NEW YORK CITY BAR

REPORT BY THE FEDERAL COURTS COMMITTEE

COMMENTS ON PROPOSED AMENDMENTS TO RULES 611, 1006 AND 613(B) OF THE FEDERAL RULES OF EVIDENCE

The New York City Bar Association ("City Bar") greatly appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the proposed amendments to the Federal Rules of Evidence proposed by the Advisory Committee on Evidence Rules (the "Advisory Committee").

The City Bar, founded in 1870, has more than 23,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. It includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The City Bar's Committee on Federal Courts (the "Federal Courts Committee") addresses substantive and procedural issues relating to the practice of law in the federal courts. The Federal Courts Committee respectfully submits the following comments on the proposed amendment of Rules 611 and 1006, and Rule 613(b) of the Federal Rules of Evidence.

I. COMMENT ON PROPOSED REVISIONS TO RULES 611 AND 1006

A. Introduction

The Advisory Committee on Evidence Rules ("Advisory Committee") has proposed tandem amendments to Rules 611 and 1006 designed to sharpen the distinction between (i) summaries, which are admissible as evidence to prove the content of voluminous admissible documents, and (ii) illustrative aids (often known as "demonstratives"), which may not be admitted as evidence but may be presented to help the finder of fact understand admitted evidence. The amendment provides valuable clarification as to when a summary may be used to prove a fact that could otherwise be adduced only through laborious examination of voluminous evidence and when an illustration, although not itself evidence, may be used to help the trier of fact understand admitted evidence.

The proposed amendment's distinction between summaries and illustrative aids is muddied, however, by its suggestion to allow illustrative aids to be provided to the jury for use during deliberations, either with the parties' consent or for "good cause." When an unadmitted illustrative aid is present in the jury room, it will be difficult for the jury to distinguish illustrative aids from summaries, and there is a risk that any attorney advocacy that they contain would be considered by the jury outside the context of the opposing advocacy. Further, neither the parties nor the court will know whether the jury is improperly treating aids—including any attorney advocacy incorporated into them—as evidence or otherwise are improperly and unduly influenced by them. This lack of transparency and accountability will make it impossible for trial and appellate courts to police the distinction between summaries and illustrative aids. The City Bar recommends that the proposed amendment allow the use of illustrative aids in jury deliberations only if all parties consent.

B. Background

The proposed amendment is modeled on the Maine Rules of Evidence. In 1976, a distinction between summaries and illustrative aids was added to the Maine Rules. They noted that "summar[ies] which presen[t] [voluminous] data substantially in its original form would be admissible in evidence" but warned that "[a] summary which presents the data in a tabular or graphic form to 'argue' the case or support specific inferences would be an illustrative aid." Advisers' Note to Me. R. Evid. 616 (1976).

The proposed amendment adopts this distinction, providing that summaries may be admitted as evidence to prove the contents of underlying admissible voluminous documents, regardless of whether the underlying originals have been admitted, provided that the underlying originals are made available to other parties. Like any admissible evidence, such summaries must also meet the standards of Rule 403. Illustrative aids, by contrast, may not be admitted as evidence but rather "present[ed] … to help the finder of fact understand admitted evidence." The proposed rule incorporates a balancing test comparable to Rule 403 and requires that all parties be given notice and an opportunity to object, unless the court, for good cause, orders otherwise.

C. Use in Jury Deliberations

The City Bar perceives significant value in clarifying the distinction between admissible summary evidence and inadmissible illustrative aids. But we are concerned that the proposed rule's allowance for illustrative aids to be used in jury deliberations has the potential to undermine the distinction the rule clarifies, with no meaningful possibility for appellate review. It also represents a sharp break from established practice. *See, e.g.*, *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000) (demonstratives that are not admitted as summaries may not go to jury room); *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 705 (7th Cir. 2013) (same); *see also United States v. Bishop*, 492 F.2d 1361, 1364–65 (8th Cir. 1974) (error to provide unadmitted exhibit to jury); *cf. United States v. Scaife*, 749 F.2d 338, 347 (6th Cir. 1984) (noting same but holding that error was harmless); *cf. LifeTree Trading Pte, Ltd. v. Washakie Renewable Energy, LLC*, 2018 WL

2192186, at *7 (S.D.N.Y. May 14, 2018) (excluding demonstrative exhibit from jury room and instructing jury that it is not evidence).

The proposed amendment of Rule 611 follows the Maine rule in allowing the presence of illustrative aids in jury deliberation only if "all parties consent" or "the court, for good cause, orders otherwise." Although the consent standard is unobjectionable, given that evidentiary objections are waivable and that each party will have an opportunity to weigh the risks, the good cause standard is dangerously vague given the perils of allowing unadmitted, argumentative illustrations into the jury room.

In introducing the distinction between summaries and illustrative aids, the Maine Advisers recognized the dangers that illustrative aids could be "so crafted as to have probative force of [their] own," that "the jury may draw inferences from the illustrative aids different from those for which the illustrative aid was created and offered," and be "difficult to capture on an oral record." Advisers' Note to Me. R. Evid. 676 (1976).

The Advisory Committee recognizes similar dangers, such as "distort[ing] the evidence presented, … oversimplify[ing], or … stok[ing] unfair prejudice." Proposed Amendment at 289. In creating a carveout for the presence of illustrative aids in the jury room, the Advisory Committee again recognizes "the risk that the jury may misinterpret the import, usefulness, and purpose of the illustrative aid." *Id.* at 290. In defense of the use in the jury room, the Advisory Committee states that illustrative aids could be helpful "in complex cases, or in cases where the jury has requested to see the illustrative aid." *Id.*

The very purpose of distinguishing admissible summary evidence from useful but inadmissible illustrative aids could be defeated if illustrative aids are allowed into jury deliberations—which could result from the vague "good cause" standard. Although the "good cause" standard allows district courts the opportunity for gatekeeping, the draft amendment may result in reasonably widespread allowance of illustrative aids in jury deliberations. The Advisory Committee suggests that a jury's mere request to use an illustrative aid in deliberations supports a finding of good cause. Proposed Amendment at 290. Juries in complex cases are likely to appreciate the ease of referring to an illustrative aid and thus to request frequent access to unadmitted aids. Given the secrecy of jury proceedings and the difficulty of showing unfair prejudice from the use in jury deliberations of an aid that was already shown at trial, appellate reversals on such grounds may be rare. A "good cause" standard, therefore, provides insufficient protection for jury deliberations.

Federal courts have recognized that "materials not admitted into evidence," including "unadmitted … summar[ies]," "simply should not be sent to the jury for use in its deliberations." *Baugh*, 730 F.3d at 705. Illustrative aids, unlike summaries, are "pedagogical devices" that "should be used only as a testimonial aid, and should not be admitted into evidence or otherwise be used by the jury during deliberations." *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991).

One purpose of the amendment is to clarify that summaries (under Rule 1006) are admissible as evidence, which means they may enter the jury room, unlike unadmitted

illustrative aids. This distinction is defeated if both categories of exhibits can be allowed into jury deliberations (including, in the case of illustrative aids, over a party's objection). The proposed amendment serves the additional purpose of distinguishing summaries that may prove the contents of admissible documents from illustrative aids that do not constitute such proof but may still help to explain documents in evidence. This purpose may be advanced by allowing the use of illustrative aids in deliberations, but only on consent of all parties as there remain numerous risks against which courts must guard:

- **Permitting Attorney Argument in the Jury Room:** Allowing illustrative aids into the jury room would create a continuing opportunity for a litigant to present its view, interpretation, or synthesis of the evidence in the jury room, without transparency to the adversary or supervision by the trial court or appellate court. *See generally Baugh*, 730 F.3d at 706 (a demonstrative exhibit is "a persuasive, pedagogical tool created and used by a party as part of the adversarial process to persuade the jury"); *United States v. Milkiewicz*, 470 F.3d 390, 396–98 (1st Cir. 2006) (demonstrative exhibits are "less neutral in [their] presentation").

- **Distracting or Prejudicing the Jury:** The foregoing concern is not theoretical. A jury can be expected to place heightened focus on issues presented by an illustrative aid. *See, e.g.*, *Steele v. United States*, 222 F.2d 628, 630 (5th Cir. 1955) (allowing demonstratives in jury room "invest[s] these exhibits with an air of credibility … over and above, and independent of, the evidence which they purport[] to summarize"). By introducing illustrative aids on issues of less relevance or significance, parties may be able to distract the jury from more meaningful and relevant issues in the case. They are especially likely to do so if they believe focusing the jury on certain issues rather than others will be more advantageous to their case. This may promote gamesmanship in the jury room by allowing litigants to fill that room with unfairly prejudicial or improper illustrative aids.

- **Needlessly Confusing the Jury:** The Advisory Committee Notes suggest that, to avoid the risks created by illustrative aids, the court should upon request instruct the jury about the limited purpose of the illustrative aid at the time it is published to the jury and again if it is allowed into the jury room. Juries, however, may become more confused by a limiting instruction regarding nonevidence in the jury room, and we believe that it would be preferable to leave illustrative aids out of the jury room altogether, unless all parties agree. In a case where both summaries and illustrative aids are used, the jury is particularly likely to be confused by such an instruction.

- **Exacerbating Socioeconomic Inequalities:** Wealthy litigants are most likely to be able to afford illustrative aids and elaborate trial graphics. By allowing these litigants to introduce their illustrative aids to the jury room, while poorer litigants have no illustrative aids to offer, the rule would unfairly direct juries' attention on wealthier litigants' presentations of their cases.

The "good cause" standard referenced in the rule is insufficient to alleviate these concerns because it is a generalized and discretionary standard, and courts may have little or no precedential guidance on its application to illustrative aids upon the rule's introduction. The application of Maine Rule of Evidence 616 is illustrative of this risk. Only nine decisions have ever addressed the Rule, and only one has even mentioned the good cause standard (but did not apply the standard). Thus, the proposed amendment licenses unacceptably discretionary uses of illustrative aids in jury deliberations. In any event, there is no way for the trial court or an appellate court to review a jury's use of illustrative aids in deliberations.

We recognize that there will be illustrative aids as to which it is uncontroversial that these concerns are not implicated, and we see the consent of all parties as an appropriate means to identify these illustrative aids.

D. Proposed Revisions

Based on the foregoing considerations, we support the proposed amendment of Rule 1006, and we propose the following additional revisions to the proposed amended Rule 611(d)(2):

An illustrative aid must not be provided to the jury during deliberations unless~~:~~

~~(A)~~ all parties consent~~; or~~.
~~(B) the court, for good cause, orders otherwise.~~

II. COMMENT ON PROPOSED REVISION OF RULE 613(b)

A. Introduction

The Advisory Committee's proposed amendment to Rule 613(b) requires that, "unless the court orders otherwise," a witness be given an opportunity to explain or deny a prior inconsistent statement (and an adversary be permitted to question the witness about it) *before* extrinsic evidence of the statement may be admitted.[1] The current rule, by contrast, imposes no requirement on timing or sequence. Instead, it provides that extrinsic evidence of a prior inconsistent statement is admissible if the witness is given an opportunity, at some point during the trial, to explain or deny the statement (or if justice so requires).

The amendment attempts to promote judicial economy and fairness to the witness by codifying the earlier common law rule requiring a *prior* foundation for extrinsic evidence of an inconsistent statement. But the proposed revised rule includes an exception that swallows it. Its carve-out— "unless the court orders otherwise"—is so broad and unbounded that it would grant courts unreviewable discretion to forego the prior foundation

[1] The text of the proposed amended rule reads as follows: "Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2)."

requirement. The City Bar has no objection to granting judges that flexibility; to the contrary, we support it. But flexibility as to the sequencing of a witness's opportunity to explain or deny a statement is a feature of the existing rule, so we see no reason to amend the rule to add a default sequencing requirement subject to an unguided exception. Thus, we propose leaving the current rule intact.

B. Rule 613(b) Should Not Be Amended

The Advisory Committee's proposed amendment of Rule 613(b) is unlikely to effectuate its underlying policy rationales and should not be adopted.

The Advisory Committee explains that the amendment is fueled by concerns of judicial economy and fairness to a witness. A witness may concede making the inconsistent statement, mooting the need to introduce extrinsic evidence. The need to recall the witness, solely to explain or deny a statement, may disrupt the orderly presentation of evidence at trial. And the admission of extrinsic evidence of a prior inconsistent statement, before a witness has the chance to explain or deny it, may increase the risk of sandbagging.

Even if the requirement of a prior foundation for extrinsic evidence of a prior inconsistent statement were necessary to achieve these goals, the amendment's ability to achieve them is called into question by its boundless exception. Specifically, the carve-out clause in the amendment—that a prior foundation is required "unless a court orders otherwise"—provides courts with unlimited discretion to dispense with the prior foundation requirement as they see fit.

Indeed, the Advisory Committee Notes to the proposed amendment confirm the exception's breadth. As the Notes explain, the "amendment *preserves* the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispute with the requirement altogether in appropriate cases." (emphasis added).

But this discretion exists under the current rule.[2] "[P]reserv[ing]" trial courts' existing discretion as to sequencing by adding a default sequencing requirement subject to an unguided exception is a roundabout way of maintaining the status quo.

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[2] *See, e.g., United States v. Schnapp*, 322 F.3d 564, 572 (8th Cir. 2003) ("[W]e cannot say that the district court's decision to disallow defendant's testimony regarding [a witness's] alleged prior inconsistent statement [because the witness was not given a *prior* opportunity to explain or deny the statement] rises to the level of an abuse of discretion."); *United States v. Hudson*, 970 F.2d 948, 956 (1st Cir. 1992) ("Even if a proponent is not always required to lay a prior foundation under Rule 613(b), a trial court is free to use its informed discretion to exclude extrinsic evidence of prior inconsistent statements on grounds of unwarranted prejudice, confusion, waste of time, or the like. Moreover, . . . Fed. R. Evid. 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 fitting.") (citations omitted); *United States v. Marks*, 816 F.2d 1207, 1210-11 (7th Cir. 1987) (Posner, J.) ("[W]hile it would be wrong for a judge to say, 'In my court we apply the common law rule, not Rule 613(a),' he is entitled to conclude that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors.").

In reaching our recommendation, we also considered narrowing the carve-out clause in the proposed amendment to constrain judicial discretion. But we believe that a restrictive rule requiring a prior foundation (in all or most cases) would not promote efficiency or fairness. Rather, the opposite is true: to advance both policy goals, courts need flexibility and freedom in managing the timing of testimony and structuring the sequence of evidence.[3] There is no "one rule fits all." In some circumstances, a prior foundation should be required—for instance, where the witness cannot be recalled due to illness, disability, physical location, or other reasons.[4] And in other circumstances, a prior foundation requirement impedes fairness—for instance, if providing the witness with advance notice of the inconsistent statement strips that evidence of its impeachment force.[5] In sum, trials are fluid, and so the Rules of Evidence should be flexible as to sequencing the presentation of evidence.

C. Recommendation

Based on the foregoing considerations, we respectfully propose that Rule 613(b) not be amended.

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February 2023

[3] Indeed, other Rules of Evidence afford courts with discretion as to the sequencing of evidence. *See, e.g.*, FED. R. EVID. 611(a) (courts may "exercise reasonable control over the mode and order of examining witnesses and presenting evidence" to advance the truth-finding function, avoid wasting time, and protect witnesses from harassment or undue embarrassment"); FED. R. EVID. 102 (courts free to fashion evidentiary procedure that will "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined").

[4] *See, e.g., Wammock v. Celotex Corp.*, 793 F.2d 1518, 1522-23 (11th Cir. 1986) ("one key to the admissibility of the extrinsic evidence of the prior inconsistent statement is the availability of the witness for recall").

[5] *See, e.g.*, FED. R. EVID. 613(b) advisory committee's note (discussing prior foundation requirement at common law, and explaining that current Rule 613(b), adopted in 1975, "abolishes this useless impedimen[t] to cross-examination"); *United States v. Barrett*, 539 F.2d 244, 254-56 (1st Cir. 1976) ("the admissibility of prior inconsistent statements ought not to be enmeshed in the technicalities of cross-examination when all that is being sought is the presentation of an opportunity to deny or explain").