evidence. The Court will reconsider this determination, however, if the United States represents to the Court that it will not call Lujan as a witness."); *Brooks v. Caterpillar Glob. Mining Am., LLC*, 2017 WL 3401476, at *7 (W.D. Ky. Aug. 8, 2017); *Krakauer v. Dish Network L.L.C.*, 2017 WL 2455095, at *11 (M.D.N.C. June 6, 2017);.

[7] *Cammeby's Mgmt. Co., LLC v. Affiliated FM Ins. Co.*, 2016 WL 10570966, at *4 (S.D.N.Y. Dec. 28, 2016) ("The trial court has the broadest sort of discretion in controlling the order of proof at trial, ; see Fed. R. Evid. 611, and . . . the Court changed the order of evidence because the jury would find this case clearer to have the plaintiff go first and Alliant go second, and, since Alliant bore the burden of proof, it made more sense for that to be fresher in the jurors' minds when they get the case for deliberations."; *Ulbricht v. United States Fid. & Guar. Co.*, , 2020 WL 5632104, at *2 (W.D. Wash. Sept. 21, 2020); *Fontenot v. Safety Council of Sw. Louisiana*, 2017 WL 3122607, at *4 (W.D. La. July 21, 2017); *Jun Yu v. Idaho State Univ.*, 2019 WL 501457, at *2 (D. Idaho Feb. 8, 2019); *Walker v. Corr. Corp. of Am.*, 2016 WL 865295, at *3–4 (N.D. Miss. Mar. 2, 2016) (declining to allow defendant to open and close argument or to present its evidence first).

[8] *United States v. French*, 2019 WL 289803, at *3–4 (D. Me. Jan. 22, 2019) (providing for sequencing of questioning a juror in a hearing on juror misconduct).

Analysis: All of the above actions seem well within the grant of authority over the "mode and order" of questioning witnesses and presenting evidence. Moreover, they can all be justified (depending on the circumstances) as having a proper designated purpose listed under Rule 611(a): they are procedures "effective for determining the truth."

2. Controlling the number of times a witness can be called or questioned.

Courts invoke Rule 611(a) in determining whether a witness who has testified may or should be recalled. [9] And if the court allows a witness to be recalled, it may invoke Rule 611(a) to impose a limit on what questions may be posed to the witness.[10]

Analysis: These actions clearly are within "mode and order" and, if proper, they would have the justified purpose of "protecting witnesses from harassment."

3. Controlling the presentation of testimony

Courts invoke Rule 611(a) on a variety of issues related to how witness testimony is to be presented. Examples include:

- Structuring *pro se* testimony, ordinarily by allowing it in narrative form.[11]

---

[9] *United States v. Bailey*, 973 F.3d 548, 563–64 (6th Cir. 2020) (proper use of Rule 611(a) to allow a witness to testify three separate times in the prosecution's case-in-chief --- in part caused by the need for lengthy continuances); *United States v. Smith*, 659 F. App'x 908, 912 (9th Cir. 2016); *United States v. Choudhry*, 649 F. App'x 60, 61 (2d Cir. 2016); *Thomas v. Concerned Care Home Health, Inc.*, 2016 WL 930943, at *4 (E.D. La. Mar. 11, 2016); *United States v. Haig*, 2019 WL 3577647, at *5 (D. Nev. Aug. 6, 2019); *United States v. Jinhuang Zheng*, 2017 WL 3434228, at *2 (N.D. Ill. Aug. 10, 2017);; *Kirkland v. Cablevision Sys.*, 2020 WL 7321358, at *3 (S.D.N.Y. Dec. 11, 2020); *One Way Apostolic Church v. Extra Space Storage Inc.*, 792 F. App'x 402, 404 (7th Cir. 2019); *United States v. Ageyev*, 2019 WL 8989871, at *2 (E.D. Wash. Sept. 30, 2019).

[10] *United States v. Woods*, 2018 WL 8997508, at *1–2 (W.D. Ark. Apr. 8, 2018) (relying on Rule 611(a), the court states in a pretrial ruling that "a witness that was previously called in one party's case-in-chief may be recalled by another party in its own case-in-chief. However, the general rule will be that when a witness is recalled under such circumstances, the party recalling that witness must restrict the scope of his direct examination to matters that were not within the scope of that witness's prior testimony.").

[11] *United States v. Rodriguez-Aparicio*, 888 F.3d 189, 196 (5th Cir. 2018) (upholding a ruling directing *pro se* criminal defendant to ask himself questions on the stand); *Chichakli v. Gerlach*, 2018 WL 3625840, at *3 (W.D. Okla. July 30, 2018) (allowing *pro se* plaintiff to testify in narrative form, both on direct and on redirect; requiring him to file beforehand the subjects he intends to cover); *DeBose v. Univ. of S. Fla. Bd. of Trustees*, 2018 WL 8919981, at *7 (M.D. Fla. Sept. 9, 2018) (*pro se* plaintiff may testify in narrative form); *Duverge v. United States*, 2018 WL 619497, at *1, *2–3 (D. Conn. Jan. 30, 2018) (prohibiting *pro se* plaintiff from testifying in narrative form); *United States v. Rankin*, 2017 WL 3096177, at *4 (S.D. Ohio July 20, 2017) (allowing *pro se* defendant to testify in "modified narrative format"—arranged by topic, with a summary description preceding each topic).

● Allowing or directing testimony of experts in narrative form.[12]

● Ordering submission of direct testimony by deposition, while requiring live cross and redirect.[13]

Analysis: These actions are well within mode and order and, when proper, are for the proper purpose of determining the truth.

4. Allowing and regulating the use of illustrative aids.

As discussed in another memo in this agenda book, illustrative aids --- which are not evidence, but rather offered to allow the fact finder to better understand the evidence --- are reviewed, and regulated, under Rule 611(a). Actions by courts under Rule 611(a) include:

● Assuring that illustrative aids are helpful and not misleading.[14]

● Admitting "summary" charts that are illustrative (and distinct from evidence summaries offered under Rule 1006).[15]

---

[12] *In re Depakote v. Abbott Labs., Inc.*, 2017 WL 11438794, at *4 (S.D. Ill. May 24, 2017) (allowing an expert to testify in narrative form); *In re: Tylenol (Acetaminophen) Mktg., Sales Practices & Prod. Liab. Litig.*, 2016 WL 807377, at *9 & n.28 (E.D. Pa. Mar. 2, 2016) (same).

[13] *United States v. Brown*, 2017 WL 219521, at *2 (N.D. Ill. Jan. 19, 2017) (order in a bench trial requiring the parties to "submit the direct testimony of all witnesses by declaration prior to trial," while also requiring they "make their witnesses available live for cross-examination and re-direct during trial."). *See also*, *In re Gergely*, 110 F.3d 1448, 1452 (9th Cir. 1997) ("The pretrial order required written declarations in lieu of direct oral evidence. It was a valid order.").

[14] *United States v. Kaley*, 760 F. App'x 667, 681–82 (11th Cir. 2019) (finding that the illustrative aid fairly represented the evidence); *Boykin v. W. Express, Inc.*, 2016 WL 8710481, at *4–5 (S.D.N.Y. Feb. 5, 2016) ("Here, Mr. Hennan's testimony compares the diagram of the accident to the accident as he recalls it occurring. Without the ability to view the diagram, this testimony lacks probative value. The diagram will aid the jurors in their attempt to understand Mr. Hennan's description of the accident and will clarify his statements as to the accuracy of the illustration. Therefore, the diagram can be used for the limited purpose of illustrating Mr. Hennan's testimony to the jury and can be displayed to the jury, but, to the extent it is offered for its truth, the diagram is inadmissible hearsay and cannot be submitted as substantive evidence."); *United States v. Crinel*, 2017 WL 490635, at *11–12 & Att.2 (E.D. La. Feb. 7, 2017) (directing modification to pedagogical aid so that it is not misleading); *Core Labs. LP v. AmSpec*, 2018 WL 6200758, at *7 (S.D. Ala. May 10, 2018) (striking summary judgment exhibits that purported to be pedagogical aids, but that made arguments in violation of page limits, as they "would waste the Court's time and be an ineffective means for determining the truth").

[15] *United States v. Mendez*, 643 F. App'x 418, 423–24 (5th Cir. 2016) ("The photographs were part of a demonstrative aid to assist the jury in following along during the foreign language conversations. They are thus subject to Fed.R.Evid. 611."); *United States v. Georgiou*, 2018 WL 9618008, at *41–42 (E.D. Pa. June 19, 2018) (habeas claimant argues that FRE 1006 summaries were in fact FRE 611(a) pedagogical aids; court disagrees); *United States v. Gordon*, 2019 WL 4308127, at *4–5 & n.1 (D. Me. Sept. 11, 2019) (explaining the difference between an FRE 1006 summary chart and an FRE 611(a) pedagogical aid); *United States v. Ojimba*, 2018 WL 1884822, at *2 (W.D. Okla. Apr. 19, 2018); *Holmes v. Godinez*, 2016 WL 4091625, at *6–7 (N.D. Ill. Aug. 2, 2016) (deposition summaries); *Monaghan v.*

● Allowing witnesses to summarize documents that have been admitted.[16]

Analysis: The distinction between demonstrative evidence and illustrative aids is discussed in Professor Richter's memo in the agenda book. As indicated in that memo, illustrative aids are not evidence. Rather they are devices used to help the factfinder understand the evidence.

Because illustrative aids (including summary charts) are not evidence, it can be argued that there is no authority to regulate them --- or even to allow them --- under Rule 611(a), because the power granted there is to control the mode and order of witness testimony or the presentation of "evidence."

But while illustrative aids are technically not evidence, they surely have evidentiary impact, because they help the jury understand the evidence that is presented. That is probably close enough to be within the broad language of Rule 611(a). Certainly the courts and treatises are clear that Rule 611(a) provides authority for the court to regulate the use of illustrative aids. If the Committee disagrees, then regulation of illustrative aids can be specified in an amendment that would broaden the language of Rule 611(a).

Note that the other memo on illustrative aids considers a different amendment to Rule 611, that would provide guidelines for distinguishing between illustrative aids and demonstrative evidence. If that amendment is pursued, then there would be no reason to amend Rule 611(a) to grant specific authority to authorize and regulate illustrative aids.

5. Admitting oral statements when necessary for completion.

As the Committee is aware --- and as indicated in a memo in this agenda book --- Rule 106 does not on its face allow completion with oral, unrecorded statements. But most courts have admitted such statements when necessary to compete --- invoking Rule 611(a) to do so.[17]

Telecom Italia Sparkle of N. Am., Inc., 647 F. App'x 763, 767 (9th Cir. 2016) (summary of expert report); *United States v. Cadden*, 2017 WL 758461, at *2 (D. Mass. Feb. 27, 2017) (summary testimony); *United States v. Franco*, 2017 WL 11466631, at *4 (D. Ariz. June 22, 2017) (summary extraction of selected text messages); *United States v. Joyce*, 2017 WL 895563, at *3 (N.D. Cal. Jan. 20, 2017) (non-argumentative charts properly offered as illustrative aids).

[16] *See, e.g., Does I-XIX v. Boy Scouts of Am.*, 2019 WL 2448318, at *2 (D. Idaho June 11, 2019) (noting that "a summary prepared by a witness from his own knowledge to assist the jury in understanding or remembering a mass of details is admissible, not under Rule 1006, but under such general principles of good sense as are embodied in Rule 611(a)") (quoting the Weinstein treatise).

[17] *See, e.g., United States v. Bailey*, 322 F. Supp. 3d 661 (D. Md. 2017); *United States v. Cooper*, 2019 WL 5394622, at *7 (E.D.N.Y. Oct. 22, 2019); *United States v. Baca*, 403 F. Supp. 3d 1181, 1184–85 (D.N.M. 2019). See also the many cases discussed in the Rule 106 memo.

Analysis: While using Rule 611(a) is not ideal (because all completeness issues should be located in one rule), it is clear that using the Rule for completion concerns both the mode and order of the presentation of evidence --- and it has the proper purpose of furthering the search for truth.

6. Excluding time-wasting, cumulative, or irrelevant evidence.

Courts often cite Rule 611(a) in precluding redundant or repetitive questioning, excluding multiple witnesses from testifying to the same point, and the like.[18] Similarly, courts have invoked the rule to limit cross-examination of witnesses when it gets to be unproductive, overly lengthy, etc.[19] And Rule 611(a) has been invoked when the court decides that allowing certain inquiries would lead to minitrials or sideshows, that are not justified under the circumstances.[20]

---

[18] *United States v. Schlosser*, 749 F. App'x 145, 146–47 (3d Cir. 2019) (no error in prohibiting introduction of documentary evidence cumulative of testimony); *United States v. Ulbricht*, 858 F.3d 71, 118–20 (2d Cir. 2017) (no error in striking speculative testimony as irrelevant); *Miller v. Greenleaf Orthopedic Assocs., S.C.*, 827 F.3d 569, 572–73 (7th Cir. 2016) (finding no error in barring repetitive impeachment); *Watkins v. Broward Sheriff's Office*, 771 F. App'x 902, 911 (11th Cir. 2019) (trial court had discretion under Rule 611(a) to prevent continuation of repetitive questioning); *Igwe v. Skaggs*, 2017 WL 5067496, at *1, 2 (W.D. Pa. July 7, 2017) (prohibiting seven witnesses from testifying on matter not at issue); *Pender v. Bank of Am. Corp.*, 2016 WL 7320894, at *1 (W.D.N.C. Dec. 15, 2016) (excluding expert reports of testifying experts); *Sanchez v. Duffy*, 416 F. Supp. 3d 1131, 1154, 1174 (D. Colo. 2018) (excluding testimony of little or no relevance); *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 2017 WL 2602332, at *5, 8 (Bankr. S.D.N.Y. June 15, 2017) (excluding witness whose testimony would be duplicative); *Gucker v. U.S. Steel Corp.*, 2016 WL 379553, at *6 (W.D. Pa. Jan. 31, 2016) (excluding witness whose testimony would be cumulative); *Hinds v. Cty. Of Westchester*, 2020 WL 7046843, at *4 (S.D.N.Y. Dec. 1, 2020) (instructing counsel to stop asking redundant questions); *United States v. Chow*, 2016 WL 3098238, at *9–15 (N.D. Cal. June 2, 2016) (excluding witnesses as cumulative or irrelevant); *United States v. Odiase*, 312 F. Supp. 3d 432, 437 (S.D.N.Y. 2018) (prohibiting playing of hour-long, nonprobative video to jury); *Jarzyna v. Home Properties, L.P.*, 2018 WL 4090498, at *1 & n.1 (E.D. Pa. Aug. 27, 2018) (denying request to call witness, large portions of whose deposition had already been read into the record); *Jun Yu v. Idaho State Univ.*, 2019 WL 346390, at *1 (D. Idaho Jan. 28, 2019) (excluding illustrative aids, in part because case was not "complex"); *United States v. Evans*, 2018 WL 8334950, at *17 (E.D. Ky. June 1, 2018) (barring criminal defendant from testifying on theory that had no basis in evidence); *Watkins v. Pinnock*, 802 F. App'x 450, 458 (11th Cir. 2020) (prohibiting questioning in violation of FRE 404(b)); *Bosby v. Hydratech Indus. Fluid Power, Inc.*, 2018 WL 2994382, at *3 (S.D. Ala. June 14, 2018) (striking *pro se*'s voluminous, unexplained summary judgment exhibit of uncertain relevance, because admission "would waste the Court's time and be an ineffective means for determining the truth").

[19] *United States v. Vargas*, No. 14 CR 579, 2016 WL 4059190, at *5 (N.D. Ill. July 27, 2016), *aff'd,* 915 F.3d 417 (7th Cir. 2019) (curtailing cross-examination after hours of largely irrelevant questioning of witness); *United States v. Browne*, No. SACR 16-00139-CJC, 2017 WL 1496912, at *6 (C.D. Cal. Apr. 24, 2017) (ending cross when it became "excessively cumulative and argumentative"); *United States v. Pinchotti*, 2019 WL 1547264, at *3 (D. Md. Apr. 9, 2019) (curtailing cross on irrelevant matter); *United States v. Atias*, 2017 WL 6459477, at *14, 18 (E.D.N.Y. Dec. 18, 2017) (curtailing cross on "problematic" impeachment ground); *United States v. Hamlett*, 2019 WL 3387098, at *13–14 (D. Conn. July 26, 2019) (prohibiting cross of alleged sex trafficking victim on prior sexual history, in conjunction with FRE 412(b)(1)); *United States v. Lee*, 660 F. App'x 8, 18–19 (2d Cir. 2016) (prohibiting further irrelevant cross).

[20] *Angelopoulos v. Keystone Orthopedic Specialists, S.C.*, 2017 WL 2178504, at *13, 15 (N.D. Ill. May 16, 2017) ("The Court will not permit a lengthy sideshow on these issues or time consuming mini-trials regarding the merits of these other allegations.") (citing Rule 611(a) and Rule 403); *Crew Tile Distribution, Inc. v. Porcelanosa Los Angeles, Inc.*, 2017 WL 633044, at *13 (D. Colo. Feb. 16, 2017); *Holmes v. City of Chicago*, 2016 WL 6442117, at *8, 14, 15,

Analysis: Preventing cumulative questioning and irrelevant or prejudicial testimony is pretty comfortably within the mode of presenting witness testimony. And it is properly purposed as it avoids wasting time and protects witnesses from harassment.

But it is not clear why Rule 611(a) is doing any work here --- because cumulative or irrelevant evidence is already regulated under Rules 401-403. If the Committee decides to further consider an amendment to Rule 611(a), it might consider the question of how that Rule 611(a) interfaces with Rules 401-403, and whether that relationship needs to be set forth in a rule or a committee note. Generally speaking, it would not be good if Rule 611(a) is somehow read to exclude evidence that is specifically permitted by another rule, nor to admit evidence that is specifically excluded by another rule. It is less offensive if Rule 611(a) is merely cited as support for applying another rule --- or as support for a ruling within the spirit of that other rule.

7. Objecting to Evidence.

In *United States v. Woods*, 978 F.3d 554, 571 (8th Cir. 2020), the court, relying on Rule 611(a), found no error in the trial court's objection to a question asked by counsel. The court found that "the objection at issue was in response to defense counsel's introduction of facts not in the record through the means of a question, and was not an improper objection."

Analysis: Objecting to a problematic question appears sufficiently related to the mode and order of witness testimony and presentation of the evidence. And if the objection is valid, it is properly purposed as protecting the search for truth.

8. Judicial questioning of witnesses and commenting on the evidence.

In *United States v. Rivera-Carrasquillo*, 933 F.3d 33, 44–46 (1st Cir. 2019), the court held that judges can "question witnesses" and "analyze, dissect, explain, summarize, and comment on the evidence" --- and otherwise extract facts to clarify misunderstandings. However, the judge's powers "are not boundless — for they cannot become advocates or otherwise use their judicial powers to advantage or disadvantage a party unfairly." The court found no abuse of discretion in this case as the comments and questions were fair and not especially intrusive, and the trial court instructed the jury that it should not give undue weight to the judicial comments and questions.[21]

17, 18 (N.D. Ill. Nov. 1, 2016); *Lawton-Davis v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 1383015, at *3 (M.D. Fla. Apr. 7, 2016); *Owens v. Ellison*, 2017 WL 1151046, at *8, 9 (N.D. Ill. Mar. 28, 2017).

[21] *See also Cain v. United States*, 2017 WL 3840258, at *9–10 (D. Md. Sept. 1, 2017); *Meyers v. Hall*, 2020 WL 1482561, at *7 (W.D. Va. Mar. 27, 2020).

Analysis: Questioning witnesses and commenting on the evidence seem well within mode and order, and if proper, they are done for the permissible purposes of streamlining the proceedings and promoting the search for truth.

But one wonders why Rule 611(a) is being used in light of Rule 614(b), which specifically grants the court discretion to examine witnesses. There would appear to be no reason to have two rules applicable to the same situation --- this problem of overlap is similar to the overlap with Rules 401-403 when the court invokes Rule 611(a) to exclude irrelevant or prejudicial evidence. Again the question is whether Rule 611(a) is somehow negatively affecting the existing rule, or rather that it is just being cited in passing in support for the more explicit rule.

9. Calling a recess in the middle of a witness examination.

In *Thompson v. Afamasaga*, 2019 WL 1290856, at *3 (D. HI. Mar. 20, 2019), the court relied on Rule 611(a) in declaring a recess in the middle of the plaintiff's direct testimony. The court noted that it did nothing to prevent questions from resuming after the recess. [22]

Analysis: Controlling the pace and timing of testimony is clearly within mode and order, properly purposed for the search for truth.

[22] *See also United States v. Boggs*, 737 F. App'x 243, 253–54 (6th Cir. 2018); *Castro v. Tanner*, 2014 WL 2938355, at *30-31 (E.D. La. June 27, 2014) (finding no error or prejudice where the court called a recess during cross-examination, allowed counsel to continue questioning witness after recess, and excused witness after counsel for both parties said they had no more questions, even though witness stated that he had more to say).

10. Allowing and managing rebuttal,[23] surrebuttal,[24] redirect,[25] and recross[26]

Analysis: There is little doubt that managing these issues are regulating the mode and order of witness testimony and the presentation of the evidence and, if proper, they promote the search for truth.

11. Regulating the form of questions:

Objections such as "compound question", "argumentative", "assumes facts that aren't in evidence" and so forth are routinely handled by courts under Rule 611(a). [27]

Analysis: Ruling as to form goes directly to the mode of witness testimony and is done with the proper purposes of effectuating truth and, in some cases, protecting witnesses.

---

[23] **Allowing**: See, e.g., *United States v. Valas*, 822 F.3d 228, 240, 242 (5th Cir. 2016) ("The Federal Rules of Evidence grant the district court the discretion to control the mode and order of interrogating witnesses. Fed. R. Evid. 611(a). This grant of discretion includes broad authority to control the scope of rebuttal."); *United States v. Wheeler*, 745 F. App'x 643, 644 (7th Cir. 2018); *Fed. Trade Comm'n v. Innovative Designs, Inc.*, 2020 WL 5701925, at *13 n.29 (W.D. Pa. Sept. 24, 2020); *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 2018 WL 6335781, at *5 (E.D. La. Dec. 5, 2018);; *United States v. Loftis*, 2018 WL 3193196, at *12 (D. Mont. June 27, 2018); *United States v. Pon*, 963 F.3d 1207, 1222 (11th Cir. 2020); *Wickersham v. Ford Motor Co.*, 2017 WL 3783122, at *10–11 (D.S.C. Aug. 30, 2017).

Restricting: See, e.g., *In re Petition of Frescati Shipping Co., Ltd.*, 2016 WL 4035994, at *7 n.15 (E.D. Pa. July 25, 2016) ("Rule 611 of the Federal Rules of Evidence mandates that the Court exercise reasonable control over the mode and order of examining witnesses and presenting evidence. This includes controlling the scope of rebuttal and surrebuttal. . . . Rebuttal testimony was limited to only new matters that the defense raised in its case-in-chief.").

[24] **Allowing**: *Meinert v. Praxair Inc*, 2016 WL 5219746, at *1, *2–3 (N.D. Ind. Sept. 21, 2016) (allowing two sur-rebuttal experts due to change in circumstances).

Restricting: *United States v. Chow*, 2016 WL 3098238, at *14–15 (N.D. Cal. June 2, 2016).

[25] *Waterman v. McKinney Indep. Sch. Dist.*, 642 F. App'x 363, 372 (5th Cir. 2016) ("With regard to preventing redirect examination of Strickland, the district judge has 'reasonable control over the mode and order of examining witnesses and presenting evidence.' The district judge's disallowance of redirect examination was in his discretion, and regardless, Waterman does not explain how he was prejudiced by the ruling."); *United States v. Mejia-Ramos*, 798 F. App'x 749, 751–52 (4th Cir. 2019) (no error in reopening redirect and allowing inquiry into new subject) *Reynolds v. Am. Airlines, Inc.*, 2017 WL 6017355, at *4–5 (E.D.N.Y. Dec. 4, 2017) (managing scope of redirect);.

[26] *Nowlan v. Nowlan*, 2021 WL 217139, at *1 (W.D. Va. Jan. 21, 2021) (allowing recross "to mitigate any potential limitations" of videoconference format).

[27] *Burley v. Gagacki*, 834 F.3d 606, 617 (6th Cir. 2016) (no error in instructing plaintiffs' counsel to use the question and answer format during cross-examination); *Hinds v. Cty. of Westchester*, 2020 WL 7046843, at *4 (S.D.N.Y. Dec. 1, 2020) (advising counsel not to use questioning as argument and not to ask inflammatory questions); *Gobert v. Atl. Sounding*, 2017 WL 479215, at *4 (E.D. La. Feb. 6, 2017) (ruling on objections as to form); *In re USA Promlite Tech. Inc*, 2020 WL 4384218, at *7–12, 15, 16, 20, 24, (Bankr. S.D. Tex. July 30, 2020).

12. Preventing harassment or embarrassment of witnesses.

Some of the actions taken under Rule 611(a) to protect witnesses are:

● Prohibiting offensive questions.[28]

● Prohibiting attacks and questions when the point has already been made.[29]

● Entering a protective order.[30]

● Taking measures to protect the witness from emotional trauma.[31]

Analysis: All the above actions are clearly undertaken for a permissible purpose under Rule 611(a): to protect witnesses from harassment or embarrassment. And limiting the questions that can be asked would appear to go to the "mode" of questioning witnesses. Protective orders under this rule are also related to the "mode" of questioning witnesses, because they regulate the conditions under which testimony is given.

13. Imposing sanctions.

In *Burnett v. Ocean Properties, Ltd.*, 422 F. Supp.3d 369, 391–92 (D. Me. 2019), the trial judge had a pending motion *in limine* on, of all things, a question of moose-hunting. The judge instructed counsel that the hunting could not be raised before the jury, pending the court's decision. But defense counsel asked a witness about moose-hunting, without approaching the bench to determine whether the testimony would be admissible. The Court viewed defense counsel's

---

[28] *Crew Tile Distribution, Inc. v. Porcelanosa Los Angeles, Inc.*, 2017 WL 633044, at *10 (D. Colo. Feb. 16, 2017) (prohibiting "prejudicial or inflammatory phrasing of questions"); *Meyers v. Hall*, 2020 WL 1482561, at *8 (W.D. Va. Mar. 27, 2020) (striking harassing questions) ; *United States v. Streb*, 477 F. Supp. 3d 835, 869–70 (S.D. Iowa 2020); *Hurt v. Vantlin*, 2019 WL 8267074, at *17 (S.D. Ind. Sept. 26, 2019); *Martinez v. City of Chicago*, 2016 WL 3538823, at *9 (N.D. Ill. June 29, 2016).

[29] *Miller v. Greenleaf Orthopedic Assocs., S.C.*, 827 F.3d 569, 572–73 (7th Cir. 2016) (no error in judge refusing to allow a witness to be attacked where it was "an attempt to bang away at a witness who has already been adequately impeached").

[30] *Planned Parenthood Arkansas & E. Oklahoma v. Jegley*, 2016 WL 7487914, at *2 (E.D. Ark. Feb. 1, 2016) (noting that "in extraordinary circumstances where the safety of a witness might be jeopardized by compelling testimony to be given under normal conditions, the courts have permitted testimony to be given in camera, outside the courtroom, or under other circumstances that afford protection.").

[31] *United States v. Counts*, 2020 WL 598526, at *4 (D.N.D. Feb. 7, 2020) (allowing child witnesses to hold "comfort objects" while testifying); *In re Ptacek*, 2019 WL 4049842, at *18–20 (Bankr. N.D. Ohio Aug. 27, 2019) (declining to stay proceedings to procure testimony because, *inter alia*, debtor-witness would be traumatized by the process and proceedings).

blurting out the issue of hunting as "an egregious violation of the clear implication of its instruction to defense counsel that there would be no reference to hunting until the Court ruled on its admissibility." As a sanction, the court held that evidence of moose-hunting was inadmissible. (In other words, the judge decided the *in limine* issue as a sanction rather than on the merits.) The court relied on Rule 611(a).

Analysis: Sanctions would seem to be within the language of Rule 611 if the order that is violated is itself within the rule. And in this case, the court's decision to exclude evidence pending its decision on the evidence was pretty clearly within the confines of "mode" and "order." But sanctions can also be grounded in the court's inherent authority; so once again the question is raised of the complicated relationship between Rule 611(a) and the court's inherent power.

14. Admitting electronic duplicates rather than originals.

In *United States v. Hofstetter*, 2019 WL 5256883, at *4 (E.D. Tenn. Oct. 16, 2019), a case involving opioid prescriptions by doctors, the defendants argued that original patient files needed to be introduced to comply with the best evidence rule. The court, citing Rule 611(a), came to the following solution:

> The Court finds that introducing photographs of hundreds of original patient files, when scanned copies of those files already exist, would waste time and resources. Accordingly, the Court finds that whenever an original patient file is used by either party in evidence, the parties may produce to the jury through the JERS system, the electronic duplicate. If a party seeks to emphasize a particular color of ink or tab that is not depicted on the electronic file, *the party* may introduce a photograph of that one page of the original paper file. The Court will ask the jury, before they retire to deliberate, if they desire to view any physical evidence, including particular original patient files.

Analysis: This ruling definitely deals with the mode of presenting evidence. And it is furthering a purpose articulated in the rule: time-saving. But on the other hand, this use of authority runs up against the best evidence rule. Once again, it should be inappropriate to use the Rule 611(a) authority where the matter is already covered by another rule of evidence --- and especially so if Rule 611 is used to authorize an action that is prohibited by another rule.

15. Requiring that deposed witnesses must testify if called in the opponent's case-in-chief or not at all.

In *CGC Holding Co., LLC v. Hutchens*, 2016 WL 6778853, at *2 (D. Colo. Nov. 16, 2016), the plaintiff had deposed certain defendants, and sought a ruling that if these defendants made themselves unavailable during the plaintiff's case-in-chief, they would not be permitted to testify in court as defense witnesses. The court, citing Rule 611(a), agreed with the plaintiff. It noted that there is nothing unusual about a party calling an opponent in its case-in-chief, and that "defendants' refusal to commit to the presence of the three Hutchens, each of whom is a defendant in the case, during plaintiffs' case in chief while reserving the option to call them as live witnesses during defendants' case in chief strikes me as unjustified gamesmanship." The court, citing Rule 611(a), concluded that "[i]f these individuals will appear live, then they must appear live during plaintiffs' case in chief so that they can be called by the plaintiffs if they so desire."[32]

Analysis: This ruling is grounded in fairness and truth-seeking, and is clearly a ruling about both mode and order of witness testimony.

16. Requiring, contrary to Rule 613(b), that a prior inconsistent statement must be presented to the witness before extrinsic evidence is admissible.

Rule 613(b) addresses whether a party can introduce extrinsic evidence of a prior inconsistent statement. It departs from the common law rule, which required the cross-examiner to confront the witness with the inconsistent statement, before extrinsic evidence of the prior statement could be permitted. Rule 613(b) provides that the witness is not required to confront the witness with the prior statement, so long as the witness has an opportunity, *at some point in the trial*, to explain, repudiate, or deny the statement.

But many federal courts have held that despite the text of Rule 613(b), a court can exercise its powers under Rule 611(a) to require that the witness be confronted with the statement before extrinsic evidence can be admitted. As the First Circuit stated in *United States v. Hudson,* 970 F.2d 948, 956 n.2 (1st Cir. 1992): "Rule 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law prior foundation requirement when such an approach seems fit." The *Hudson* Court concluded that Rule 613 "was not intended to eliminate trial judge discretion to manage the trial in a way designed to promote accuracy and fairness." *See also United States v. Marks,* 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite Rule 613(b) "to conclude that in particular

[32] See also *Iorio v. Allianz Life Ins. Co. of North America*, 2009 WL 3415689, at *18 (D. D. Cal. Oct. 21, 2009) ("If Plaintiffs are forced to show the videotaped depositions or read the transcript into the record of any of the movants in this action because Defendants have failed to produce them, Defendants will thereafter be precluded from producing the same witnesses in person."); *Niebur v. Town of Cicero*, 212 F. Supp. 2d 790, 806 (N.D. Ill. 2002) (invoking district court's authority under Fed. R. Evid. 611(a) to exercise reasonable control over the mode and order of examining witnesses to preclude live testimony of a witness during the defense case after the witness refused to appear during plaintiffs' case and forced plaintiff to read his deposition into the record).

circumstances the older approach should be used in order to avoid confusing witnesses and jurors").

Analysis: Requiring a prior foundation before introducing an inconsistent statement clearly goes to the mode and order of presenting evidence. It also has a proper purpose: it can avoid the time and effort necessary to admit extrinsic evidence. The time-saving would occur if the witness, when confronted, admits the statement she made. That could make the extrinsic evidence cumulative. Moreover, it can be confusing to have the prior inconsistent statement admitted, and then sometime after that the witness is given an opportunity to explain or deny it.

Yet it is troubling that courts are using Rule 611(a) as an authority to override the requirements of another rule. The Federal Rules of Evidence give judge lots of discretion, but it is rulemakers that make the rules, not judges. If Rule 613(b) is ill-conceived --- as many have argued --- the solution is to amend Rule 613(b) --- not to allow judges the discretion to abrogate it under Rule 611(a).

If the Committee decides to continue its consideration of a possible amendment to Rule 611(a), it might consider whether something needs to be added (to new text or note) that would caution against relying on Rule 611(a) to override a limitation imposed in another rule.

17. Allowing jurors to ask questions.

Occasionally trial judges have invoked Rule 611(a) to permit questioning by jurors. Appellate courts have mostly been skeptical about the practice. As the court noted in *United States v. Bush,* 47 F.3d 511, 515 (2d Cir. 1995), questioning by jurors "risks turning jurors into advocates" and "creates the risk that jurors will ask prejudicial or other improper questions." The *Bush* court observed that prejudicial lines of questioning could not easily be remedied by the trial judge, because "remedial measures taken by the court to control jurors' improper questions may embarrass or even antagonize the jurors if they sense that their pursuit of the truth has been thwarted by rules they do not understand." Finally, the court expressed concern that juror questioning "will often impale attorneys on the horns of a dilemma" because an attorney, by objecting to a question from a juror, risks alienating the jury. The *Bush* court concluded that the balance of the prejudicial effect arising from juror questioning, against the benefits of issue-clarification, will "almost always lead trial courts to disallow juror questioning, in the absence of extraordinary or compelling circumstances."

Other courts are more embracing of the practice. For a more positive view on juror questioning, see *SEC v Koenig,* 557 F.3d 736 (7th Cir. 2009) (while prior decisions had expressed skepticism about juror questioning, "[n]ow that several studies have concluded that the benefits exceed the costs, there is no reason to disfavor the practice"). *See also* Third Circuit Pattern Jury Instruction for Civil Cases 1.8, Option 2 (recognizing that certain judges routinely allow juror questions). *Compare* Ninth Circuit Instruction 1.15 (comment) (recommending that no questions

by jurors be permitted).

Assuming that the court decides to allow jurors to ask questions, it is clear that the trial judge must maintain strict control over the procedure, or else the discretion granted by Rule 611(a) will be abused. *See, e.g., United States v. Sykes,* 614 F.3d 303 (7th Cir. 2010) (error to permit jurors to question witnesses directly, without reducing the questions to writing or submitting them first to the judge); *United States v. Hernandez,* 176 F.3d 719 (3d Cir. 1999) (allowing jury questions is within the trial court's discretion, but the judge should ask any juror-generated questions and should only do so after allowing attorneys to raise any objection out of the hearing of the jury). See also *United States v. Ricketts,* 317 F.3d 540 (6th Cir. 2003) (error for the trial court to permit jurors to submit questions to witnesses without counsel first being allowed to review those questions).

The court in *United States v. Collins*, 226 F.3d 457, 463–464 (6th Cir. 2000), set forth the following procedural safeguards that should be undertaken before jurors' questions are permitted:

> When a court decides to allow juror questions, counsel should be promptly informed. At the beginning of the trial, jurors should be instructed that they will be allowed to submit questions, limited to important points, and informed of the manner by which they may do so. The court should explain that, if the jurors do submit questions, some proposed questions may not be asked because they are prohibited by the rules of evidence, or may be rephrased to comply with the rules. The jurors should be informed that a questioning juror should not draw any conclusions from the rephrasing of or failure to ask a proposed question. Jurors should submit their question in writing without disclosing the content to other jurors. The court and the attorneys should then review the questions away from the jurors' hearing, at which time the attorney should be allowed an opportunity to present any objections. The court may modify a question if necessary. When the court determines that a juror question should be asked, it is the judge who should pose the question to the witness.

Other circuits impose similar requirements on juror questioning.[19]

[19] *See e.g., United States v. Douglas*, 81 F.3d 324 (2d Cir. 1996) (the trial judge employed proper procedure by requiring juror questions to be in writing, and by asking the questions himself, after reviewing them with counsel; however, the judge exceeded his allowable discretion by inviting questions both at the start of the trial and at the end of each witness' testimony; this error was harmless, however, because the juror questions were directed at only two witnesses, neither of whom was the defendant, and the questions were few in number and of slight significance); *United States v. Sykes,* 614 F.3d 303 (7th Cir. 2010) (error to permit jurors to question witnesses directly, without reducing the questions to writing or submitting them first to the judge); *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999) (allowing jury questions is within the trial court's discretion, but the judge should ask any juror-generated questions and should only do so after allowing attorneys to raise any objection out of the hearing of the jury).

For a jury instruction to be used if the trial judge decides to allow juror questions, see Third Circuit Pattern Instruction for Civil Cases 1.8, Option 2 (written by Capra and Struve):

Analysis: Assuming that the court is within its discretion in permitting juror questions, such a ruling concerns the mode of witness testimony and the presentation of evidence. And if properly employed, juror questioning can be justified for a purpose articulated in the rule --- the pursuit of truth.

But a broader point to consider is that an amendment to Rule 611(a) could go beyond covering actions of trial courts and deal specifically with juror questioning. The safeguards required for juror questioning can be found in the case law, but it might well be useful to set forth a list of requirements in the Evidence Rule. If this were to be done, it would of necessity be placed in a later subsection of Rule 611: a new Rule 611(d) --- as it would be dealing with a specific problem.

Whether to allow juror questioning is controversial. It would be very problematic for an amendment to take sides --- to prohibit or to encourage the practice. What is not controversial is that, if juror questioning is allowed, safeguards must be imposed. A rule setting forth those safeguards is something for the Committee to consider. A "thought experiment" draft Rule 611(d) is set forth in the next section.

B. Actions Possibly Outside the Text of Rule 611(a)

1. Realigning the parties

In *In re Quality Lease & Rental Holdings, LLC*, 2020 WL 1975349, at *1 (S.D. Tex. Apr. 25, 2020), the court changed plaintiffs into defendants and defendants into plaintiffs, citing Rule 611(a). It stated that "QLRH was the first party to file claims that are to be tried in this case. Claims on which the Debtor Parties' bear the burden of proof predominate, both numerically and substantively. Therefore, the Court exercises its discretion to realign the parties such that the Debtor Parties are Plaintiffs and the Mobley Parties are Defendants. The Court will, however, allow the Mobley Parties to cross-examine fully any witness called by the Debtor Parties in their case-in-chief, not limited by the scope of direct examination." The court stated that "a court normally will not realign the parties from their original designations unless the plaintiff no longer

---

You will have the opportunity to ask questions of the witnesses in writing. When a witness has been examined and cross-examined by counsel, and after I ask any clarifying questions of the witness, I will ask whether any juror has any further clarifying question for the witness.

If so, you will write your question on a piece of paper, and hand it to my Deputy Clerk. Do not discuss your question with any other juror. I will review your question with counsel at sidebar and determine whether the question is appropriate under the rules of evidence. If so, I will ask your question, though I might put it in my own words. If the question is not permitted by the rules of evidence, it will not be asked, and you should not draw any conclusions about the fact that your question was not asked. Following your questions, if any, the attorneys may ask additional questions. If I do ask your question you should not give the answer to it any greater weight than you would give to any other testimony.

retains the burden to prove at least one of its claims or if subsequent events in the case significantly shift the ultimate burden of proof from the plaintiff to the defendant."

Analysis: Realigning parties seems to be beyond the "mode and order" of witnesses. It actually seems to be an action that is not grounded in an evidence rule at all --- rather more like a rule of civil procedure. Assuming that realigning parties might be appropriate in some cases, it is not apparent that the grant of authority to do so should be placed in Rule 611(a).

2. Excluding designated party representatives from the courtroom

Some courts have relied on Rule 611(a) to exclude party representatives who are immune from sequestration under Rule 615(b). They reason that "Rule 615 does not bar the Court from excluding party representatives; it merely withholds authorization for their exclusion. This is a subtle difference that suggests the Court may still have discretion to exclude these individuals so long as that power derives from a source other than Rule 615" --- such as Rule 611(a). *United States ex rel. El-Amin v. George Washington Univ*., 533 F.Supp.2d 12, 48 (D.D.C. 2008). *See also United States v. Mosky*, No. 89-0669, 1990 WL 70819, at *3 (N.D. Ill. May 14, 1990) (invoking Rule 611 to exclude government's Rule 615 case agent from the courtroom until after he had testified); *Bradshaw v. Purdue*, 319 F. Supp. 3d 286 (D.D.C. 2018) ("The Court finds that the circumstances of this case warrant limited sequestration of [the designated representative] pursuant to the Court's general powers to manage the conduct of trial and to control the mode and order of witness presentation under Rule 611."). Courts have also held that if two government witnesses are exempt from sequestration, Rule 611(a) may be invoked to require the second witness to be excluded while the first testifies. [33]

Analysis: The goal of exclusion is certainly within the truthseeking purpose of Rule 611(a). But query whether exclusion of a witness from the courtroom is regulating the "mode" or "order" of witness testimony. Moreover, it is concerning that Rule 611(a) is used in a way that undermines the exemption from sequestration that is provided in Rule 615.

3. Allowing "non-testifying experts" to authenticate exhibits.

In *Hart v. BHH, LLC,* 2019 WL 1494027, at *3 (S.D.N.Y. Apr. 4, 2019), the court relied on Rule 611(a) to order that expert witnesses who were non-testifying experts under Rule 26 could nonetheless be allowed to testify to authenticate certain documents. The non-testifying experts were the only ones with personal knowledge about the preparation of the documents.

Analysis: Determining WHO can testify is not comfortably within "mode" or "order" of witness testimony or presenting evidence. Maybe the identity of a witness is somehow related to the "mode" of testimony, but it is a stretch. If the Committee decides to pursue an amendment

[33] *United States v. Vaughn*, No. CR 14-23 (JLL), 2016 WL 450163, at *4 (D.N.J. Feb. 4, 2016) (supplementing the court's FRE 615 sequestration powers, by limiting the exemptions in Rule 615).

to Rule 611(a), it might consider adding something about the identity of the witness to the list of authorized actions.

4. Allowing a witness to speak to an attorney between direct and cross.

In *United States v. Campuzano-Benitez*, 910 F.3d 982 (7th Cir. 2018), the defendant complained that the trial court erred in allowing a prosecution witness to consult with counsel between direct and cross-examination. The court held that the broad discretion set forth in Rule 611(a) "certainly includes deciding whether to allow a non-party witness to speak with his attorney between direct and cross-examination."

Analysis: Allowing a witness to consult with counsel does not itself relate to the mode of the testimony, nor does it speak to the order of testifying or presenting evidence --- though the decision certainly does impact the effectiveness of cross-examination and thus the search for truth. So if the Committee decides to proceed on an amendment, language might be added to cover practices such as declaring a recess during testimony (or something more general than that).

5. Allowing non-live testimony

Examples include allowing the use of taped deposition testimony at trial;[34] allowing testimony by submission of sworn declarations at a bench trial;[35] allowing a witness to testify by telephone;[36] and of course allowing a witness to testify by videoconference (as in the pandemic).[37]

Analysis: Videoconferencing, sworn declarations, telephone, etc. are all about the "mode" in which testimony is provided. And if such modes are reasonable in light of the circumstances, they could be supportable as procedures "effective for determining the truth."

That said, all these forms of remote testimony are often justified because of the inability

[34] *Botey v. Green*, 2018 WL 5985694, at *33 n.30 (M.D. Pa. Nov. 14, 2018) (ordered to limit burdens on a witness, and as a sanction against the opposing party for conduct that led to the need for introducing the deposition).

[35] *Cabrera v. United States*, 2020 WL 5992929, at *10 (S.D.N.Y. Oct. 9, 2020) ("At trial, Defendant's witnesses presented their testimony by sworn declarations which were accepted into evidence. In addition, Defendant's two experts gave live direct testimony about MRIs and other images of Plaintiff's knees and spine. Plaintiff's counsel thereafter cross-examined Defendant's expert witnesses. I find that this procedure, which was efficient and also offered me ample opportunity to assess the credibility of Defendant's witnesses, was appropriate in the circumstances of this case where I am the trier of fact.").

[36] *Carroll v. United States*, 703 F. App'x 615 (9th Cir. 2017).

[37] *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020) (invoking Rule 611(a) in order remote testimony during the pandemic); *Meirs v. Cashman*, 2018 WL 9815834, at *1–2 (W.D. Mich. Aug. 3, 2018).

to conduct live testimony (like during the pandemic), or to otherwise avoid inconvenience to the witness. And with respect to witnesses, the articulated purposes in Rule 611(a) are to avoid harassment or undue embarrassment. If the Committee decides to pursue an amendment to Rule 611(a), it might consider adding another purpose for protecting witnesses --- such as protecting witnesses from substantial hardship. And it might consider more broadly, as a proper purpose for court orders, "preserving the health and safety of participants." Changes to Rule 611(a) that would cover these concerns are set forth in the next section.

6. Streamlining proceedings

There are a grab bag of tactics that courts have used to promote a more efficient proceeding. Here are some examples:

● Making counsel provide to opposing counsel a list of witnesses and exhibits intended to be offered the next day, as a precondition of their admission.[38]

● Setting time limits for witness examinations[39] or for each party's presentation of its case.[40]

● Allowing the trial to go forward while delaying ruling on a disputed issue.[41]

● Ordering that the proceedings continue rather than waiting for a tardy witness.[42]

---

[38] *ACT Grp., Inc. v. Hamlin*, 2016 WL 7634679, at *10–11 (D. Ariz. May 11, 2016) ("The Court's ruling was made for purposes of controlling the examination of witnesses and was an attempt to minimize objections during testimony so that the jury's time would not be wasted with numerous objections. The Court disagrees that its exercise of reasonable control over the trial unduly prejudiced ACT.").

[39] *United States v. Morrison*, 833 F.3d 491, 503–06 & n.3 (5th Cir. 2016) ("The authority to set limits stems from a district court's authority to oversee the presentation of evidence. Fed.R.Evid. 611(a)."); *Garber v. Mohammadi*, 714 F. App'x 749 (9th Cir. 2018);*Watkins v. Broward Sheriff's Office*, 771 F. App'x 902, 911 (11th Cir. 2019); *Guerrero v. Meadows*, 646 F. App'x 597, 601–02 (10th Cir. 2016); *Branch v. Brennan*, 2019 WL 6037009, at *7 (W.D. Pa. Nov. 13, 2019); *Grewal v. Cuneo Gilbert & LaDuca LLP*, 2018 WL 4682013, at *3 (S.D.N.Y. Sept. 28, 2018).

[40] *Ma v. Am. Elec. Power, Inc.*, 647 F. App'x 641, 645 (6th Cir. 2016) ("Ma fails to demonstrate that the court abused its discretion in scheduling each side eleven hours of trial time. Though it permitted but modest extensions for cross-examination, the court noted that excessive and duplicative evidence spurred its adherence to the allotted time. *See* Fed.R.Evid. 403, 611(a). A judge has special latitude in applying time limits in a bench trial, since the court often has become familiar with the case long before trial begins and can readily comprehend the evidence presented.") ; *Raynor v. G4S Secure Sols. (USA) Inc.*, 327 F. Supp. 3d 925, 938 n.5, 939–42 (W.D.N.C. 2018) (court used a chess clock); *Jun Yu v. Idaho State Univ.*, 2019 WL 501457, at *2 (D. Idaho Feb. 8, 2019).

[41] *Madison v. Courtney*, 2019 WL 3802025, at *3 (N.D. Tex. June 5, 2019) (delaying a ruling on judicial notice: "Given the timing of Madison's request, and the need to permit AA an opportunity to respond, deferring ruling on the request and taking it up later in the trial was a reasonable approach to efficiently presenting the evidence that also permitted AA an opportunity to respond." (citing Rule 611(a)).

[42] *United States v. Larch*, 2020 WL 998757, at *9–10 (W.D.N.C. Mar. 2, 2020) (citing Rule 611(a) as authority for rulings that avoid wasting time: "Here, the Court properly determined that it could not hold this matter open

● Deciding on admissibility of prior sexual offenses under Rule 414/403 before all the government's evidence is admitted.[43]

● Urging the parties to move it along.[44]

Analysis: All the above examples are in pursuit of a goal set forth by the Rule: saving time. It is less clear that all of them deal with the mode and order of presenting evidence. Certainly some do: timing of an admissibility ruling, for example, is about the order of proof. But what about time limits, and continuing the trial instead of waiting for a witness? These orders can end up excluding certain evidence, and there is at least an argument that this goes beyond "mode" and "order."

Perhaps the language should be expanded to "mode, order and admissibility." But that might be problematic because there are many other rules of admissibility and it would not be ideal to have Rule 611(a) swallow them up. Another possibility is "mode, order, and timing."

7. Allowing victorious defendants to stay at the defense table with a remaining defendant.

In *Green v. City of Chicago*, 2017 WL 5894203, at *6 (N.D. Ill. Mar. 17, 2017), a civil rights action against four police officers and the City, three officers were dismissed from the case mid-trial. The remaining officer asked the court to allow the dismissed defendants to remain at the defense table. The court allowed them to remain, stating that "the Court has explicit authority to control the mode evidence is presented at trial, Fed. R. Evid. 611." It noted that "[t]he jury would have been confused as to why the three officers were suddenly gone before deliberations. Instead of considering the evidence to render a verdict, jurors may have deduced that [the remaining officer] must be guilty of something simply because he was the only defendant remaining at defense table." It also noted that "the mere presence of all four officers at the defense table at the conclusion of the trial did nothing to prejudice Plaintiff."

---

indefinitely while it waited for the arrival of [the defendant's witness who] was supposed to have arrived at the beginning of the Defendant's case. [The witness still had not arrived after the Defendant had called two witnesses, examined them, and allowed the Government to cross-examine them. Moreover, [the witness] still had not arrived after the Court handled the pending administrative matters in this case or after the Court recessed to give him more time to arrive. In light of those facts, the Court could not continue to hold the jury and delay the trial while it waited for [the witness] to arrive at some time in the future.")

[43] *United States v. Thornhill*, 940 F.3d 1114, 1121 (9th Cir. 2019) ("Forcing judges to wait until the end of testimony at trial to make such an evidentiary decision . . . would be an unwelcome constraint when we have otherwise long trusted trial judges to moderate and run their courtrooms effectively." (citing Rule 611(a)) .

[44] *United States v. McQueen*, 636 F. App'x 652, 667 (6th Cir. 2016) (no error in urging parties to move cases along efficiently; court was simply exercising the authority it had under Rule 611(a)); *Watkins v. Broward Sheriff's Office*, 771 F. App'x 902, 911 (11th Cir. 2019) (telling *pro se* plaintiff to move things along); *United States v. Johnson*, 2016 WL 4087351, at *8–9 (D. Utah July 28, 2016) (telling parties to move on; correcting them when they asked improper questions).

Analysis: The ruling allowing the dismissed defendants to remain seems eminently sensible, though it is hard to see how it is about the "mode" or "order" of presenting evidence. Rather it is more about regulating the courtroom in a way to avoid a possible injustice. It can be argued that the authority to issue this order rests not in Rule 611(a), but in the trial court's inherent power to control the courtroom proceedings in a way that furthers the interest of justice.

If the Committee decides to proceed with an inquiry into Rule 611(a), an issue it may wish to consider is whether to tease out the relationship between Rule 611(a) and the trial court's inherent authority. Or maybe it is not worth the effort to distinguish between the two.

8. Permitting hearsay testimony in order to minimize unduly cumulative evidence.

In *Warren v. Main Indus. Inc.*, 2018 WL 10562387, at *9 (E.D. Va. June 19, 2018), an employment discrimination action, the court admitted hearsay evidence concerning Lunsford's intentions before getting into a fight with Warren. The court allowed the testimony "to minimize unduly cumulative evidence based on Defendant's intention to call Mr. Lunsford as a witness and Plaintiff's anticipated rebuttal." The court stated that "such a course of action is consistent with the discretion of district courts to 'exercise reasonable control over the mode and order of examining witnesses and presenting evidence,' and to regulate the admission of evidence."

Analysis: Rule 611(a) allows the courts to do many things, but it would be surprising if it allowed courts to admit testimony that was clearly excluded under another rule of evidence. Certainly Rule 611(a) cannot be used as a roving hearsay exception, especially when the fact to be proven is what will be the subject of witness testimony. Such a ruling turns the hearsay rule on its head. It may well be that the hearsay statement would fit a hearsay exception, and then either the statement or the identical testimony might be cumulative. But it cannot be the case that otherwise inadmissible hearsay can be admitted under Rule 611(a) because the witness testimony on the same point will take too much time. If the Committee does wish to pursue an amendment to Rule 611(a), it may wish to add, perhaps in a Committee Note, that Rule 611(a) does not allow the court to admit evidence that is specifically excluded under another rule.

II. Possible Language for Amendments to Rule 611

A. Expanding Rule 611(a) to cover more actions and more purposes.

If the Committee is interested in pursuing a project to broaden the language of Rule 611(a) to cover actions currently out of the textual grant but nonetheless authorized by the courts under the Rule, then here is a possible amendment --- which is not at all intended to be the final word.

(a) Control by the Court~~; Purposes~~.

(1) Actions within the court's discretion. The court should exercise reasonable control over such matters as ~~the~~ :
● the mode and order of examining witnesses and presenting evidence ~~so as to:~~;
● the timing and conditions of witness testimony; and
● conduct of the parties in examining witnesses and presenting evidence.

[Add other purposes as the Committee sees fit.]

(2) Proper purposes for the court's action. Actions under this rule must be taken for one or more of the following purposes:

● ~~make those procedures~~ promoting effective procedures for determining the truth;
● ~~avoid wasting~~ avoiding a waste of time; ~~and~~
● protecting witnesses from harassment, ~~or~~ undue embarrassment, or substantial inconvenience; and
● protecting the health and safety of trial participants.

Reporter's comment: The reference in the last bullet point to "protecting the health and safety of trial participants" obviously flags Covid-related issues (as well as future emergencies). The Committee previously determined that it was unnecessary to add an emergency rule to the Evidence Rules --- precisely because Rule 611(a) gave broad discretion to trial courts to order remote testimony, testimony with masks, etc. While this is true, if Rule 611(a) is going to be amended to "codify" the actions courts take to control a trial, then it would be very useful to include, as an objective, protecting the health and safety of trial participants. Covid-response procedures are, broadly speaking, done with the motivation of determining the truth, but it would improve the rule to add health and safety to the list of proper purposes.

B. Adding a new subdivision to set forth safeguards if jurors are to ask questions.

As stated above, the Committee might consider adding a new subdivision to Rule 611 that would set forth safeguards if the court decides to allow jurors to ask questions. Safeguards are found in some case law, but there is an argument that it would be useful to have them at the ready in a rule. A provision on the subject might look like this:

(d) Juror Questions. If the court allows jurors to ask questions of the witnesses or

the parties during a trial, that questioning must be subject to the following safeguards:

- Questions must be submitted in writing;

- Jurors must be instructed not to disclose to other jurors the content of any question submitted to the court;

- The court must review each question with counsel --- outside the hearing of the jury --- to determine whether it is appropriate under these rules;

- The court must allow a party's objection to a juror's question to be made outside the hearing of the jury;

- The court must notify the jury that it may rephrase questions to comply with these rules;

- The court must instruct the jury that if a juror's question is not asked, or is rephrased, the juror should not draw any negative inferences;

- The court must instruct the jury that answers to questions asked by jurors should not be given any greater weight than would be given to any other testimony; and

- When the court determines that a juror's question may be asked, the question is to be posed by the court, not the juror.