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Submitted online

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Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO EVIDENCE RULES PROPOSED FOR COMMENT, Aug. 2022

To the Committee and Staff:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed amendments to Rules 611, 613, 804 and 1006 of the Federal Rules of Evidence. We have no separate comment to make on the proposed amendment to Rule 801(d)(2); the latter provision is rarely, if ever, pertinent to criminal defendants. Our sole focus in commenting is on encouraging fairness to the accused in criminal cases.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has almost 10,000 direct members. Including NACDL's 95 state and local affiliates, in nearly every state, we speak for a combined membership of some 40,000 private and public defenders, along with many academics.

EVIDENCE RULES 611 and 1006 – ILLUSTRATIVE AIDS, DEMONSTRATIVE EVIDENCE, and SUMMARIES

The NACDL strongly supports the proposal to add a new paragraph (d) to Rule 611 for the purpose of distinguishing between "demonstrative evidence" and "illustrative aids." The Association agrees with the statement in the Committee Note that illustrative aids are, not infrequently, subject to abuse. The proposed amendment, particularly the requirement that all such aids be disclosed prior to their use in court, if meaningfully enforced, should go a long way towards curbing that abuse.

The common practice in federal criminal trials is that the defense does not see any of the government's illustrative aids until the morning of trial at the earliest, and more often not until the moment during trial that a particular aid is to be used. Almost never is there time for the defense to scrutinize them with care and to make meaningful objections. As the Committee Note says, the use of such aids has been subject to very different interpretations, often involving confusion between what is an illustrative aid, what is a demonstrative exhibit, and what is a Rule 1006 summary. For example, some judges allow witnesses to write on illustrative aids, such as informal street diagrams or schematic representations of the inside of a house, and then allow those aids containing the witness's markings to go back to the jury room during deliberations. This practice is allowable for demonstrative evidence, such as maps and accurate floor plans, but should be forbidden for mere illustrative aids. The amendment makes clear that the aid does not go back to the jury room, because it is not to be admitted into evidence. As the aid is not an exhibit, it seems

equivalently clear that witnesses cannot be allowed to alter them or make any notations of any kind on them. Those markings would be part of the witness's testimony, which explains why marking (with a proper record being made) is sometimes permissible on demonstrative evidence. It might be useful for the Note to say so, as this helps clarify the difference between the two.

It is especially important that under the amended Rule no "illustrative aid" can be used, absent good cause found by the court, unless the opposing party has had an adequate opportunity to review it and make any pertinent objections. To this end, we suggest a minor amendment to the wording of proposed new Rule 611(d)(1)(B), which as circulated would establish the precondition that "all parties are given notice and a reasonable opportunity to object." We think it is at least as important that the *notice* be "reasonable" as that the *opportunity to object* be reasonable. The proposed wording, if anything, suggests otherwise. NACDL therefore proposes that this language be revised to say, "(B) all parties are given reasonable notice and a fair opportunity to object ...."

We understand the word "substantially" to appear in brackets in the proposed Rule 611(d)-(1)(A) and Note as an invitation to comment on whether to include it in the amended Rule. NACDL urges the Committee to omit the word "substantially" from the final version. We realize that the word reflects the terminology of FRE 403 and that proposed subparagraph (d)(1)(A) is intended to impose a Rule 403-type balancing inquiry into the court's evaluation of whether to allow the use of an illustrative aid. But, as the Committee Note recognizes, Rule 403 inquiries are required when the issue is the admissibility of evidence, and illustrative aids, by definition, are not evidence. It is appropriate to require that the risk of confusion, delay or unfair prejudice *substantially* outweigh probative value when the court is considering proffered evidence that is relevant to a determination of guilt or innocence (or liability, in a civil case). But illustrative aids are not evidence and have no direct probative value. Every illustrative aid, by its nature, creates a risk of confusion in the minds of jurors, who are not trained to distinguish between what is and is not evidence, and the significance of that difference. For that reason, we believe that excluding illustrative aids only when their utility is *substantially* outweighed by the risk of undue delay, confusion or unfair prejudice puts an inappropriate thumb on the scale in favor of allowing the use of non-evidentiary aids in more cases. NACDL therefore recommends removing the word "substantially" from the proposed amendment. Illustrative aids should be disallowed whenever their utility is outweighed at all by any of the kinds of risks that Rule 403 is designed to avoid.

In practical terms, the use of summaries at trial is closely related to the use of illustrative aids and demonstrative evidence, so we proceed here to comment on the proposed amendment to Rule 1006. The amendment would make clear that accurate and non-argumentative summaries of voluminous materials are directly admissible, whether or not the underlying materials are themselves introduced into evidence, so long as those materials are made available to the adversary in time – which ordinarily should be well in advance of trial – to allow both the underlying voluminous materials and the summary itself to be fully examined and evaluated. We do believe that the paragraph in the Note that references the relevance of Rule 403 should be strengthened to state expressly that a summary that does not accurately and non-argumentatively present the relevant contents of the underlying materials inherently lacks probative value, which in turn would necessarily be (not just "may be") substantially outweighed by the risk of confusion, waste of time, and unfair prejudice.

EVIDENCE RULE 613 – WITNESS'S PRIOR INCONSISTENT STATEMENT

NACDL supports the effort of the Advisory Committee to resolve the Circuit split that has developed over the proper application of Rule 613(b), where a witness's credibility is impeached by extrinsic evidence of an inconsistent statement. The proposed amendment to Rule 613(b) would overturn an attempted reform in the original 1975 Rules by restoring the common law "Rule in Queen Caroline's Case." As the Committee notes, the amendment makes the Rule consistent with the preferred approach of most judges and with the current law in many states, which have not generally followed the prior Federal Rule in this regard. A competent cross-examiner will still be able to expose a lying witness who has changed their story by asking carefully framed questions before disclosing knowledge of the prior inconsistent statement, and will be able to introduce evidence of that statement afterwards, where such evidence exists. We agree that the proposal should make for a more orderly and efficient presentation of evidence, with no loss of fairness.

We fear, however, that the amended rule's silence on what standards the trial judge should use in deciding when to depart from the rule's requirements may well lead to divergent results. A trial court that simply prefers the prior Rule over the amended version may well conclude that Rule 611(a) (judicial control over order of presentation of evidence), coupled with the introductory wording of the proposed amendment to Rule 613(b) ("Unless the court orders otherwise,") means that the court may exercise its authority and discretion to simply override the amendment. Stronger language in the Note about a need for special circumstances to properly justify a court in allowing a deviation from the Rule might help obviate this risk.

The proposed wording is also not clear whether a lawyer needs to ask for permission *before* proffering extrinsic evidence of a prior inconsistent statement without having previously confronted the witness with it. May the lawyer proceed unilaterally to offer the extrinsic proof in the hope that there will be no objection – or that the court may exercise its authority to allow exceptions when ruling on an objection – even though the witness has not yet had an opportunity to explain or deny that statement? We suggest that the Committee make clear in the Note that an attorney seeking, in reliance on the court's authority to "order otherwise," to offer a prior inconsistent statement without having first complied with the confrontation requirement should ordinarily request leave of court to do so, rather than proceeding unilaterally.

EVIDENCE RULE 804(b)(3)(B) – HEARSAY EXCEPTION FOR STATEMENTS AGAINST PENAL INTEREST

NACDL has long opposed the existence in Rule 804(b)(3) of language disfavoring the use of against-penal-interest hearsay statements in criminal cases. We adhere to the view, based on long experience, that self-serving, accusatory statements from the government's "cooperating" witnesses, testifying in exchange for huge rewards in the form of reduced deprivation of liberty, present by far the larger problem of unreliable evidence in criminal cases. But we also recognize that the Committee is not offering to reconsider the entire premise of this Rule now. Nevertheless, we do propose that the words "corroborating circumstances that suggest" would be better than the overly restrictive "corroborating circumstances that clearly indicate." That said, we support the present proposal insofar as it moderates to some extent the unfair impact of the Rule by making clear that those "corroborating circumstances" may be found in characteristics of or circumstances surrounding the statement itself, or may take the form of separate corroborating evidence, or both.

Because the distinction that the amendment is drawing between "corroborating circumstances" and "corroborating evidence" – with the latter being available for reference in making the court's ruling, but not required – is new and subtle, we further suggest that the Note underscore the point being made by this amendment by restating it in the clearest possible language.

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NACDL thanks the Committee for its diligent and valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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