

ADVISORY COMMITTEE ON EVIDENCE RULES

**DISCUSSIONS ON JUROR QUESTIONS
OF WITNESSES AND THE USE OF
ILLUSTRATIVE AIDS AT TRIAL***

REPORTER

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DISCUSSION ON JUROR QUESTIONS TO WITNESSES

Hon. Susan R. Bolton
Zachary Cain, Esq.
Sally S. Duncan, Esq.
Elizabeth Gonzalez, Esq.
Hon. Stephen Hopkins
William Klain, Esq.
Paul McGoldrick, Esq.
Hon. Douglas L. Rayes
Hon. Danielle J. Viola

DISCUSSION ON ILLUSTRATIVE AIDS

Milagros Cisneros, Esq.
Hon. Dominic W. Lanza
James Melendres, Esq.
Professor Peter Murray
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I. DISCUSSION ON JUROR QUESTIONS TO WITNESSES

JUDGE SCHILTZ: Good morning, and welcome to this meeting of the Advisory Committee on the Federal Rules of Evidence. I want to thank the Sandra Day O'Connor School of Law and Dean Zachary Kramer, and especially Professor Jessica Berch for all they've done to host us.

I want to get right to our panel discussions because we really appreciate all of our panelists being here today. This morning, we have two distinguished panels of judges, lawyers, and professors to address two issues that are now before our Committee. The first panel assembled before us is a panel that will address the issue of jurors asking questions or posing questions to witnesses.

At our spring meeting—spring of 2022—we approved for publication a proposed amendment that would add a new subdivision (e) to Federal Rule of Evidence 611, and that new subdivision (e) would establish certain procedural safeguards that would apply if a judge decided to allow jurors to

pose questions to witnesses.¹ Our Advisory Committee note was as clear as we could be that we were taking no position at all on whether judges should allow jurors to pose questions to witnesses.² We were simply setting forth

1. ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF MAY 6, 2022, at 15 (2022), https://www.uscourts.gov/sites/default/files/2022-04_evidence_rules_meeting_minutes_final_0.pdf [<https://perma.cc/65AX-DVMC>] [hereinafter ADVISORY COMM., MAY MINUTES]. The proposed rule, drafted by the Advisory Committee and considered by the panel, provides:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

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(e) *Juror Questions for Witnesses.*

(1) *Instructions to Jurors If Questions Are Allowed.* If the court allows jurors to submit questions for witnesses during trial, then the court must instruct the jury that:

- (A) any question must be submitted to the court in writing;
- (B) a juror must not disclose a question's content to any other juror;
- (C) the court may rephrase or decline to ask a question submitted by a juror;
- (D) a juror must draw no inference from the fact that a juror's question is asked, rephrased or not asked;
- (E) an answer to a juror's question should not be given any greater weight than an answer to any other question; and
- (F) the jurors are neutral factfinders, not advocates.

(2) *Procedure When a Question Is Submitted.* When a question is submitted by a juror, the court must, outside the jury's hearing:

- (A) review the question with counsel to determine whether it should be asked, rephrased, or not asked; and
- (B) allow a party to object to it.

(3) *Posing the Question to a Witness.* If the court allows a juror's question to be asked, the court must pose it to the witness or permit one of the parties to do so.

ADVISORY COMMITTEE ON EVIDENCE RULES—OCTOBER 28, 2022, at 21 (2022), https://www.uscourts.gov/sites/default/files/2022-10_evidence_rules_committee_agenda_book_final_0.pdf [<https://perma.cc/94XA-UCY8>] [hereinafter ADVISORY COMMITTEE, OCTOBER 2022 AGENDA BOOK]; *see also* ADVISORY COMMITTEE ON EVIDENCE RULES—MAY 6, 2022, at 266–67 (2022), https://www.uscourts.gov/sites/default/files/evidence_agenda_book_may_6_2022.pdf [<https://perma.cc/M9C9-R98G>] (Memorandum from Daniel J. Capra, Reporter, to Advisory Committee on Evidence Rules); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 1018 (2022), https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf [<https://perma.cc/7KNW-J25F>] (Memorandum from Patrick J. Schiltz, Chair, Advisory Comm. on Evidence Rules, to John D. Bates, Chair, Standing Comm. on Rules of Prac. & Proc.).

2. The proposed Committee Note to the new addition on juror questions provides as follows:

New subdivision (e) sets forth procedural safeguards that are necessary when a court decides to allow jurors to submit questions for witnesses at trial. Courts have taken different positions on whether to allow jurors to ask questions of witnesses. But courts agree that before the practice is undertaken, trial judges should weigh the benefits of allowing juror questions in a particular case against the potential harm that it might cause. And they agree that safeguards must be imposed.

Rule 611(e) takes no position on whether and under what circumstances a trial judge should allow jurors to pose questions to witnesses. The intent of the amendment is to codify the minimum procedural safeguards that are necessary when the court decides to allow juror questions. These safeguards are necessary to ensure that the parties are not prejudiced, and that jurors remain impartial factfinders.

The safeguards set forth are taken from and are well-established in case law. But the cases set out these safeguards in varying language, and often not in a single case

certain minimal procedural safeguards that should apply if a judge were to allow jurors to pose questions to witnesses.

We approved that amendment for publication.³ It went to the Standing Committee at their June 2022 meeting.⁴ There, the members of the Standing Committee devoted a lot of discussion to our proposed amendment.⁵ No one, as best as I can remember, expressed any concerns about the proposed procedural safeguards. Virtually all of the discussion was about whether judges should allow jurors to ask questions of witnesses.⁶ Those members who expressed concern about our rule said that they felt that having the rule on the books would result as a practical matter in more judges allowing jurors to pose questions, and they felt that would be a bad thing.⁷

So, the Standing Committee sent this back to us for more study, especially on the issue of whether juror questioning is or is not a good thing,⁸ and today we're here to start that study. It's just coincidental that we're in Arizona, which is ground zero for juror questioning. It was just coincidental, and, fortunately, we have a lot of people who know a lot about this here. And so now I'll turn it over to our Reporter, Dan Capra.

PROF. CAPRA: Thanks, Judge Schiltz. Thank you all for coming. The first part of this discussion is the meta one—an inquiry into the practice of allowing jurors to pose questions of witnesses. We want to do a cost-benefit

in each circuit. The intent of the amendment is to assist courts and counsel by setting forth all the critical safeguards in uniform language and in one place.

The safeguards and instructions set forth in the rule are mandatory, but they are not intended to be exclusive. Courts are free to impose additional safeguards, or to provide additional instructions, when necessary to protect the parties from prejudice, or to assure that the jurors maintain their neutral role.

A court may refuse to allow a juror's question to be posed, or may modify it, for a number of reasons. For example, the question may call for inadmissible information; it may assume facts that are not in evidence; the witness to whom the question is posed may not have the personal knowledge required to answer; the question may be argumentative; or the question might be better posed at a different point in the trial. In some situations, one of the parties may wish to pose the question, and the court may in its discretion allow the party to ask a juror's question—so long, of course, as it is permissible under the rules of evidence. In any case, the court should not disclose—to the parties or to the jury—which juror submitted the question.

After a juror's question is asked, a party may wish to ask follow-up questions or to reopen questioning. The court has discretion under Rule 611(a) to allow or prohibit such questions.

ADVISORY COMMITTEE, OCTOBER 2022 AGENDA BOOK, *supra* note 1, at 21–22.

3. *See* ADVISORY COMM., MAY MINUTES, *supra* note 1, at 15; COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 875.

4. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 875.

5. *See* COMM. ON RULES OF PRAC. & PROC., MINUTES—JUNE 7, 2022, at 22–24 (2022), https://www.uscourts.gov/sites/default/files/2022-06-07_standing_committee_minutes_final_0.pdf [<https://perma.cc/3RUH-WGKH>].

6. *See id.*

7. *See id.*

8. *See* COMM. ON RULES OF PRAC. & PROC., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE, at 25–26 (2022), https://www.uscourts.gov/sites/default/files/sept_2022_jcus_rules_report_final_for_website.pdf [<https://perma.cc/JZF8-CB87>]; COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 22–24.

analysis based on the panelists' experience. And then we'll talk about specifically how questions from jurors are managed at trial. When are objections rendered and how is the questioning process administered? And then, if we have any time, we'd like to get to the rule itself to see if the panelists believe that there are any improvements that could be made. So, I'd like to start with Judge Bolton, a district judge in the District of Arizona, for her view on the meta question.

JUDGE BOLTON: Well, I'm an enthusiastic supporter of juror questions, and for all the years that I've been on the district court and, for several years prior to that, on the state court, I have allowed jurors questions in both civil and criminal cases. I give a preliminary instruction to the jury right after they're seated and before the opening statements that says, "If you need to communicate with me or have any questions during the trial of a witness or about the evidence, simply give a note to the law clerk or courtroom deputy to give to me."

If any juror submits a written question, I will consult with counsel before deciding whether the question can be answered. I tell the jury: "Do not discuss your question with anyone. Remember that you are not to discuss the case with other jurors until it is submitted for your decision."⁹ My experience then is that during the average trial, there will be anywhere from zero to three or four questions. There are some exceptions. Every so often you have a juror that typically is anticipating what's going to come, but I have never found any juror try to take over the role of prosecutor, to try to turn into a Perry Mason defense attorney in a criminal case. Rather, the juror is ordinarily asking a question for clarification. The question gives an insight into something that happened previously that they're confused about or uncertain about.

During my last trial, there was one question from a juror. It was not of a witness; it was of me, and the question was, "What does lack of foundation mean?" I think it's important that we remember that the jury's not an audience. They're the people that are going to have to decide the case, and they shouldn't be going into the jury room—or, even worse, going home at night—not certain about what a word means or with a need to clarify something, and I think we should do all we can to make sure they know that we'll provide to them the information that they need so that they're not tempted to Google it.

PROF. CAPRA: Thanks. Judge Rayes?

JUDGE RAYES: I'm like Judge Bolton, a big fan of jury questions. The only reason we're doing a jury trial is for the jury to understand the evidence, and I take the position that we should do everything possible to assist them. And there's a wide variety of reasons why jurors might not understand the evidence, might not hear it, or they're not always paying attention, so I think it's important that if they have a question, they have a chance to ask it. My

9. *See, e.g.*, Preliminary Jury Instructions at 9, *Hayden v. Ariz. Pool & Fountain Guy's LLC*, No. 16-cv-00840 (D. Ariz. Aug. 8, 2017), ECF No. 104.

entire career has been in courts where juror questions are allowed, and I don't understand why we wouldn't allow them.

I think it's hard enough to be a juror and sit there and listen, and if a question comes up, it is wrong to have to sit there and not be allowed to ask it. I haven't had any situation where I felt like jurors were taking over the courtroom with their questions. It's just, jurors want to get it right. They understand that they have an important duty, and they want to understand the evidence, and allowing them to ask questions in my opinion is a good thing.

PROF. CAPRA: Judge Viola?

JUDGE VIOLA: Thank you. I don't want to sound like a broken record, but I agree with Judge Bolton and Judge Rayes in terms of being a fan of jury questions. I started practicing in 1999, and we've always had juror questions in my practice, so I don't know a different environment. From my perspective, it works. I think, in presiding over both criminal and civil trials, I don't really see a difference between the two in terms of how the jurors approach the ability to ask questions or the opportunity to ask questions. I feel like they, in my experience, use the opportunity to clarify, for example, dates and times. Sometimes there's inconsistencies that come about either through the evidence that's submitted or through specific testimony, and you can tell they're paying attention because they're asking for that clarification. So, if a witness says "Tuesday" in one sentence and "Wednesday" in the next sentence, those are often the types of questions from jurors that we see.

As a busy trial court, I can't afford unnecessary delays, and so I'm always mindful of whether juror questions extend the length of our trials, but in my experience, they really don't. Every once in a while, you might have a situation where perhaps the questions that are being asked actually reflect the presentation itself and the inability of the practitioners to get across the point that they're trying to get across with the evidence that they're presenting. So, from my perspective, it gives jurors the opportunity to let the attorneys know what's working and what isn't so that they can also adjust their presentation.

PROF. CAPRA: Judge Hopkins?

JUDGE HOPKINS: I'm going to paraphrase the movie *Blazing Saddles*: Judge Viola is right about Judge Bolton being right.¹⁰

I started practicing in 1985, and at that point in time, there were no juror questions by rule. There were some judges who had permitted juror questions, but it wasn't a rule of civil procedure,¹¹ and here in Arizona, it's a civil procedure or criminal procedure rule, not a rule of evidence. I was a member of the Civil Jury Instruction Committee that was involved in creating our pattern jury instruction that talks about juror questions, which I have here.

It's Preliminary Instruction 11, and it says:

10. *BLAZING SADDLES* (Crossbow Productions 1974).

11. *See, e.g., State v. Taylor*, 544 P.2d 714, 716 (Ariz. Ct. App. 1976); *Super. & Pittsburg Copper Co. v. Tomich*, 165 P. 1101, 1104 (Ariz. 1917), *overruled on other grounds by* *Consol. Ariz. Smelting Co. v. Egich*, 199 P. 132 (Ariz. 1920).

If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the Courtroom Assistant. If your question is for a witness who is about to leave the witness stand, please let the Courtroom Assistant or me know you have a question before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question I will ask the witness the question or provide you with an answer at the earliest opportunity. When we do not ask a question, it is no reflection on the juror submitting it. You should attach no significance to my decision not to ask a question you submitted. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

If a particular question is not asked, please do not try to guess why the questions [sic] was not asked or what the witness's answer might have been.¹²

So that is our preliminary instruction, which tracks the language of the Arizona Rules of Civil Procedure and the Rules of Criminal Procedure,¹³ and in my experience, it's worked fine. First of all, it makes juries more engaged, in my experience, and also gives the attorneys the opportunity to address issues that maybe the jury's thinking about.

To take as a recent example a trial I had about a month ago, there was insurance coverage involved. We have a standard instruction on insurance, and it was a personal injury case. The jury's usually told right up front insurance is not an issue that they should consider.¹⁴

I think what the lawyers wanted to do in this particular case is just defer any mention of insurance. They were hoping it would never come up, and they would therefore not need to give the instruction. But then, the very first question that I received from the jury was: "How are these medical expenses being paid? Is there insurance that covers it?" And at that point, the attorneys asked me to read the insurance instruction, which is real brief, and I'll just read it: "In reaching your verdict, you should not consider or discuss whether a party was or was not covered by insurance. Insurance or the lack of insurance has no bearing on whether or not a party was at fault, or the damages, if any, a party suffered."¹⁵ So allowing the jury to ask questions saved the lawyers from their decision not to ask for an instruction.

Another example from the most recent trial I had two weeks ago is a juror question that asked for something that had been talked about over and over and over. It had been asked and answered about six times. So, I get the lawyers to the bench, and we have our bench conference, and one of the lawyers said, "Well, Judge, this has been asked and answered." I said, "Well,

12. CIV. JURY INSTRUCTIONS COMM., REVISED ARIZONA PATTERN JURY INSTRUCTIONS (CIVIL) Preliminary Instructions 11 (7th ed. 2020), Westlaw (database updated Dec. 2020).

13. See ARIZ. R. CIV. P. 40(i)(2); ARIZ. R. CRIM. P. 18.6(e).

14. CIV. JURY INSTRUCTIONS COMM., REVISED ARIZONA PATTERN JURY INSTRUCTIONS (CIVIL) Standard Instructions 9 (7th ed. 2020), Westlaw (database updated Dec. 2020).

15. See *id.* (alterations omitted).

that's true, and if you were asking the question, I might sustain that objection, but, obviously, someone's not getting it, so do you want to object on that basis, or do you want me to ask the question?" They said: "You know what? You're right. Ask the question." And so that's what we did.

And if you don't permit juror questions, you don't have the opportunity to address the possibility that jurors aren't getting it, or maybe jurors are thinking about things that are inadmissible. They shouldn't think about them or talk about them, but they do, and juror questions are really helpful, in my experience, to flesh them out.

PROF. CAPRA: Thanks. So, we got basically good reviews from the judges. Now we're going to go to the lawyers and see if they agree. We'll start with Elizabeth Gonzalez.

MS. GONZALEZ: Thank you, and I echo and agree with what everyone has said so far and, you know, from the attorney's perspective, I'm a proponent of jurors being able to ask questions. I believe, in addition to everything else that has been said, jurors are our general population. You have people who might be thinking of certain questions and maybe even during the deliberations aren't the type of people that would outwardly ask them. But knowing that there's a system in place—that they can confidentially, in a sense, write a question—will encourage them to express their concerns. In my experience with the juror questions, jurors write out a question, and a bailiff or a clerk will take it and put it in a container at the edge of the bench, so after the witness's questioning, it then comes up to the judge, and the judge filters through the questions with the attorneys to see what would be permissible to ask the witness. And, in those situations, the attorneys don't know which juror asked the question. The jurors are able to get their question answered and resolve any sort of confusion or clarification that was needed.

I also think it promotes active listening with the jurors to be able to think of what questions that they need answered to help understand this information better. Most of my jury trial experience has been in criminal defense, but also in civil cases as a plaintiff's attorney. And in civil cases especially, expert witness testimony can be difficult to digest. Juror questions can allow the attorneys to pivot or adapt questions appropriately—follow up with a few more questions for a witness if need be—because our job obviously is to convey the message to the jury in a way that they will understand our position and hopefully see it in the position that we're supporting.

PROF. CAPRA: Paul McGoldrick?

MR. MCGOLDRICK: Good morning. I'm a civil trial practitioner, and I've had the honor of trying a case against Doug Rayes when he was in private practice, the same with Judge Hopkins, and I tried a case before Judge Rayes when he was a sitting judge. When I started practice, you could not ask juror questions, and I want to give an example that segues into what Judge Hopkins talked about.

I was representing a plaintiff in a case, and I suggested in closing a particular figure for a damages award. My opponent suggested a lower number, not stunningly, and the jury came back with even a lower number on the admitted liability case, and so we were all shocked.

And Judge William Sargeant was the judge, and he had the jury stay put and said, “How did you arrive at this because it is not supported by the evidence.”

“Well,” the foreman says, “We presumed that the plaintiff had health insurance because she testified that her husband worked for the City of Phoenix.” Well, he did so testify, but he was a temporary employee, had no benefits. She had no health insurance. “And we presumed that the sixteen-year-old driver of the car didn’t have insurance, because if he did, certainly, Mr. McGoldrick would have told us that.”

And so I immediately moved for an additur, which was immediately granted. So, the problem was solved—at least for my client—but it likely would not have happened if the jurors were permitted to ask the question, subject to the preliminary standard instruction that we now have.¹⁶

What I did to get ready for today is I went back through the last three jury trials I’ve had. I went through what we call the minute entries that we use to track what goes on. In one trial, there were no juror questions, and I think the jury got it right. In the case I had last November, there were three jury questions. Again, I think the jury got it right, and it did not add any additional delay to the case. In fact, we got done early.

And then I had a malpractice trial in March, which was scheduled for eight days. We got done in seven. There were four jury questions that did not expand the case, and in that case, we had six lawyers testify as witnesses. I think the jury paid great attention, in large part because they knew they had the opportunity to ask questions, and the ones that they asked were certainly very appropriate.

So, from my perspective, we’re at a jury trial because we couldn’t get the case settled. There were no dispositive motions that got rid of the case, and at least one of the parties demanded a jury trial, so we ought to give them what I call the keys to the car to be able to drive it and get right.

One final thought. My wife was a juror on a three-week criminal trial this summer. She did not ask a single question, but she said that she appreciated the right to be able to ask a question if she had a legitimate question that was not presented by the evidence or the lawyers. So, I’m a big fan of having jurors be able to ask questions, and if they ask a question that’s legally not permissible, I’ve found every judge will kindly and respectfully explain why that question either cannot be answered, or they’ll say, “Listen to the evidence,” and it doesn’t make them feel embarrassed at all. I have found virtually no juror whose question is not asked. I’ve never seen an outward embarrassment factor because the judge has handled it quite well.

PROF. CAPRA: Bill Klain?

16. See CIV. JURY INSTRUCTIONS COMM., *supra* note 12.

MR. KLAIN: Good morning. My name is Bill Klain. I'm a civil practitioner in Scottsdale. I just finished day four of a ten-day jury trial yesterday. We've had no questions in this trial. The last jury trial I did, which was last year, also a ten-day trial, we had five, and the subject matter was very complex, involving qualified residential personal trusts in New York. It was very complex, and the juror questions helped us.

First of all, I should say I'm a proponent of juror questions. Jurors are there to decide the case. They need to know the facts. If there's something we're not addressing that's significant—maybe we're addressing it but not in a manner that they comprehend—well, I need to do my job better, and the question helps me do my job better, assuming it's admissible. I think it largely depends on the subject matter, but overall, juror questions are very, very helpful.

I'll talk later during the discussion about the process, like whether the jurors really feel invited to ask the question, and that's a separate issue that if a judge is going to allow them, how do the jurors do that functionally. Certainly we should be concerned about the possibility of a juror being turned off by not having the question read.

Picking up on what Judge Bolton said, one of the questions from that prior trial from last year was, "What's Rule 403?" I guess I was unduly prejudicial that day or trying to be. Particularly, there was a piece of evidence that I wanted to get in that was significant, and it wasn't allowed, but 403 came up a couple times. When we got the "what's 403" question, we all agreed that question should not be answered. When we did our sidebar with the headphones and static white noise, so the jury couldn't hear us, we all agreed. We were unanimous.

PROF. CAPRA: A question such as "what's 403?" is not covered by the proposed rule because the proposed rule is about posing questions to witnesses.¹⁷ "What's 403?" is really a question to the judge or to the lawyers. While that is not a question of testimony or presentation of evidence, the fact is that if you allow jurors to pose questions to witnesses, and then they come up with a question that is not to a witness, maybe a rule should at least deal with that in a Committee Note. Zack?

MR. CAIN: I also agree that juror questions are a good idea. Allowing questions credits the role that the jury plays. It forces the lawyers to be zeroed in on the fact that the jurors are their ultimate audience. I've had trials in both the Arizona Superior Court and the United States District Court. I've never had a case where juror questions were disruptive, caused delay, or were so numerous that anybody thought it was a problem. My experience has been consistent with what Judge Bolton related. You know, you may have a handful of questions in any given case. Sometimes the questions show that the jurors really are paying attention.

Sometimes they're anticipating evidence that's going to be upcoming in the trial. The lawyers may be overly focused on the small slice that they're

17. See ADVISORY COMMITTEE, OCTOBER 2022 AGENDA BOOK, *supra* note 1, at 21.

trying to elicit from each witness, and the jurors are already thinking ahead, “Well, I want to hear about this.” And so usually, in those instances, when you’re side-barring on that issue, the court is inquiring as to whether or not one of the parties is going to cover this in an upcoming examination.

I haven’t ever seen or experienced an incident where the juror appeared to be stepping outside of their role, trying to be an advocate for one side or the other. In my experience, the jurors really do take their role seriously. They’re trying to be conscientious, and they’re trying to ask good questions. Sometimes lawyers try to hide from unfavorable evidence, and jurors are keen enough to zero everybody back in. And there are certainly times when—I’m usually on the defense side—what I think is important and what the government thinks is important are different than what the jurors think is important, and so it gives them the opportunity to ask the questions that they find important.

PROF. CAPRA: Thanks very much. At this point in the discussion, I was going to have somebody who was relatively negative about allowing jury questions, and she’s sick today, so I’m going to paraphrase what she told me. That’s Sharon Sexton, who’s an Assistant U.S. Attorney. She has concerns about loss of control by lawyers, and I think that’s what the Standing Committee was concerned about—lawyers are going to lose control if jurors are allowed to ask questions.¹⁸ She had an experience where jurors were filing statements indicating doubt about the credibility of witnesses. The only question to the witness was: “How can you say that you saw something in the dark when you were on marijuana? That’s not believable.” What do you do about that?

Ms. Sexton also . . . she had the experience of a witness who, while answering a juror’s question, just took off on a narrative. And how do you stop a witness who’s started on a lengthy narrative? Neither of the lawyers want to do that right at that point. Probably the judge should terminate the testimony. Perhaps that problem should be addressed in a Committee Note. Judge Schiltz?

JUDGE SCHILTZ: I did note at the Standing Committee Meeting—and this has been my experience generally with discussions of jury questioning—the people who are most against it have never experienced it.

PROF. CAPRA: Exactly. And the data shows that.

JUDGE SCHILTZ: And the people who are most in favor of it are the ones who have experienced it.

PROF. CAPRA: Yes.

JUDGE SCHILTZ: Are any panelists aware of judges or lawyers here in Arizona who have experienced the practice and who just don’t like it, who have said, “I wish we didn’t do this,” or are aware of a case that got reversed because of something a juror did or a judge that had to declare a mistrial because of something a juror did? Any sort of negative consequences that any of you are aware of here in Arizona?

18. See COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 23.

PROF. CAPRA: Well, just yesterday, I spoke to a judge on the superior court who was negative about the practice. I guess his name should go undisclosed, but his point was that there are time limits imposed on civil cases.¹⁹ And lawyers have time, and they're fighting over minutes. And so, when you add juror questions to everything else, including the time to negotiate the questions and then to ask the question and answer the question, it takes time that you don't really have.

In terms of reversal, Judge Campbell told me about a case in which a judge who's now on the district court got reversed by the Ninth Circuit because a juror question was asked, nobody objected to it, and it was found to be plain error to allow the question to be asked.²⁰ That was Judge Soto who had that happen to him.²¹ These are just data points that have been coming up in my research in talking to people who are experienced with the practice. Yes, Judge Hopkins?

JUDGE HOPKINS: I actually looked to see if I could find an answer to that. The only Arizona cases that I'm aware of that have addressed the practice are *State v. LeMaster*²²—which is a 1983 case, so that was before the rule had even been amended to allow it, but there were some judges that were doing it—and then *Warner v. Southwest Desert Images*,²³ which held that the failure to ask or asking a question is held to an abuse of discretion standard.²⁴ In that case, the judge was affirmed in refusing to ask the question.²⁵ There was no abuse of discretion.²⁶ So, those are the only two cases that I'm aware of that are published opinions in Arizona.

PROF. CAPRA: There are published opinions at the federal level about asking questions. Just recently, the Fifth Circuit had a case in which the judge allowed jurors to ask questions but forbade the lawyers from objecting to them, and the question was, "Is that an error?"²⁷ What the court said is: we have case law which permits judges to bar objections. It takes the court en banc to overrule that case, and so we're not going to overrule the case.²⁸ So in the Fifth Circuit, it is pretty remarkable that jurors can be allowed to ask questions, and lawyers can be barred from objecting to them.²⁹

JUDGE BOLTON: Dan, could I comment on the lawyer who said she was opposed to it and gave as an example the question, "How in the world could he see in the dark and be on marijuana?"

PROF. CAPRA: Yes.

19. *See, e.g.*, ARIZ. R. CIV. P. 16.

20. *See* United States v. Preston, 873 F.3d 829, 838, 846 (9th Cir. 2017), *rev'g* No. 13-CR-1851, 2015 WL 13655671 (D. Ariz. July 24, 2015).

21. *See id.*

22. 669 P.2d 592 (Ariz. Ct. App. 1983).

23. 180 P.3d 986 (Ariz. Ct. App. 2008).

24. *See id.* at 999.

25. *See id.* at 1000.

26. *See id.*

27. United States v. Kieffer, 991 F.3d 630, 636 (5th Cir. 2021).

28. *See id.* at 636–37.

29. *See id.*

JUDGE BOLTON: If I were prosecuting a case, I would want to know that that juror had that concern because, if they weren't allowed to write it down as a question to perhaps be addressed in the evidence or in argument, you know the very first thing that juror is going to say at deliberations is there's no way this witness could have seen anything—it was dark, and he was on marijuana.

PROF. CAPRA: Thanks, Judge Bolton, because that's what I said to Ms. Sexton. I said, "Well, so now you know," and she said she made that a point in her closing argument that people can still see when they're on marijuana. So that anecdote winds up supporting the practice of juror questioning.

I think we've done the first round of the meta question of, "Does the practice of juror questioning provide more benefits than costs?" So, I want to talk about how the rule works and how the process works, and there's some data, I believe, that Judge Viola has compiled.

JUDGE BATES: Are you going to have some time for questions about the meta question—the big question?

PROF. CAPRA: If you want to ask a question, now, please do so, Judge. If you want them now, you can submit that.

JUDGE BATES: I'm John Bates, by the way.

PROF. CAPRA: So he's the boss of the Committee—just to make you aware.

JUDGE BATES: My concern is not with the question that is actually asked. Assume that the judge could screen out questions that shouldn't be asked. The concern is with informing the lawyers. And in particular, in a government case, a juror may ask a question, and the judge will then talk about it with the lawyers and give the lawyers a chance to object, and it may be that that question will reveal something to the prosecution that will enable them to cure a problem that they otherwise wouldn't have addressed. It might be something that they're required to address—an element of the offense—or to address something that a juror is raising—in the nature of an affirmative defense—that otherwise the government didn't intend to address, but because the juror had expressed a concern about it, the prosecutor decided that he needed to address it. The concern that I've heard is that this makes the juror into something other than the neutral figure deciding the case. It involves them in the case and enables the prosecution to fill in a gap, and you have that for the defense as well, but it enables the prosecution in particular to get an advantage in the case.

And one response to that, of course, is, well, it's much better to have the truth out, that this will even out in the long run. Sometimes it might help the prosecution. Sometimes it might help the defense.

I'm not sure that's an answer for some people, and I don't want you to take this question to indicate the view that I have. But I'm not sure that it's an answer to say that it evens out, and sometimes it could help with the prosecution, sometimes it could help with defense, and indeed, I'll quote

from a decision by the Minnesota Supreme Court as to whether it comes close to home or not.³⁰

It is a case where the court decided that the prosecution had gotten an unfair advantage by a question being asked because it enabled the prosecution to decide to address an affirmative defense, and what the court said ultimately was:

Whether one side is benefited more than the other is of secondary concern. [The] concern is not in equalizing the number of notches in the belt[] . . . but, rather, whether the jury is being lured into a role that is inconsistent with its responsibility to be an impartial arbiter of justice.³¹

And there are some cases from state courts holding that it was reversible error to allow juror questions, at least in criminal cases.³²

This does come up in criminal cases and usually will help the prosecution, and I wonder if any of you have ever thought about that or have ever experienced it because it does seem to me that there could be an advantage for one side or the other just from knowing that a particular juror had a particular concern, and it could cause the prosecution more often to actually change what it's doing in the course of the case—maybe call an additional witness because a juror is indicating in a question that they didn't really think a witness was credible. Maybe the prosecution will decide whether to call a second witness to reinforce that. Is that something that should be a concern?

JUDGE BOLTON: Judge Bates, I've heard that concern raised in the past, and I think it's a legitimate concern, but I think that when we're talking about allowing juror questions or not allowing juror questions, we have the advantage, at least in Arizona, of about thirty years of experience of allowing juror questions in both civil and criminal cases.³³

And I don't think that that concern—something that might happen and perhaps has happened in a handful of the hundreds and hundreds—if not thousands—of cases where juror questions have been allowed—should be enough to not allow juror questions. Because I think that the collective experience of everyone here, and including those who are criminal practitioners, is that most of the questions have been clarifying questions as opposed to the kind of question that might give the prosecution an advantage. And my experience over all of the years that I've allowed questions in criminal cases is I can't really remember a defense attorney objecting to a question being answered on that basis.

So, I don't disregard the concern. It could happen, and it would be a difficult thing for the judge and the lawyers to deal with, and the judge in the first instance to deal with, but I think we have to balance that against the

30. *State v. Costello*, 646 N.W.2d 204 (Minn. 2002).

31. *Id.* at 212.

32. *See, e.g., Wharton v. State*, 734 So.2d 985, 990–91 (Miss. 1998); *State v. Zima*, 468 N.W.2d 377, 379 (Neb. 1991).

33. ARIZ. R. CIV. P. 39(b)(10) (1996) (current version at ARIZ. R. CIV. P. 40(i)(2) (2023)); ARIZ. R. CRIM. P. 18.6(e) (1996) (amended 2017).

advantages of making sure that the jurors have the information they need to find the facts.

In the situation you pose, there is of course a problem because the judge really can't prohibit the lawyers from seeing the question.³⁴ But, again, do we really not allow questions because this might happen in a minuscule number of cases and where in all of the rest of the cases, the questions are helpful to the jury and don't cause an advantage or disadvantage to one side or the other?

PROF. CAPRA: Anybody else want to speak to Judge Bates's concern? Judge Rayes?

JUDGE RAYES: Yes, juror questions give insight into the thinking of the jury, and I think that's one of the good things about them. When the lawyers are presenting their case, they don't always understand how it's being received. Juror questions typically, like Judge Bolton says, are clarifying, but once in a while you get some insight as to what one juror might be thinking, and I don't have a problem with the lawyers understanding what they're thinking and presenting evidence accordingly. This is a search for the truth, and that's what I look for. That's how I see it. If they have a question, I want them to ask it even if it may give some insight into what they're thinking.

PROF. CAPRA: Thank you. Yes, Bill?

MR. KLAIN: I think there are two sides. First of all, the advantage . . . the way you pose the question, respectfully, assumes that the advantage only flows one way. The other side now knows that something they're doing is effective, and so they may want to highlight something in response to the question. So it cuts both ways. You are getting insight, but the insight is beneficial to both sides.

There are other things—I assume we all know this—that I'm looking for when they're taking notes. We allow juror notes here,³⁵ and that tells me something's resonating. If the plaintiff is giving their damage calculation, and they have their damages expert up there, and everyone has their notepads in their laps, and no one's taking a note, that tells me something from the defense side, and it tells the plaintiff something. Who's nodding? Who's tuned out? Jurors are communicating to us all the time with everything they do in the box. I can get some precision with a jury question. If there's something that they think is that important, I think we need to know it and address it, and I think the advantage, respectfully, Your Honor, cuts both ways.

PROF. CAPRA: Okay. So thank you, and let's go to some data points if we could, Judge Viola.

JUDGE VIOLA: So, I think there was some mention by folks already about some of the data that they had collected informally, and I did the same

34. *Cf.* *United States v. Rawlings*, 522 F.3d 403, 408–09 (D.C. Cir. 2008) (suggesting that judges should review juror questions with counsel).

35. *See* ARIZ. R. CIV. P. 40(f); ARIZ. R. CRIM. P. 18.6(d).

thing, so I am presenting this data with caveats because I didn't scour all of the information. I just looked at my trials for 2021 and 2022—so three trials in '21, six trials in '22. In the 2021 trials, the average trial days that I had were four days—four-day trials—and the average number of questions was four, so very consistent with some of the other comments that have been made thus far.

This year, in the six trials that I had, the average number of trial days was 6.6, and the average number of juror questions was 16.8. Interestingly, I went back to look at what were my trials this year. I had one thirteen-day trial with thirty-one questions. That was a product liability death case involving two individuals who died as a result of what occurred in that case. I had a six-day trial with twenty-seven questions—that was a breach of lease with some allegations of breach of the duty of good faith—and then a four-day trial with nineteen questions.

That was probably the simplest case, interestingly, which was a car accident. My recollection is that ended up being about a \$1,500 verdict in favor of the plaintiff, if that gives you any perspective. That number of questions for such a simple case is an outlier. That is very unusual. I think that's the only time I've seen that many juror questions in that type of a case. It's very unusual. I think, as I mentioned earlier, that's probably driven by the presentation of the evidence—the way that counsel approached the issues that were raised in that case.

Case complexity certainly influences the number of questions, but I also think the lawyering influences the number of questions as well. Sometimes jurors will ask four questions in one juror question form, and so this data doesn't necessarily take into account subparts that may have been asked or sub-questions that may have been asked, so these numbers aren't exact, but it gives you a flavor for what we see.

PROF. CAPRA: Thanks. So, I'd like to go now to how the process works. First, how do questions get posed? I've heard several kinds of accounts of this. It's not uniform as far as I can tell, so if you want to talk about the practice that you have experienced. A juror has a question. How do they process it? When do they process it? When does it happen in the trial? Anybody want to start? Judge Hopkins?

JUDGE HOPKINS: I'll start first, if it is okay, by commenting on Judge Viola's data. Depending on who your jury is, you can get some really insightful questions—better questions than the lawyers have asked—and then you get some that maybe aren't so good, and just based upon the cases I can recall, I have no way to tell as far as I know which is a case I'm going to receive a lot of juror questions and which isn't.

For example, I had a one-month criminal case. It was a wrong-way driver. It involved technical issues involving toxicology and human factors. There was not a single question in a month. The most recent case I had—and we have a jury form, so the bailiff hands the jurors questions as part of their juror notebooks, and I always number the sheets for the record, so you have a clear

record about, you know, this is Question 1, this is Question 2—and this most recent case was a really simple case.

It was a motor vehicle pedestrian mishap in a parking lot, and in a four-day trial, we had twenty-nine sheets, and most sheets had four or five questions, and it just didn't seem like the kind of case where you would expect even a single question. So, in my experience, it's hard to tell, but what we do is, if there's, say, one question or one sheet, I'll call the lawyers to the bench. We'll have a bench conference. I'll hear their objections, and then we'll put—

PROF. CAPRA: How does the question get to you?

JUDGE HOPKINS: The witness has just finished testifying, and then I always turn to the jury and say, “Does anyone have a question for this witness before the witness is excused?” And if they do, they hold up the juror sheet, and I have my bailiff go get it. If it's only one or two questions, then I just have a bench conference, and we have the white noise headphones so the jury can't hear, and we address it at the bench.

If it's more than, say, three or four—because it's always after a witness has testified—it's kind of a good time to take a break anyway. I just tell the jury: “We're going to take about a five-minute break. We'll get you back into court as promptly as we can.” And then I hear from the lawyers, and then the other thing—even though we have a bench conference, at our next recess, I always allow the lawyers the opportunity to make a better record if they want to. If they do have an objection, then they can state their objection on the record outside the presence of the jury, and—

JUDGE SCHROEDER: Can you explain about whether jurors can remain anonymous?

JUDGE HOPKINS: So the way we do it here, we don't use names. So, everyone has a juror number, so we go by juror number.³⁶ That was part of the changes made in '94³⁷ as part of this recommendation,³⁸ and so the lawyers will know who the jury—let's say there's one juror that has a question. Even though they don't sign the sheet—they don't put their name on the sheet—if it's Juror Three, and they're the only juror that has a question, then everyone knows the question is from them. If it's multiple sheets from different jurors, then there's no way that anyone can track what question is being asked by what juror.

PROF. CAPRA: So, if there are multiple jurors submitting questions, there would be semi-anonymity in that you would know it's, say, one juror out of three. Is there a way to make the submission of questions completely anonymous?

36. See ARIZ. REV. STAT. ANN. § 21-312 (2022); ARIZ. R. CRIM. P. 18.3(b); *id.* r. 23.3; ARIZ. SUP. CT. R. 123(e)(10); *see also* ARIZ. R. CIV. P. 49(d)(2).

37. See ARIZ. R. CRIM. P. 18.3 (1996) (current version at ARIZ. R. CRIM. P. 18.3(b) (2023)); ARIZ. SUP. CT. R. 123(e)(9) (1998) (current version at ARIZ. SUP. CT. R. 123(e)(10) (2023)).

38. See THE ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12, at 21 (1994).

JUDGE HOPKINS: No, I don't know a way to make it completely anonymous. Maybe Judge Viola has an idea?

JUDGE VIOLA: I think the way you could do it is wait until there is a break. At that time, let the jurors give their questions to the bailiff when they leave the courtroom, and then the bailiff brings them back in, and then there would be anonymity. But I think, when they're handing them in, the only caveat I would give is that sometimes the same juror is asking a number of questions, so even if there are multiple questions being turned in, you start to recognize the handwriting if you can read it. You start to recognize the handwriting, and so it's typically easy for the lawyers to tell who's asking the questions in that type of situation. But I think you could take a break and collect the questions and then have the lawyers address the questions.

PROF. CAPRA: It strikes me, though, it's costly in terms of time.

JUDGE VIOLA: I just don't know what benefit there is from that method.

PROF. CAPRA: Especially since you would have to send them out for every witness, and if they don't have any questions, you've just wasted however much time doing it.

JUDGE VIOLA: Well, if they said no, then you wouldn't have to do anything.

PROF. CAPRA: Oh, I see. Judge Bolton, I think you have a different process?

JUDGE BOLTON: Well, at the outset, I told you that I give this preliminary instruction, and the jurors have the written copy—the preliminary instruction—in their notebook. I do not ever remind them or solicit questions. They can ask. They were told at the beginning they can ask questions, and if any juror asks a question, they can. But I don't say, for example, "This witness is going to be excused, do any jurors have questions?" I don't invite the questions in that way. So, my experience is that the vast majority of questions come at the break in the evening when we're recessing or first thing in the morning, and they're given to my courtroom deputy.

And so a lot of times, the lawyers aren't even present when the question is given because it's handed in as the courtroom deputy escorts them out to the break, or goes to get them at the break, or comes in in the morning, and so that's the typical way it happens in my courtroom. Now occasionally, a juror will waive a question that they have. They obviously are not concerned about anonymity.

PROF. CAPRA: But the way you do it, though, what happens if somebody's got a question and the witness is no longer there? Has that happened?

JUDGE BOLTON: Yes, but the time that I remember it happening, the question came so late it wouldn't have mattered anyway. It was like two days later after the witness was gone—the only witness who could address that question. And I don't have specific recollection of how we handled it, but, you know, if the witness is gone, the witness is gone. But unless it's a

very specific witness, it may still be able to be covered or it may have been covered and the juror just doesn't remember that.

PROF. CAPRA: Right.

JUDGE BOLTON: Then the lawyer has the insight that at least one juror doesn't remember that the witness said something.

PROF. CAPRA: So there's value in that.

MR. COONEY: I have a question. I'm Jim Cooney, a trial lawyer. Who actually asks the question? If a juror comes up with a question that needs to be asked, does the court ask the question? Do you let the direct examining lawyer ask the question? Is it up to the cross-examiner to ask the question? How do you decide who gets to air out the issue?

JUDGE BOLTON: It varies. Sometimes the lawyers—sometimes I give the question to the lawyers, and they answer. I tell the jury I've provided your question to the lawyers, and they will cover it with the witness. Sometimes they ask me to ask the question. Sometimes they ask to ask the question, but typically they just say go ahead and you ask the question, and then I allow the lawyers to ask any additional questions they might have in light of the juror's question.

MR. COONEY: Do you think the fact it's a juror question, particularly if the court directs it to the witness, that the jurors are going to put more emphasis on that question than on the evidence presented by the lawyers?

JUDGE BOLTON: Well, that's why I give the lawyers a choice, and if they think it's fine for me to ask the question, they obviously don't have that concern. And the concern that you raise is that this is some really, really important thing that's going to make a difference, and my experience is that's not usually the case with the questions—the jurors are asking because they are almost always just clarifying questions.

PROF. CAPRA: Judge Rayes?

JUDGE RAYES: I follow the same procedure Judge Hopkins usually follows. When the witness is done, I'll turn to the jury and say, "Does anyone have any questions for this witness before he's excused?" And then, the jurors pass it down to the front, and then we take it up. The lawyers come up, and after we review it and I rule on objections, I always ask the question, and usually because I rephrase it a little bit just so it neutralizes it, and I want to make sure it's asked in a way that the witness will understand what I'm asking. And then, when I'm done with that, I'll turn to the lawyer who was performing the cross-examination and ask him if he has any further questions and limit it to only areas that were addressed by the juror's questions. Then, I turn to the lawyer who called the witness and give them the last chance for the follow-up questions.

PROF. CAPRA: What's the likelihood of follow-up questions in your experience?

JUDGE RAYES: Very likely.

JUDGE HOPKINS: I always read the question. I think that's the practice for most state court judges here, and so you get the question, you get the objections, and then, if no one has an objection or I overrule the objection, I

read it out. I read it like I was reading the back of an aspirin bottle or something. There is no voice inflection or emphasis. Also, because our preliminary instruction says that I'm holding jury questions to the same standards as the lawyers',³⁹ I never rephrase it. I never make them a better question or a worse question. I just read it word for word as it's written because I think that's more consistent with our rule or at least the spirit of the rule.

JUDGE SCHROEDER: Do you allow follow-up then from the lawyers?

JUDGE HOPKINS: I do. I always turn to the lawyers, and I think, as a matter of fundamental fairness and due process, they should have that right—and they understand it's limited to that question and answer. The way I do it in my court is whoever called the witness has the opportunity to ask the first question or first series of questions, and I say to opposing counsel, "Do you have follow-up questions to that question and answer?" And very often, the answer is no, but sometimes the answer is yes.

PROF. CAPRA: Judge Viola?

JUDGE VIOLA: I would just add sometimes you can ask the question with just a slight modification to it, and neither lawyer objects, but the way that it was phrased by the juror, if you asked it, one or both would object. So sometimes the lawyers ask me, "Will you just change this word?" It doesn't necessarily change the substance of the question, but it allows it to become one that's not objectionable, so I will do that.

Also, I sometimes vary my approach to questions to avoid what feels like the need to go back to the examining lawyer to ask them or the person who called the witness to let them have a rebuttal. I will sometimes switch the order and allow the other side to ask the question first to avoid the need for that third time, if you will, to ask a follow-up question. And then typically, I go back to the jury once all the questions have been asked before the witness leaves to make sure there's nothing else, and sometimes there is. So sometimes we do have follow-up questions from the jury.

PROF. CAPRA: More questions?

JUDGE VIOLA: It usually doesn't go more than one additional question, and it's sometimes because that juror had some more time, and so they thought of another question, or it's a follow-up to what was asked or a clarification question.

PROF. CAPRA: Judge Rayes?

JUDGE RAYES: When I rephrase the question—if I do—of a juror, I always tell the lawyers how I'm going to phrase it to give them a chance to object to the question I'm going to ask. It's always the question the juror asked, but rephrased in a different way if I do rephrase it. I don't always do that, but if I do, the lawyers have a chance to address it.

39. See CIV. JURY INSTRUCTIONS COMM., *supra* note 12; CRIM. JURY INSTRUCTIONS COMM., REVISED ARIZONA PATTERN JURY INSTRUCTIONS (CRIMINAL) Preliminary Instructions 16 (4th ed. 2016), Westlaw (database updated Dec. 2016).

PROF. CAPRA: This is all very helpful. Let's now talk about how lawyers make an objection to a juror's question. I would like to start with the lawyers. Are there concerns about objecting to a juror's questions, that it will come back to prejudice your client? I'll start with Paul.

MR. MCGOLDRICK: I've found it's usually not a lot of debate as to whether or not a question should be asked or not, you know, unless there's some evidentiary rule that would forbid the answer. Now, if I object, every judge gives us the opportunity to make our record and then you move on. Every judge I've ever been in front of allows a follow-up from the lawyers.

PROF. CAPRA: I'm just wondering, though, about the prejudice you might think you might suffer when you're objecting to a juror's question. Are you concerned that the juror would be personally offended? I know they're instructed not to take offense,⁴⁰ but is that enough to alleviate a lawyer's concern?

MR. MCGOLDRICK: I'm not necessarily concerned about that. I try to be very respectful, but I'm not—because the lawyer—the juror doesn't hear my objection. We have the white noise headphones.⁴¹

PROF. CAPRA: But I would think that, in many cases, the juror doesn't have to hear the objection to deduce which lawyer is making it.

MR. MCGOLDRICK: True. Here's something that has concerned me. It probably doesn't concern a lot of people, but believe it or not, in Arizona, we allow jurors to deliberate during the course of the trial.⁴² So whenever they're all together from day one through day twenty, they're actually deliberating and talking about the evidence in the case, and so I think oftentimes, we get questions that are not necessarily a question from Juror Three. It could be a collective question because these jurors are talking about the case all the time. So I don't look at it that I might offend Juror Three. I'm just thinking collectively—

PROF. CAPRA: —offending the whole jury.

MR. MCGOLDRICK: That or, conversely, this is a question that everybody wants asked.

PROF. CAPRA: Yes. Right.

MR. MCGOLDRICK: And so that's my perspective.

JUDGE VIOLA: And, Dan, that's just for civil—juror deliberation during the trial is only for civil trials.⁴³

MS. SHAPIRO: I'm wondering how questions from the jurors might have affected the dynamic between jurors, because jurors are having their views

40. See, e.g., CIV. JURY INSTRUCTIONS COMM., *supra* note 12 (“When we do not ask a question, it is no reflection on the juror submitting it.”).

41. See Mark A. Drummond, *How About a Free Shadow Jury?: Inside the Juror's Mind*, LITIG. NEWS, Winter 2013, at 16, 17 (describing use of white noise in the context of objections to juror questions).

42. See ARIZ. R. CIV. P. 40(e), (h).

43. See Shari S. Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 6 (2003) (“The Committee recommended that discussion be permitted in both civil and criminal trials, but the Supreme Court subsequently adopted it only for civil trials . . .”).

shaped by other jurors when you read the question—and there’s always that dynamic in the jury room where you have dominant members and you have more passive people—and I think the jury dynamic might be affected because, instead of people listening to all of the evidence, they’re being influenced as it goes along by their fellow jurors.

JUDGE VIOLA: Well, I can just say that I’ve presided over both criminal and civil trials. So, in criminal trials in state court, they’re not deliberating during a trial.⁴⁴ In civil, they are.⁴⁵ And I talk to the jurors afterward not about their deliberations but just about their perspective of the process and so forth, and I haven’t—again, I’m not in the room—but I haven’t seen a difference created by juror questions during the trial. I haven’t seen an appreciable difference between the type of questions that we get or the interaction of the jurors. So, from my perspective, I don’t think there is an impact or at least one that makes it such that we should change the process. That’s just my personal experience.

PROF. CAPRA: So let’s return to lawyers and objections and concerns about juror prejudice against the party objecting to the juror’s questions. Elizabeth?

MS. GONZALEZ: I don’t think that the risk of prejudice is an issue. I find that, ordinarily, I’m not in a battle with opposing counsel over a particular question. We’re usually in either pretty good agreement that the question can be asked, maybe with a modification, or we are in agreement that the question should not be asked.

Sometimes the question is a fair question, but it may be subject to a motion in limine that the judge has already ruled on, so I just don’t see where the juror necessarily draws a negative inference against a party. The arguments by the attorneys are made outside the presence of the jury—or in the courtroom with the white noise headphones. If you have multiple questions that you’re addressing with the bench, there is really little chance that the juror’s going to know which attorney precluded the question.

JUDGE SCHROEDER: Ms. Gonzalez, I think you said you do criminal defense work as well, is that right?

MS. GONZALEZ: Yes.

JUDGE SCHROEDER: So the question that Judge Bates asked about—concern that the questioning might prompt the prosecution in a way to prove something that otherwise it might not meet its burden of proof on in a case. From a criminal-defense-bar point of view, is that an issue that’s been raised in the defense bar, and are there any views on that, or do you have a view on that?

MS. GONZALEZ: My experience in criminal defense has been within the realm of jurors being able to ask questions. I have not personally experienced a situation, and I have not seen it amongst my colleagues, where we felt that

44. *See id.*

45. *See* ARIZ. R. CIV. P. 39(f) (1996) (current version at ARIZ. R. CIV. P. 40(h)(1)(B) (2023)).

the prosecution now was able to shift their strategy in how they're going to prosecute the case. I think there are safeguards within the rules that will not allow the prosecution to, for example, change their strategy and call a witness they may not have wanted to call before.⁴⁶ That witness still had to have been disclosed. I would still have an opportunity to interview and know what they were going to say. Whether they strategically decided prior to that question being asked to not ask it and then change, it would maybe be something you have to pivot and adjust to, but it wouldn't—I don't think—catch a defense attorney off guard if that witness has been disclosed before.

PROF. CAPRA: I guess the real issue is not that the defense attorney is going to be caught off guard, but that the government's not going to satisfy an element of the proof if they don't ask the question that has been posed by the juror. Isn't that, Judge Bates, your point? That it's not that the defendant is going to be hoodwinked—it's that you're positing a situation where the government has not established an element of the proof somehow, and this question will help them do so because they haven't thought of it. I was thinking, as an example, about a bank robbery trial and the government has to show that the bank is a federally funded institution. Maybe the government failed to bring in evidence on that rather obvious point, and a juror's question reminds them that they have to do so. Is that the idea?

JUDGE BATES: Yes. It's going to be the government in the criminal case, and then maybe it's an element that the prosecutor—an inexperienced prosecutor—has forgotten about, or they didn't talk about in examination. And the juror asking or trying to ask the question will move the prosecutor to be concerned that at least some juror has thought of that, and therefore they better address that—that it may be not even an element in the case, but it may just be something of importance to a juror that could give the defense a real opportunity in terms of their argument that the prosecution would then be able to say, "Ah, I better take care of that and the next agent that I'm calling to the stand—I'll get the agent to address that so that it won't be a problem later on." The concern is that the juror question can clue in one side and thus provide an advantage that the other side doesn't have.

PROF. CAPRA: Zack, as a public defender, hopefully you can address both the questions on the floor right now: the problem of prejudice in making objections and the possibility that the prosecution will be clued to a deficiency by a juror question.

MR. CAIN: The situation that you have described—a juror question allowing the prosecutor to cure a defect—is more theoretical than real. I agree with you that it's more likely to happen if you have an inexperienced attorney who has somehow dropped the ball and not accounted for a certain element, and the juror clues them in, "Hey, where's this element?" In our practice, it's unlikely to happen. I would say, in federal court—just because there's so much preparation and joint preparation involved in preparing all

46. See ARIZ. R. CRIM. P. 15.1.

the joint pretrial filings—I have not had that experience where a federal prosecutor has just totally dropped the ball and missed an element.

The issue with objections, in my experience, is similar to what you've heard already. You're typically not making objections in the presence of the jurors. You're in sidebar. Could the jurors hold it against a lawyer for objecting? I suppose that comes down to the body language that the attorney is using as he or she is making the argument in sidebar. I imagine that if an attorney is acting in a way that the juror takes offense to, that lawyer probably has done that throughout the trial anyway.

PROF. CAPRA: Good point.

MR. CAIN: The question about whether the juror can help one side cure a deficit in their case: I think, in the heat of trial, there are so many different pieces of information, so things happen during the trial where both sides are constantly assessing what they have proven and what they have not. One witness may testify, and they may do a great job of covering something that you were going to call this other witness to do, and you may make the judgment, "You know what, I don't need this other witness." Or you may call somebody who you thought was going to satisfy an element, and things did not go well, and so you're scrambling because you know you now have to recall other witnesses.

I guess I view that more as, that's just the way trials go, and that's the strategy and the battle that you're in. I don't think a juror question will ever make much of a difference in light of all that goes on at a trial.

PROF. CAPRA: Thank you. I'd like to pose a few more questions on how the process works. Let's assume that an objection to the juror's question has been sustained. Does the judge tell the juror why the question didn't get asked, or do you just rely on the general instruction not to draw negative inferences?

JUDGE VIOLA: I do not tell the juror why the question did not get asked. Though sometimes, you're not asking a question because the lawyers tell you the next witness is going to answer that question, so sometimes I will remind the jurors of the instruction that I gave them that they shouldn't read anything into the fact that a question wasn't asked.⁴⁷ And sometimes I'll point-blank tell them—they know a question was submitted because they saw it handed up—and so I'll say the question that was submitted will be addressed at a later time.

PROF. CAPRA: What if the juror's question is a leading question? I guess jurors can lead witnesses, right? Rule 611(c) doesn't apply. Judge Rayes?

JUDGE RAYES: When the form of the question is bad, I'll rephrase it, tell the lawyers: "Here's how I'm going to ask the question. Do you have an objection to the way I'm asking this question?" Then we'll resolve that, but I try to take the form issues out of the questions when I ask them.

PROF. CAPRA: Judge Hopkins?

47. See CIV. JURY INSTRUCTIONS COMM., *supra* note 12.

JUDGE HOPKINS: In my experience, most of the questions are leading. There's some that you don't ask that are really leading and argumentative. The one I recall—the plaintiff had just testified, and the question was, “How can you say that?” And it got worse from there, but when that happens, you don't tell the juror or the jury why you're not asking it. Sometimes I'll do the same thing that Judge Viola does, which is just say: “Ladies and gentlemen, when we don't ask a question, it's no reflection on any of you. I hold your questions to the same standards of the questions from the lawyers, and you should attach no significance to the failure to ask a question.”

PROF. CAPRA: And juror questions are made part of the record in Arizona?

JUDGE HOPKINS: Yes.

PROF. CAPRA: Judge Bolton, in federal court, if you don't ask the juror question, do you make any record of why you are not asking the question? Do you tell the juror why you're not asking the question?

JUDGE BOLTON: Well, of course, the record that the question is not going to be asked would have been with the lawyers objecting and the court sustaining the objection. But when it comes back to explaining why I don't ask the question, I don't say anything if the lawyers don't want me to. If the lawyers say, “Just don't even mention this again,” I don't.

But typically I would say, “A juror submitted a question” and “I'm sorry, but that question cannot be answered.”

PROF. CAPRA: And that's it? You don't explain?

JUDGE BOLTON: That's it. That's it.

JUDGE SULLIVAN: I don't think there's real data on this, but for those of you who have been doing this for a while, what percentage of the questions are ones that don't get put to the witness? And of the ones that do get put to a witness, what percentage, do you think, advance the trial? In other words, are these things that—well, the lawyers would have gotten to this? This is something another witness was going to bring out? In other words, a juror might feel good, and it might make them pay more attention, but it's not something that ultimately was going to go unanswered in the trial.

JUDGE VIOLA: This is a guesstimate because I've not looked at the numbers, but I would say at least 25 to 30 percent of the questions are not asked. Oftentimes, there are no objections, and the lawyers are glad that the question was asked. And to the question of whether juror questions advance the ball, I guess I'll answer it this way: from my perspective, it does because it answered that juror's question and helped that juror, so I think it does advance the ball.

In terms of whether it would have been addressed anyway, oftentimes it's already been addressed, and the juror didn't hear it, didn't understand it. Again, most often, we get those clarification questions, so, to me, I think the answer is yes, it does help to advance things because it probably shortens deliberation time because they've received this information instead of having back and forth about whether or not it was presented previously. So that would be my take on your question.

PROF. CAPRA: Judge Bolton?

JUDGE BOLTON: I don't keep my statistics, but just thinking back, I think there's a relatively small percentage of juror questions that are just flat-out not addressed—not answered—but I would say that the percentage of questions that are actually asked of a witness is maybe half of the questions because so often, the questions are the anticipatory question that my answer to the juror is: "I've provided that to the lawyers. They will cover it later." Sometimes it's a question that I answer. The lawyers tell me, "Yes, please you just answer it." So, in terms of actually asking it of the witness and having the additional examination or cross-examination, I would say maybe 50 percent.

PROF. CAPRA: Judge Rayes?

JUDGE RAYES: Estimating this, I think it's about two-thirds of them get asked, and a third don't. Very few get asked over objection, though. Most of the time, the parties stipulate or agree to the question or agree to how it's rephrased. The lawyers typically want to hear the answer too.

PROF. CAPRA: Does it happen that a lawyer says, "I'd like to ask that question?" Can a lawyer ask the question? In Arizona, can you give it to the lawyer to ask the witness, or is it always going to be from the judge?

JUDGE BOLTON: Where the question is one that will be taken up later, I tell the juror, "I have provided your question to the lawyers, and it will be addressed later." So that would be a question that one of the lawyers would pose, but perhaps not in exactly the same way as the juror question. The lawyer might cover the subject matter of the question and not necessarily pose it in the exact same way that the juror did, but they know that that juror is wondering about that particular issue.

JUDGE CONRAD: Is there a difference, when you have out-of-state lawyers, who aren't used to jury questions, versus the Arizona lawyers, who have grown up with them? Is there a difference in how often they object or how they treat the process of juror questions? Because, if I were to start implementing juror questions, it would be a bunch of attorneys who have never seen it before unless they were there from Arizona.

JUDGE RAYES: I haven't noticed any difference to be honest with you. They pick it up pretty quick.

PROF. CAPRA: Judge Hopkins?

JUDGE HOPKINS: Yeah, I was just going to address the question about how many juror questions actually get asked to a witness. In my experience, probably 20 percent of the questions don't get asked, and it is usually that both parties agree that it's objectionable for some reason. It's a very rare circumstance in my experience that one party would object and not the other. It's usually they both would say, either, "That's a terrible question, we're not going to ask that," or on the other hand, "There is no objection from either side."

JUDGE SULLIVAN: You've said that jurors find this very positive and like the opportunity to ask questions. Is there any experience where a juror

was frustrated and sort of checked out because their question or questions were not asked of a witness?

JUDGE RAYES: Not that I know about. I mean, it's hard to tell, but the people who don't have their questions asked seem to be every bit as engaged in the process, and they continue to ask questions, in my experience, so they don't seem to be rebuffed.

PROF. CAPRA: That would actually be a data point, Judge, you know? The one who got rejected, do they keep asking questions? Right?

JUDGE RAYES: Well, they'll keep asking questions, but they won't ask the same question. And the other thing that's kind of interesting to me, the lawyers use the jury questions in their closing, and very often they'll say one of you asked a question and, gosh, that was a great question, and I thought, "I'm going to talk about that in closing."

PROF. CAPRA: I have a question about how the process of juror questioning might be related to other procedures. I spoke with Elizabeth Gonzalez before the meeting and talked about the fact that Arizona no longer allows peremptory challenges of jurors.⁴⁸ How might juror questions interact with the fact that lawyers can now strike jurors only for cause? Elizabeth, do you want to talk about that for a second?

MS. GONZALEZ: Right. In our conversation, you know, you brought up the new rule change here that gets rid of the ability to strike jurors peremptorily, so you have only your for-cause challenges. I think that change makes it more important for jurors to be allowed to ask questions. It becomes a way to track jurors on whom you might have exercised a peremptory challenge. We are limited a bit now in the number of questions we'd be able to ask on voir dire, and we won't be able to strike those jurors that we don't have that for-cause reason for but just believe maybe they wouldn't be the best fit for our panel.⁴⁹

So I think, as a trial attorney, I'm looking for every bit of insight I could get, and I've lost it, for lack of a better word, in the voir dire process. So now I'm able to get kind of that insight from any questions a juror might ask at the trial. I think it's more important, and there's far more benefit and advantages for being able to promote fact-finding for the jurors and understanding of the jurors' mindset from the attorneys' perspective to present a better message.

PROF. CAPRA: Another relationship question is between juror questioning and jury deliberations. There's a lot that I don't think can be known about the effect of questioning on jury deliberations. One theory is that there will be fewer hung juries because jurors will have better

48. *See* Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. Aug. 30, 2021), <https://findfx.thomsonreuters.com/gfx/legaldocs/egvbkkwkrpq/R-21-0020%20Final%20Rules%20Order.pdf> [<https://perma.cc/8KP8-ST8G>].

49. *See id.*

information when they're allowed to ask questions.⁵⁰ I don't know if that can ever be shown, but that seems to make sense.

JUDGE KUHL: So, while we're talking about the context in which jury questions are used, I thought we might ask Judge Hopkins or the others from Arizona about the context for adopting this reform of asking jury questions. My recollection is that it was part of an envelope of reforms that included plain-language jury instructions,⁵¹ preopening or pre-voir dire opening statements,⁵² and giving jurors the jury instructions so each juror had jury instructions.⁵³ I'm a California state judge. When I came to California, the idea of reform was to think about jurors in a different way—not just mannequins who sit in the jury box, and at the end of the trial, you get some slip of paper as though it's coming out of a slot machine, but rather caring about giving jurors the tools necessary for intellectually analyzing the case.⁵⁴

PROF. CAPRA: Any comment from the panel about juror questions as part of a whole package?

JUDGE HOPKINS: That is a very insightful comment because I'm looking at the first study that was done in Arizona in 1994, and it was 132 pages long, and it talked about having a jurors' bill of rights and trying to make the jury instructions better and allowing jurors to take notes, et cetera,⁵⁵ and the part dealing with juror questions specifically is two pages.⁵⁶ I mean, it's pages ninety-one and ninety-two, so part of a much larger effort.⁵⁷

PROF. CAPRA: Same with the Ninth Circuit report. It's a very small part in a large body of reforms.⁵⁸ Interesting. I have one final question, and this is about the Advisory Committee's proposal: one of the instructions that's supposed to be given or proposed to be given is to remind the jurors that they

50. Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 734 (2010) ("It may even be that juror questions will lead to fewer hung juries, though there have been no empirical studies that have addressed this question.")

51. See THE ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, *supra* note 38, at 99; Rosalind R. Greene & Jan Mills Spaeth, *Say What You Mean: Drafting Comprehensible Jury Instructions*, ARIZ. ATT'Y, Feb. 2011, at 34, 35 (noting amendment of Arizona jury instructions following the 1993 efforts of the Arizona Supreme Court Committee on More Effective Use of Juries).

52. See THE ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, *supra* note 38, at 59; ARIZ. R. CIV. P. 47(b)(2) (1996) (current version at ARIZ. R. CIV. P. 47(c)(4) (2023)); ARIZ. R. CRIM. P. 18.5(c)(1996) (current version at ARIZ. R. CRIM. P. 18.5(e) (2023)).

53. See THE ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, *supra* note 38, at 107; ARIZ. R. CIV. P. 51(b)(3) (1996) (current version at ARIZ. R. CIV. P. 51(b)(1) (2023)); ARIZ. R. CRIM. P. 22.2(b) (1996) (current version at ARIZ. R. CRIM. P. 22.2(a)(2) (2023)).

54. See, e.g., J. CLARK KELSO, FINAL REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT (1996), <https://www.courts.ca.gov/documents/BlueRibbonFullReport.pdf> [<https://perma.cc/FR8Y-5E6U>].

55. See THE ARIZ. SUP. CT. COMM. ON MORE EFFECTIVE USE OF JURIES, *supra* note 38, at 9, 90–92.

56. See *id.* at 90–92 (considering juror questions).

57. See *id.*

58. See NINTH CIR. JURY TRIAL IMPROVEMENT COMM., SECOND REPORT: RECOMMENDATIONS AND SUGGESTED BEST PRACTICES 11 (2006), <https://cdn.ca9.uscourts.gov/datastore/uploads/jtic/FINALSecondReport.pdf> [<https://perma.cc/CT28-PM79>].

are neutral fact-finders, not advocates.⁵⁹ There's been some pushback by various commenters about that proposed instruction. Is that an effective instruction to give? Will jurors know what that even means?⁶⁰ I think we talked about this in advance of the meeting, Judge Viola.

JUDGE VIOLA: I think we did have a discussion about it. I think the statement is accurate. I think, though, that sometimes we use words that jurors understand differently or don't understand in a legal context.

In our preliminary instructions, we certainly talk about the duty of jurors and that they're "fact-finders," so we use that word.⁶¹ I think, in this context, it may not have as much meaning as we think it does sitting here and reading it. We understand what it means. I don't know that it conveys or that it would convey what we're trying to convey to the jurors.

PROF. CAPRA: Yes, maybe the alternative is to tell the jury that questions are not supposed to be argumentative but rather designed to help you as a finder of fact instead of talking about not turning into an advocate, which is a bit of a grand statement.

JUDGE VIOLA: I don't know that when they write those questions, they sometimes understand that that's an argumentative question, and I'm not suggesting that the jurors are not smart or that they don't understand what's going on, but I think sometimes, again, in the world of the courtroom, we use words all the time that jurors are confused by. We get questions about what does foundation mean. So, I'm just not sure how meaningful the instruction is.

PROF. CAPRA: Thanks. Judge Bolton?

JUDGE BOLTON: When I read that proposed instruction, I thought this is clearly something written by lawyers and not something written for jurors. I don't know that including this or not including this would make one wit of difference. I don't think telling them, "Your questions shouldn't be argumentative," would change anything about the questions they would ask. So, I read this and thought, "Oh, you can say this, but—"

PROF. CAPRA: It's not going to affect anything.

JUDGE BOLTON: Right.

PROF. CAPRA: Yes, Bill?

MR. KLAIN: Thank you, Dan. I agree with Judge Bolton. I also want to go back to what one of the Committee members asked about the alpha juror, the dominant juror, and the effect of them asking a question on the

59. ADVISORY COMMITTEE, OCTOBER 2022 AGENDA BOOK, *supra* note 1, at 21 (providing proposed Rule 611(e)(1)(F): "[T]he jurors are neutral factfinders, not advocates").

60. *See, e.g.*, COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 23 ("However, Rule 611(e)(1)(F)'s requirement of an instruction that 'jurors are neutral factfinders, not advocates,' gave [a judge] pause. Jurors may be confused as to how to incorporate that instruction into what they may or may not ask.").

61. *See* CIV. JURY INSTRUCTIONS COMM., REVISED ARIZONA PATTERN JURY INSTRUCTIONS (CIVIL) Preliminary Instructions 2 (7th ed. 2020), Westlaw (database updated Dec. 2020) (describing the jury's "fact-finding abilities"); CRIM. JURY INSTRUCTIONS COMM., REVISED ARIZONA PATTERN JURY INSTRUCTIONS (CRIMINAL) Preliminary Instructions 1-2 (4th ed. 2016), Westlaw (database updated Dec. 2016) (same).

deliberations. That's going to happen regardless of juror questions. During trial, they're going to be more charismatic and they're going to be a dominant presence, and the questions they ask during trial are just a function of how they will be operating in the jury room. They're advocating for what they believe is the right result.

So, if we presume that this rule could be misused, the use of jury questions could give an alpha juror a direct channel to get a piece of evidence that they want to get. Let's assume that that's what a juror's doing through the juror question. If they don't ask the question, they're going to be doing the same thing with every other piece of evidence that is presented anyway.

In any case, I think the concern is unfounded because, as we saw on the panel today, juror questioning is by and large for purposes of clarification. There's something that they were confused about that they didn't quite catch that may or may not be significant, and they don't really know yet because they don't have all the pieces. Why not allow them to ask that question?

In terms of the instruction about advocacy, they're already told that they are going to be determining the facts, so they're aware of that.⁶² I'm ambivalent as to its inclusion in this rule.

PROF. CAPRA: I have two more quick questions about the proposed rule. Somebody, I think it was Zack, made a suggestion that maybe the rule should set forth the procedures under which the questions were asked, such as, for example, specifying that questions are to be submitted after each witness testifies. But I sense from the panel that the procedures are not uniform, and I am not sure that there is a reason to try and universalize the practice. Zack, that was your thought. I wanted your comment.

MR. CAIN: Well, my initial thought was probably a product of having practiced in Arizona, where the court normally does wait until the end of the examination to ask the questions, but I think it does make sense to leave it to the court's discretion. This probably happens more in the civil context than the criminal, but you may have one witness who's testifying for two or three days covering a wide variety of subject matter, and so, if you were going to make the jurors wait until the end of day three to ask a question, that wouldn't make a lot of sense. So I think it probably does make more sense to just leave it at the discretion of the court.

PROF. CAPRA: I have one final question for the panel. Is it clear enough to you as readers that the proposed rule takes no position on the meta question? In other words, it doesn't say one way or another whether juror questions should be allowed. It just says that if it's allowed, here are the safeguards that must be employed. Is it clear to you that that's so?

JUDGE SCHROEDER: The first words of the rule are "If the court allows."⁶³

62. See CIV. JURY INSTRUCTIONS COMM., *supra* note 61; CRIM. JURY INSTRUCTIONS COMM., *supra* note 61.

63. See ADVISORY COMMITTEE, OCTOBER 2022 AGENDA BOOK, *supra* note 1, at 21 (providing proposed Rule 611(e)(1): "If the court allows jurors to submit questions for witnesses during trial, then the court must instruct the jury that . . .").

PROF. CAPRA: Yeah.

JUDGE SCHROEDER: I thought it was clear.

PROF. CAPRA: Well apparently it was not clear to the Standing Committee.⁶⁴

JUDGE BATES: Does the presence of this rule as a rule suggest to you that it is an endorsement of the process?

PROF. CAPRA: I guess that's a better way to ask it than I did. The question is whether even mentioning the possibility of juror questions of witnesses could be seen as an endorsement of the process.

JUDGE BOLTON: I think the answer to that is yes. When you put a rule in the Rules of Evidence that gives a very comprehensive instruction on what to tell the jury if questions are asked, it would suggest to me that asking questions is probably a good idea. I happen to think that is the way it should be, but to a judge who has never done it before, I would think, "Why would you have this comprehensive rule if, in reality, the answer was no to juror questions?" Obviously, it can be interpreted—because it begins with "if"—that it's not endorsing it.

PROF. CAPRA: I guess the response to the argument of, "Why would you write about it if you didn't think it was a good idea?" is that there are errors that are occurring in the federal courts that allow jury questions, but with insufficient safeguards—like the Fifth Circuit case I talked about where objections were prohibited.⁶⁵ And so it makes sense to set forth safeguards for courts that are already doing it without taking a position on the practice itself. But I certainly get your point, Judge Bolton.

JUDGE BATES: I wanted to ask Judge Bolton if she had any insight she could share with us while on a committee that she chaired for the Ninth Circuit, which recommended allowing questions for the jury in civil cases but did not recommend allowing it in criminal cases.⁶⁶

JUDGE BOLTON: Well, Judge Bates, I would say that the question that you posed earlier—I heard those concerns on the Committee. I was in the minority on that issue, but the Committee as a whole felt that it was a step too far to allow juror questions in criminal cases, and the concerns they raised were exactly the concerns that you posed in your previous question.

PROF. CAPRA: Our time is up. Thank you so much to all the panelists. We're very grateful.

JUDGE SCHILTZ: Thank you to all of you for coming down. We have another round coming up. We'll take a fifteen-minute break.

64. *Cf.* COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 22–24 (describing a Committee member concern that "[j]udges who do not allow the practice [of allowing juror questions] may feel compelled to permit it" and another member's concern regarding "the Standing Committee . . . in essence putting its imprimatur on this practice").

65. *United States v. Kieffer*, 991 F.3d 630, 636 (5th Cir. 2021); *see supra* text accompanying notes 27–28.

66. *See* NINTH CIR. JURY TRIAL IMPROVEMENT COMM., *supra* note 58, at 11.

II. DISCUSSION ON ILLUSTRATIVE AIDS

JUDGE SCHILTZ: Our second panel today is a panel on illustrative aids. Illustrative aids are used in virtually every trial. I've never been involved in a trial in almost forty years in the law—as a lawyer and as a judge—that did not have illustrative aids, and, if anything, I think their importance is growing because of technology. When we were at the Standing Committee Meeting in June, one of the members said trials these days are PowerPoint shows, which is true.⁶⁷ Oftentimes, we all just sit there and watch screens for the trial, so they're important.

Despite the importance of illustrative aids, they are not directly addressed by any Federal Rule of Evidence or any other rule of practice and procedure, and, as a result, trial judges take wildly different approaches to illustrative aids. Even within my district, our federal judges in Minnesota take wildly different approaches to things like defining what is an illustrative aid and what is not—that is, what's evidence and what's not evidence—and to such procedural questions as: “Who has to give what notice to whom before an illustrative aid is used? Do illustrative aids go into the jury room? Do they go in if the jury asks to see them? Do you make them part of the record?” Even among the judges in Minnesota, we have very, very different practices.

At the spring meeting of this Committee, the Committee approved for publication a proposed amendment.⁶⁸ It would add a new subdivision (d) to Federal Rule of Evidence 611 to address illustrative aids. That proposed amendment was discussed at the Standing Committee in June.⁶⁹ It had a lot of interest. It generated a lot of discussion.⁷⁰

67. See COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 20–21.

68. ADVISORY COMM., MAY MINUTES, *supra* note 1, at 11.

69. See COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 19–22.

70. The proposed amendment and Committee Note is as follows:

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

.....

(d) *Illustrative Aids.*

- (1) *Permitted Uses.* The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence if:
 - (A) its utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time; and
 - (B) all parties are given notice and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise.
- (2) *Use in Jury Deliberations.* 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.
- (3) *Record.* When practicable, an illustrative aid that is used at trial must be entered into the record.

Committee Note

The amendment establishes a new subdivision within Rule 611 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term “illustrative aid” is used instead of the term “demonstrative evidence,” as that latter term is vague and has been subject to differing interpretation in the courts. “Demonstrative evidence” is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the factfinder thus fall into two separate categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room, to study it, and to use it to help determine the disputed facts.

The second category—the category covered by this rule—is information that is offered for the narrow purpose of helping the factfinder to understand what is being communicated to them by the witness or party presenting evidence. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as “illustrative aids,” have also been described as “pedagogical devices” and sometimes (and less helpfully) “demonstrative presentations”—that latter term being unhelpful because the purpose for presenting the information is not to “demonstrate” how an event occurred but rather to help the finder of fact understand evidence that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous, admissible information offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 611(d).

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be prepared to distort the evidence presented, to oversimplify, or to stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence. *Cf.* Fed. R. Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403—one particular problem being that the illustrative aid might appear to be substantive demonstrative evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the trier of fact, the trial court should exercise its discretion to prohibit—or modify—the use of the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. *See* Fed. R. Evid. 105.

One of the primary means of safeguarding and regulating the use of illustrative aids is to require advance disclosure. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. The amendment therefore provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection—unless the court, for good cause, orders otherwise. The rule applies to aids prepared either before trial or during trial before actual use in the courtroom. But the timing of notice will be dependent on the nature of the illustrative aid. Notice as to an illustrative aid that has been prepared well in advance of trial will differ from the notice required with respect to a handwritten chart prepared in response to a development at trial. The trial court has discretion to determine when and how notice is provided.

Because an illustrative aid is not offered to prove a fact in dispute, and is used only in accompaniment with testimony or presentation by the proponent, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint

The Standing Committee did unanimously approve the proposed rule for publication, but everybody in the room agreed that there were some really difficult questions that needed to be answered, and we were hopeful that the comment period will give us some help with that as well as this panel, of course.⁷¹ The two problems that generated the most discussion at the Standing Committee Meeting were probably defining what an illustrative aid is—and there were differences even among the people in the room—and the notice issue, where I think, broadly speaking, judges were all for notice and attorneys were all against notice.⁷²

So we have a very distinguished panel here to help us think through these issues, and, Dan, I'll turn it over to you.

PROF. CAPRA: Thank you. This rule is derived from another rule, the only rule on demonstrative evidence that I know about in the United States, that's the Maine Rule of Evidence 616, and the principal draftsman is here at the table today—the Thomas Jefferson of 611(d), Professor Peter Murray.⁷³ So I thought, since he did so much work in getting this all together and thinking about the issue, I would give him a few minutes to say where it came from, and what the rule is designed to do.

PROF. MURRAY: I thank you for including me in this panel. This is a subject which has been of great interest to me for a long time, and there are two points I'll address. One is why we did it in Maine, and the second is how it has worked out. We introduced Rule 616 in 1993, and it was largely to address some of the issues raised by Judge Schiltz—that there was a lot of confusion about what you do with kinds of information, communicating devices, such as PowerPoint slides, such as blowups, such as overlays. That was the stage of technology at the time.

It's come, of course, much further since. When I started trying cases back in the late '60s, why, it was mainly the blackboard, but we've seen how that's gone from there. In fact, we in New England call illustrative aids “chalks”

of accompaniment with witness testimony or party presentation, runs the risk that the jury may misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations; that discretion is most likely to be exercised in complex cases, or in cases where the jury has requested to see the illustrative aid. If the court does exercise its discretion to allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 1010–14 (footnote omitted).

71. *See* COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 19–22.

72. *See id.*

73. *See Peter Murray*, MURRAY, PLUMB & MURRAY, <https://www.mpmlaw.com/attorney/peter-l-murray/> [<https://perma.cc/44RZ-WWMZ>] (last visited Apr. 3, 2023) (“Starting in 1973 Peter became co-consultant (with Prof. Richard H. Field) to the newly formed Maine Advisory Committee on Rules of Evidence.”).

because of that history that there originally was a blackboard, and we defined illustrative aids—we don't have a category of demonstrative evidence or demonstratives,⁷⁴ although lawyers would stray into Maine using that terminology from other places—it's either "evidence" or it's an "illustrative aid," and we take the boundary as being, if you draw the inference, a factual inference, directly from the thing, directly from the document, such as from a business record, or directly from the object, then it's evidence, and it has to satisfy the Rules of Evidence and be admitted.⁷⁵

If, on the other hand, the thing is something which is used to convey a message that passes through a witness—either an expert witness or a lay witness, such as a drawing on a blackboard or a preprepared diagram—then it's an illustrative aid.⁷⁶ We don't want it to rise any higher in terms of probative value than the testimony of the witness, even though it may be a more effective way to communicate that testimony than would be the case of just the witness speaking it out. So that's the boundary that we've drawn, and there was a lot of confusion about illustrative aids and how to handle them, and so we put together Rule 616, which covers the same ground as the proposed Federal Rule 611(d), to address it.

We saw a concern with prejudicial inferences where people would disobey the boundary that I just talked about and would draw inferences directly from the illustrative aid, such as the scale of the street in a simple case or, in the case of computer simulations. Of course, that was particularly dangerous when you'd have a fancy computer simulation showing how cars crash; people would forget that this is merely the theory of the expert witness as to how they crashed, and it was not entitled to probative force of its own. And so, we were concerned about that.

We also were concerned about the use of the opponents' aids because, as these aids became more sophisticated, then, on cross-examination, you'd want to muck up the opponents' aids or you'd want to crisscross on it, or you want to take it apart, or you'd want to show—indeed, in the case of computer simulation—how you could, by varying some little input, make it quite different, and do you have to allow your opponent to be able to do that.

And also, of course, notice and surprise was a big issue—coming to court with an elaborate panoply of stuff that you're putting up, and the other side's wondering, "What the heck's going on here?" That became a big issue—and the potential also for distortion in the illustrative aids and prejudice that was deliberately caused by artful illustrative aids that went beyond the testimony in subtle ways that you couldn't even figure out very quickly. So you needed the notice. You needed your own experts to look at them and so forth.

74. Eric Green, Charles Nesson & Peter Murray, *Diagrams*, HARV. WIKI, <https://wiki.harvard.edu/confluence/display/GNME/Diagrams> [<https://perma.cc/AMQ8-TGH8>] (last visited Apr. 3, 2023) ("In the New England states such diagrams are often referred to as 'chalks' deriving from their historical development out of the in-court chalkboard. In other states this kind of media is considered as 'demonstrative evidence' and is admitted as a special category of evidence . . .").

75. ME. R. EVID. 616 advisers' note to former Me. R. Evid. 616—February 2, 1976.

76. *See id.*

And finally, the status of illustrative aids in the record was a matter of concern. For example, one party draws an illustration on a whiteboard. Then, does the party take a picture of that whiteboard and put it in the record? That was also an issue. So we did Rule 616, which, as I say, basically covers in different language the subject matter of the proposal that's before the Committee.

How has it worked out? Well, it's worked out pretty well. Interestingly, there have been only a handful of cases in which Rule 616 has been adverted to.⁷⁷ I think the main thing is, it's given the parties and the judges a framework to deal with illustrative aids, as opposed to demonstrative evidence, and I think that's what this rule would do here—that people will say, “Oh, yeah, this is what we have to do,” and they follow the rule.

While the reported cases are few, there are two kinds of cases that have come up. One kind of case is a medical malpractice case where the plaintiff's lawyer has got a favorable finding of the screening panel, which, in Maine, a favorable finding of the screening panel in a malpractice case means that you can communicate that to the jury at the trial, and so they put it up, usually in bold letters in a big blow-up in front of the jury, as an effort to remind the jury over and over.⁷⁸

How do you communicate that it's not really evidence? It's a communication as to what another panel has done that the jury is permitted to take into account when they decide whether or not the doctor has been negligent, and so they're communicating it by a big illustrative aid, and how long can that stay up, and does it stay up the whole trial? The appellate court sustained the discretion of the superior court to limit the exposure to a reasonable extent.⁷⁹

The other type of case is a wrongful death action where the plaintiff places a picture of the decedent on a small easel or otherwise for part of the trial.⁸⁰ Now, strictly speaking, of course, that's not an illustrative aid because you draw inferences based upon what the person looked like directly from the picture, and we rely upon photographic evidence to provide actual evidentiary support for propositions.

Photographs are considered competent evidence. We rely upon the photographic process to capture information, not merely to recite what a witness is saying. It's a borderline case in other parts of the country, but they put this up as an illustrative aid because it's of marginal relevance to the case. Perhaps there is something you can learn about the decedent from looking at his picture.

77. See, e.g., *Jacob v. Kippax*, 10 A.3d 1159, 1165 (Me. 2011); *Irish v. Gimbel*, 691 A.2d 664, 671–72 (Me. 1997).

78. See, e.g., *Irish*, 691 A.2d at 671–72.

79. *Irish v. Gimbel*, 743 A.2d 736, 738 (Me. 2000) (“[T]he trial court correctly read *Irish I* and M.R. Evid. 616(a) and ruled that the blow-up could be used, but only while counsel was making direct reference to it.” (footnote omitted)).

80. See, e.g., *State v. Irving*, 818 A.2d 204, 209–10 (Me. 2003).

The court has then also said that these are covered by Rule 616 and that they are again limited-exposure-type propositions.⁸¹ They can be put up during the opening argument but should not be there overseeing the trial.⁸² So I'd say it's worked out well.

PROF. CAPRA: Thank you, Peter, that was great. Thank you. So I want to just very quickly go through the panelists to get, as we did with the previous panel, a meta view. The question is: Is the use of an illustrative aid a matter that will be usefully treated by a rule? Have the panelists had issues or arguments in negotiating the line between illustrative aids and demonstrative evidence? And so just talk briefly about that, and then we'll get to the particulars of problems like notice, and what the balancing test should be.

I'm going to start with Judge Teilborg. Welcome back to the rulemaking process, Judge Teilborg. Judge Teilborg was on the Standing Committee for six years, and he was the chair of the restyling committee, and we went through the restyling wars together and we're still alive to talk about it. So let's go, Judge Teilborg.

JUDGE TEILBORG: I'm glad I at least have the appearance of life.

Thank you. I had the pleasure and honor of being with Judge Schiltz on the Standing Committee and working especially closely with the Evidence Committee on the restyling project and, therefore, I know firsthand the quality of thought and credentials behind any proposed rule, and certainly one that's gotten to this point. I have to confess that in twenty-two years on the bench, I've never encountered any of these problems, which makes me think neither I nor counsel in my courtroom were paying attention somehow, and/or we were just allowing ourselves to bathe in confusion and not be aware of it, so I'm here to get educated and find out what it is I ought to know about this subject.

I will say that I'm very concerned about what might happen in opening statement or closing argument, which is outside the scope of this rule as written,⁸³ but it has an easy solution. I simply require the lawyers, if they're going to use anything other than their words or a PowerPoint that encompasses their words, to show it to the other side before opening statement or closing argument, and if they have an objection, I'll resolve it then. I don't want to have to resolve that thing by an interruption during the course of the trial, and I don't want a prejudicial video to suddenly pop up unexpectedly and maybe have a mistrial situation so, as I said, that doesn't require a rule, and I just require them to do that.

Now knowing that I'm not quite seeing the imperative for the rule, you'll appreciate that I'm looking at this also through the eyes of a judge and, in particular, focusing on this notice requirement. Because, the way I read it, if you're going to use one of these illustrative aids, which can run the

81. *See id.* at 211 (“By allowing the State a narrowly restricted use of [the decedent’s] photograph, the court did not abuse its discretion.”).

82. *See id.*

83. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 1010–14.

universe—anywhere from the devices that allow you to expand an exhibit so that it's more prominent to all the other software that's being used—a prudent lawyer has got to be thinking ahead: “How many of these instances am I going to use or encounter at trial?”

For example, maybe it's my custom to have the witness come down and draw something on the chart or come down and let me take him through something, and I can imagine a prudent lawyer is going to suddenly develop a long list of things that he or she's got to give notice of, failing which may be precluded. And that means potentially that many more fights I've got to preside over in addition to all the other fights, and I wonder how many new motions in limine are going to be generated by this—in a field where there are far too many motions in limine—and in the process become a greater imposition on the court's time and patience and on the lawyers' time—and maybe ginning up that much more in the way of billing. So that's my quick point of view.

PROF. CAPRA: Judge Lanza?

JUDGE LANZA: Thank you. I think my preliminary views largely echo the thoughts that Judge Teilborg just shared. Taking a look at this proposed rule, I think I'm very interested to hear what the other panelists say because I have an open mind, but my tentative sense is this is a solution in search of a problem that may lead to some unintended consequences and complications.

My experience—both trying cases before I became a judge and then as a judge—is that there are very, very few legitimate disputes over the display of illustrative aids, and to the extent there are disputes, judges are already able to use their common sense and the existing rules to reach fair outcomes that everybody agrees with.

And then, on the flip side, what're the potential problems with the rule? My concern is that it sweeps so broadly in terms of trying to govern the entire universe of illustrative aids that it necessarily has to address a lot of very different things. A PowerPoint is very different than trial management software, is very different than an accident reconstruction. And so, you know, to the drafters' credit, they've tried to craft standards that can accommodate the breadth of illustrative aids, but I think that the standards they've come up with are so . . . they give judges a lot of discretion. My concern is it's so much discretion it's essentially meaningless.

The rule, as I understand it, is that we may admit things after we do a balancing test. That seems to me a double dollop of very broad discretion that anybody could come out essentially any way, which is what we're already doing. So it's not clear to me that this is actually providing much clarity other than the notice provisions, which we can get into, and my concern with that is whenever you create a rule, you are creating potential for claims of error for not following the rule. And I don't say that as a district judge who doesn't like my friends on the appellate courts telling me I erred.

Anytime you're creating more potential for claims of error on appeal, you're creating uncertainty in cases, which is degrading the certainty of

outcomes, and so I think that's always a consideration we need to take into account whenever we're deciding whether to create rules. And I guess the final point is the problem of notice. Some of my most vivid memories as a trial lawyer were staying up all night after the evidence closed when I'm putting on closing the next morning, trying to put together my PowerPoint, and the idea that that would somehow be subject to a notice requirement doesn't make any sense.

Separately, I just finished a trial yesterday, and this was fresh in my head because I was preparing for this panel. We've got, you know, the standard software in our district courts here in Arizona, the touch screen when you put an exhibit up on the screen, the witness can touch it and circle it and make marks on the screen. That, I think, would literally be covered by this rule, and so I think the drafters, in trying to address such a broad concept—when you create a notice requirement that doesn't make any sense as applied to the great majority of illustrative aids that are actually used, trial management software, these types of presentation—that is problematic. I understand that the provision allows judges to waive notice for good cause.⁸⁴ But it just seems not quite right to create a rule that the notice requirement on its face would never apply to the great majority of evidence that is governed by the rule.

So I have some other thoughts as well, but those are my initial thoughts.

PROF. CAPRA: Sure. I think, Judge Duncan—former Judge Duncan—Sally? Yes, go ahead.

MS. DUNCAN: Just retired, so I don't take the "Judge" in front of my name anymore. I'm just Sally Duncan. I have really conflicted feelings, especially after hearing my former judge colleagues. I initially, when asked about this in a phone call, had said this is a rule that's exactly what you said, looking for a solution where there's no problem, but there are a couple features of the rule that I actually like and implemented where possible in my court when I was presiding.

The problem is this rule is overly broad and, I would argue, not only sets up trial judges for reversible error because you now have a rule, it's treating different subject matters of illustrative exhibits. There are the preplanned illustrative exhibits that my colleague in Maine talked about where you're talking about accident reconstruction videos, med mal cases that are really sophisticated, powerful illustrative exhibits that can dominate the perspective a juror may have of the evidence. Those are preplanned, prepared, and should be disclosed to the opposing side well in advance of trial. A lot of thought went into the expert's videos and everything else and reconstruction, and there should be an opportunity for the court to have access to whatever the objections are ahead of time and resolve those. So, when we're talking about that type of illustrative exhibit, absolutely, and I always imposed that rule in my own courtroom.

84. *See id.* at 1010 (providing proposed Rule 611(d)(1)(B): “[A]ll parties are given advance notice and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise”).

What Judge Lanza just talked about is the organically created illustrative exhibit with witnesses during trial. This is way too cumbersome and clumsy a rule to deal with the organic nature of trial, so I feel like that's going to create all kinds of problems and actually create error because judges, when we're given rules, we're kind of rule followers. We're going to try to maybe adhere too closely to the rules, and if there wasn't notice, judges may feel overly prescribed and constrained by the rule, so I think there are different types of illustrative exhibits. So notice of basically the expert ones, I think, is really good, and I did impose that rule.

The other feature of this that I always did where practicable, and the rule does say this, where "practicable," is an illustrative exhibit—I on my own motion admitted it for appellate review because, if it became an illustrative exhibit that sort of dominated testimony or something, and it was just illustrative, I thought the appellate court needed to see it, have access to it, and understand it.⁸⁵ Lots of judges don't make it part of the appellate record. I think it needs to be part of the appellate record; this rule does that.⁸⁶

I somewhat concur here that this could create some problems rather than fixing a problem, and it has to be, I think, more narrowly tailored to the type of illustrative exhibits that have become much more common in our courtrooms: the electronic and video recreations and those types of things. That's my two cents' worth.

PROF. CAPRA: If one were to create a Venn diagram of all illustrative aids that we would broadly say is the definition of "not offered as evidence but to help explain things," your point is that there's too much in the Venn diagram?

MS. DUNCAN: Right.

PROF. CAPRA: Okay.

MS. DUNCAN: I see what the preplanned ones that lawyers have worked really hard on, but the ones where you've got the flip chart and you're just creating it in the courtroom, or a witness steps into the well of the courtroom and circles something, that cannot be covered by a notice requirement.

PROF. CAPRA: Got it, but let's say you narrow the Venn diagram, and so there's space outside that nonetheless includes illustrative aids? Are they without a rule? If this rule doesn't cover an illustrative aid, then what does? Rule 403 does not because it's not evidence.⁸⁷

MS. DUNCAN: But it does. It actually does because an illustrative exhibit, if it's being used, could potentially be overly prejudicial. Let's use for an example the victim or the decedent in the case that was described.⁸⁸ That plays to the passions of the jurors as it's plainly for a jury.

PROF. CAPRA: I understand that it might be prejudicial, but Rule 403 applies to "evidence," and this is not evidence. I would argue Rule 611(a)

85. *See id.* at 1011 (providing proposed Rule 611(d)(3): "When practicable, an illustrative aid that is used at trial must be entered into the record").

86. *See id.*

87. FED. R. EVID. 403 ("The court may exclude relevant evidence . . .").

88. *State v. Irving*, 818 A.2d 204, 209–10 (Me. 2003).

applies to it.⁸⁹ At any rate, I think we can all agree that some rule already requires a court to exclude problematic illustrative aids. So, what's the advantage of having two rules cover all of the illustrative aids as opposed to one specified rule covering them all?

MS. DUNCAN: Because I agree with my learned colleagues here. I think the way this is written sets up trial judges, who are worried about reversible error. There's peril that you're going to create error because a judge is too rigidly following this. Absent notice, perhaps a judge may think, "I'm scared to let them use it."

PROF. CAPRA: The concern about the notice requirement is well taken, but—I agree—but in terms of allowing an illustrative aid to be used at all, there's room for error no matter what rule covers it, right?

MS. DUNCAN: Of course, yes.

PROF. CAPRA: So, I guess I just wanted to focus my thoughts on what you've been talking about. I think the concern about the rule comes down to the notice requirement.

MS. DUNCAN: I agree. I agree.

PROF. CAPRA: Michael Perez-Lizano?

MR. PEREZ-LIZANO: I'm a federal prosecutor down in Tucson, so I come at this from the perspective of a practitioner, somebody who does often use these types of illustrative aids in my practice—although just for personal reasons, I tend to shy away from the high technology versions of this because I had a bad experience one time. I hate to give the lawyer's answer, but it depends on how far this rule is intended to reach.

I know from reading the materials that it's not intended to cover illustrative aids used in opening and closing statements,⁹⁰ although I feel like that could be clarified in a Committee Note because, to be frank, when I reviewed the materials and reviewed the rule, I saw language in there talking about "writings," "objects," and "other presentations" that are used during the trial.⁹¹ That made me think, well, obviously, opening and closing are part of a trial, so this rule must apply to those scenarios, and then I was surprised to learn that it was not intended to cover those scenarios.

And I do think that's a good thing because one of the dangers I think that exists in allowing this rule—this proposed rule—to cover certainly closing arguments, perhaps less so opening statements, but the intrusion upon the parties' work product, essentially: strategizing, thinking about the case, preparing ways in which to present the arguments and draw inferences from the arguments—I think it would be very easy if the rule were to extend to, let's say, a PowerPoint that's used during a closing argument for an opponent

89. See FED. R. EVID. 611(a) (granting the court discretion to exercise reasonable control over the mode and order of examining witnesses and presenting evidence).

90. See ADVISORY COMMITTEE, OCTOBER 2022 AGENDA BOOK, *supra* note 1, at 154.

91. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 1011 (providing proposed Rule 611(d) Committee Note referring to "[w]ritings, objects, charts, or other presentations").

to say, “Well, the inferences that you’re drawing in this PowerPoint are misleading or they’re unfairly prejudicial.”

But, of course, that’s the prerogative of the attorney making reasonable inferences from the evidence that was already introduced into court, so I worry about that if the rule were to extend that far to cover that scenario. Also, to Judge Lanza’s point about the practicalities of it, I can tell you from my own personal experience, oftentimes, I’m preparing my closing argument the night before, and if I am going to use a PowerPoint, I’m preparing that the night before. I may have sketched out something a little bit in advance, but sometimes it’s over the lunch hour to be quite honest. How much notice can I give as an officer of the court if I were to be asked, “When did you prepare this?” Well, did I prepare it over the lunch hour? Is it considered to have been prepared when I first sketched it out, maybe three weeks ago? So, I think it raises a lot of questions if you start to try to apply this rule into the area of opening and closing arguments, but as applied to actual trial practice and the examination of witnesses, I do see some utility in it in providing a framework.

And I do appreciate the effort of the rule to essentially divide the world into two camps, which are evidence and not evidence,⁹² and I think that is helpful. But I also think it comes along with a necessary corollary during trial. Basically, as a practitioner, you have to be able to articulate to the court on what basis are you seeking to proffer this illustrative aid. Is it evidence or is it not evidence? Are you just seeking to use it as an illustrative aid to educate the jury on a concept? I think that’s a good thing to have to clarify why it is that you’re trying to get this information or this diagram or chart or PowerPoint or whatever it happens to be in front of the jury. I think that’s a good thing, so I think there is utility to the rule.

PROF. CAPRA: Thank you. Milagros Cisneros?

MS. CISNEROS: Thank you. I’m not crazy about this rule either, and it has to do with a lot of the reasons that folks have given here before I’m speaking now. I struggled with it quite a bit, thinking initially, “Well, maybe it’s a good thing,” but as a criminal defense practitioner, as somebody who represents indigent criminal defendants day in and day out, I would say that this rule would probably tend to favor the government. We don’t have to present any evidence at all, right? So, any chart that might come in, any illustrative aid that might come in, could end up tipping the scales in favor of the government as a general matter.

PROF. CAPRA: But this rule imposes regulations, so one would think you’d be in favor of it. It will provide a regulation over presentations that aren’t specifically regulated now.

MS. CISNEROS: Okay. Then, I think it’s too broad. I don’t like the notice. I mean, I’ve had instances where I have my client on the stand. I’m evaluating how he’s coming across to the jury, and then I decide at that moment, “Okay, I’m going to do a demonstration with him,” which, actually

92. *See id.* at 1011–12.

this happened in one of my cases. It was a—and don't ask how this was in federal court, but it was—it was an animal cruelty case, and it was—well, in any event—it was an interesting case, but the issue had to do with a trap, right?⁹³

So I had the trap, and I wasn't sure if I was going to use it, and then boom, you know, I was like, "Okay, I'm going to have him set off the trap on his hand so the jury can see whether it hurt him or not," and I did, and it did not, but, I mean, I had already—I was on the fence whether I was going to use it or not, right? And I only determined that I was going to use it at the moment that I realized that he had some credibility before the jury. I didn't want to kind of go over the top.

PROF. CAPRA: I think that example is not covered by this rule. I think that's demonstrative evidence, governed by Rule 403 and subject to whatever notice requirements exist with the presentation of evidence. What do you think, Peter?

PROF. MURRAY: Well, I think that using the trap on a human being if you're trying to suggest how an animal felt is an experiment, which may be a little shaky, but it would follow in the experiment, and you'd have to—just like any other experiment in court—you'd have to make the preliminary findings—a foundational finding that the conditions of the experiment were sufficient that reasonable inferences could be drawn therefrom about the reality.

PROF. CAPRA: So, it is evidence?

PROF. MURRAY: Yes, because it is an attempt to demonstrate what happened.

PROF. CAPRA: I'm sorry. Go ahead.

MS. CISNEROS: Well, it worked.

PROF. CAPRA: As it should have.

MS. CISNEROS: It worked, but in any event, sort of as a general matter, the notice is a concern, obviously, and also, as Sally has indicated also, appellate attorneys are always trying to emphasize with us the importance of the record where practicable. How do we make a record of a line that was drawn on a screen, as Judge Lanza was indicating? I have real concerns about that.

PROF. CAPRA: I would say, take a picture. That's what the Federal Judicial Center says.⁹⁴ James Melendres?

MR. MELENDRES: My view is going to be different from what's been expressed so far, and my perspective is that of a practitioner, formerly an

93. See *Arizona v. Files*, 36 F. Supp. 3d 873, 876 (D. Ariz. 2014).

94. See FED. JUD. CTR., *EFFECTIVE USE OF COURTROOM TECHNOLOGY: A JUDGE'S GUIDE TO PRETRIAL AND TRIAL 121* (2002) ("Any significant enhancement to an evidentiary exhibit may turn the enhanced version into an illustrative aid that needs a separate exhibit number to keep it apart from the unadorned exhibit that was admitted in evidence. This is so when the enhancement is merely an aid to testimony and has no independent admissible purpose. As such, the enhanced exhibit should have its own exhibit number, be allowed as an aid to testimony, not be admitted in evidence, and not be available for jury use.").

Assistant U.S. Attorney, now a private practitioner and a white collar defense attorney, and my perspective is at least partially informed by a recent trial experience that I can talk about in more detail later, but I generally support the rule.

In particular, I think that the notice requirements⁹⁵ are helpful to the truth-seeking function of a jury trial, and I think that the record provision⁹⁶ is also important because, given the nonexistence of a similar requirement, I think that there is a real issue with the illustrative aid record not being maintained for appellate review.

Having staked out my general support for the rule, I totally agree with Judge Lanza's comments about some of the issues with the proposed amendment in terms of breadth, and in thinking about this coming into the panel, I identified really the two issues that Judge Lanza staked out. One is that this would be, in my view, overbroad as applied to opening statements or closing arguments, and it presents real practical issues, as many of the panelists have articulated so far.

The other issue that I see in terms of overbreadth has to do with trial management software. I think that, as a general proposition, in the Committee Notes or in some other way, to the extent that trial management software could be considered an illustrative aid, it should be excluded from the rule. The trial management software that many of us use today is basically a result of the evolution of technology. So, twenty years ago, if you had a chart up in the courtroom or you had a blow-up of a contract and you walked up to it and pointed to it with your finger, that is how you pointed out to the jury a particular provision that you wanted them to focus on.

When I started as an Assistant U.S. Attorney in 2007–08, we typically had a laser pointer, so we would point with the laser pointer. Now we have Trial Director, where you're blowing up and underlining or circling words digitally. To me, it is not practicable—it's not workable—to try and provide notice as to how you're going to point to parts of a document or different aspects of a photograph. So, as I said, I'm generally supportive of the amendment. I do think it's important particularly given my current perspective as a white collar defense practitioner, but I do think there are real overbreadth issues.

PROF. CAPRA: Wendi Sorensen?

MS. SORENSEN: Good morning, everyone. I have been practicing law for almost forty years as a civil defense lawyer—primarily insurance defense—so I'm the red car, blue car person in the group. I've tried a number of cases, and as I was sitting here listening to Judge Teilborg, I had this moment of anxiety thinking, "Is there a state rule?" No, there's not, and I think that's the whole point of many of the people on this Committee or on this side of the table here.

95. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 1010 (providing proposed Rule 611(d)(1)(B)).

96. *See id.* at 1011 (providing proposed Rule 611(d)(3)).

In all the cases I've tried, these issues have been handled intuitively, just based on the rules as they are. There's really never been a rule or an equivalent of a rule along these lines in state court, and we've all just handled these sorts of evidence or these types of evidence, like I said, pretty intuitively. The closing argument question is really an interesting point—the opening, the closing. I like my posters. You know, they don't blow up, they don't go away, they don't blank out on the screen because there is no screen, thank you very much. But, you know, I've pulled them out of my case, and I set them up for closing. I've had plaintiff attorneys say, "Now wait a minute, let me see that."

"No, you don't get to see my closing."

"Well, why don't I?"

"It's an illustrative aid. I need to approve it."

"No, everything that I'm going to show is going to be samples of the evidence that's already in evidence. Thank you."

And no one's questioned me beyond that.

There are people who are visual learners. I can't imagine how painful a trial would be if all we could do is sit in front of a jury and talk. Can you imagine a one-hour-long closing argument where all a lawyer said was "Blah, blah, blah, blah, blah," and they couldn't show documents and show pictures? So, there has to be some flexibility for how messages get conveyed.

And some of the judges have talked about concern about error. From the perspective of a lawyer, I get concerned about gamesmanship. You know, if my opposing counsel all of a sudden says, "Wait, you didn't give me notice of that," well, something that really should be usable, something that intuitively should be admissible or discussable, gets kept out because I didn't provide a line on a piece of paper that gave him notice of something he fully expected I was going to use anyway. So, I do worry about that aspect as well. But, certainly, there are bigger issues, like the video reconstruction. Those things should be shared beforehand.

In Arizona, we have disclosure requirements that are pretty darn strict.⁹⁷ You know, if I wanted to use a video reconstruction of an accident and I haven't disclosed it, I'm not using it. No judge on this panel is going to let me get it in if I haven't disclosed it. So, anyway, those are my thoughts. I think we get along pretty well without a rule.

PROF. CAPRA: Thanks. David?

MR. ROSENBAUM: Thanks. Everything's been said, and even though there were some different perspectives or perhaps some points of disagreement on how to treat openings and closings, I think it highlights where we, I suspect, all agree, and I feel bad about this. This is a panel to discuss the potential merits of a proposed rule, and I don't see a lot of enthusiasm for it anywhere on the panel. Maybe that's because the Arizona experience has been so good.

97. *See, e.g.*, ARIZ. R. CRIM. P. 15.1, 15.2.

My reaction when I read the rule is, I think, the same as that articulated by Judge Teilborg. Why do we need it? I have never had a problem, an issue, in any case dealing with illustrative aids, dealing with a notice issue. My practice is commercial litigation. They tend to be large cases. Both sides have the same concerns, and we talk about them, and so what Judge Teilborg, if we're in his court, is going to tell us we have to do is—but we're going to do it anyway—have a discussion about advance exchange of illustrative materials that are prepared in advance.

If you're going to use a PowerPoint slide that is something other than an exhibit, something you think is going to get into evidence and other than just a summary of your words, give it to us twenty-four hours in advance, forty-eight hours in advance—and I've had cases where we've raised those issues in advance of opening with the court. I had a case with now Judge Albrecht, an excellent trial lawyer, and he gave us his opening slides, and we had a discussion about some of them because they were so darn effective that I was worried that the jury was going to see them, and they did see some of them.

So I think there are two useful aspects to the rule—but do we even need it for this purpose? One is to remind lawyers and judges that there's a difference between evidence that's admissible and what is merely an illustrative aid, and the other is the suggestion that, yes, if folks are using illustrative materials, to the extent you can put it in the record, you should do that for appellate purposes, and that may require taking a photograph of what was written in chalk on the board or in ink on the white paper.

But I share the concerns expressed by others that, if you codify this very broad aspect of trial and create rules, you are potentially doing more harm than good. And I guess I take some comfort from the Maine experience. I mean, that tells us, you know, something about it that maybe the rule is not going to invite the problems, and maybe it's actually going to help lawyers and judges, but that hasn't been my experience here in Arizona.

PROF. CAPRA: That is our round of opening statements. I would like to turn to Professor Murray for his responsive thoughts.

PROF. MURRAY: I just have a couple of comments to some of the points which were raised. The Maine rule does apply to both argument and to evidentiary presentation, but the reference to notice we say is limited to aids which are prepared before use.⁹⁸ Now that had in mind at the time—and this was back in the '90s—that people were . . . the big deal was to prepare huge things on foam board, and you'd bring them in and line them up on easels, either for your argument or for the testimony, and the idea was, well, if you went to the trouble of getting those ready before, at least you ought to, at some point, show them to the other lawyer before you stepped up and did it

98. ME. R. EVID. 616(c) (“Opposing counsel must be given reasonable opportunity to object to the use of any illustrative aid prepared before trial.”); ME. R. EVID. 616 advisers’ note to former Me. R. Evid. 616—February 2, 1976 (“The rules proposes [sic] that illustrative aids prepared before use in court be disclosed prior to use so as to permit reasonable opportunity for objection.”).

so the other lawyer could say, “Wait a second, there’s something wrong there.”

But with chalkboards marked up in real time, you weren’t expected to give any notice, and the same has kind of gone over to PowerPoint slides, so there’s no practice in Maine of giving PowerPoint slides unless perhaps you had created some elaborate insert in your PowerPoint slide of some kind of recreation or something like that.

The issue of prejudice—Dan referred to it—is Rule 403 is not quite enough for this because it requires a substantial prejudice and probative value, and that’s talking about evidence.⁹⁹ Well, maybe you can get it in under 611(a), the judge who’s supposed to manage the trial, but what happens is that we have these rules which often become judge-local: that judge will let you do it and that judge won’t.

PROF. CAPRA: Right.

PROF. MURRAY: And that’s a problem if it gets to be that localized and illustrative aids are an important part of the trial. So, for example, assume you have a computer recreation, and you haven’t given that to your opponent beforehand. The rule in this court is you can’t use it. Well, the lawyer might say, “Well, where is the authority for that? Is that just what that judge is requiring?” That can be questionable.

We have not had any trouble in Maine with the notice requirement. If you have something that’s preprepared, and so there’s an opportunity to give notice, and it’s something that the other side—if you were in their shoes—would want to know about, then you give the notice, and it’s a reasonable notice,¹⁰⁰ the night before, earlier that day, whatever it is, so the other side can look at it and decide whether or not they have an objection—whether it’s distorting, whether it’s prejudicial, whether it’s not grounded in the evidence or whatever.

PROF. CAPRA: I would say the rule is intended just to put order over the whole chaos of what’s a demonstrative, what’s an illustrative.

PROF. MURRAY: Yes. That’s important.

PROF. CAPRA: And then you have to think through, once you’ve got that delineation, there’s nothing really specific in the rules that regulates illustratives. Technically, even Rule 611(a) could be held not to because it’s talking about the presentation of evidence.¹⁰¹ So there’s nothing in the rule that regulates something that comes up in every court all the time, which seems like something that one should try and order.

PROF. MURRAY: We found that lawyers were making book on judges. They were saying, “Well, in that judge’s court, you can do this. In that judge’s court you can’t.”

99. See FED. R. EVID. 403.

100. See ME. R. EVID. 616 advisers’ note to former Me. R. Evid. 616—February 2, 1976.

101. FED. R. EVID. 611(a) (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting *evidence* . . .” (emphasis added)).

PROF. CAPRA: Yeah, and private ordering only works if you've got civilized people on each side of the aisle as it were. Maybe we should have had a panel of bad lawyers.

PROF. MURRAY: Yes.

PROF. CAPRA: If you are going to put order in this area in terms of nomenclature, then what should be the safeguards? There's a big problem with notice pretty obviously. How does Maine come out on notice, Peter?

PROF. MURRAY: We said, "Illustrative aids prepared before use shall be disclosed to opposing counsel before use so as to permit reasonable opportunity for objection."¹⁰²

PROF. CAPRA: A two-tiered notice kind of situation where no notice would be required if—I think, Michael, you had language. I don't know if you could use it for text, but what was your thought on that?

MR. PEREZ-LIZANO: Well, my thought on that was that it should be made very clear. I don't know if in the rule itself or the Committee Note, but it should be made very clear that notice is excused for illustrative aids that are developed—I don't know what would be the right word—contemporaneously.

PROF. CAPRA: In the moment.

MR. PEREZ-LIZANO: In the moment, yeah.

PROF. CAPRA: But "contemporaneously" is probably better for rule language.

MR. PEREZ-LIZANO: Right. Yeah, "contemporaneously." That way, it's very clear that in this rule, the notice provision doesn't apply to things that are created in the moment while witnesses are being examined.

PROF. CAPRA: Still, that language might not cover everything you need to cover by a notice provision because James has the example of a contemporaneously created aid that was in fact conceived well before presentation. Do you want to talk about that for a minute?

MR. MELENDRES: Sure. My view is actually that the notice provision should apply to at least some contemporaneously prepared illustrative aids, and that view comes from this recent experience that I had in a federal wire fraud trial over the summer in which the case involved an allegation that my client, a former CEO of a green technology company, had made misrepresentations about the launch date for a particular type of engine technology.¹⁰³

In the course of the trial, one of the engineer witnesses, let me just say, illustrated during his testimony various torque and power graphs relative to this engine technology that were very clearly thought through in advance of the presentation of his testimony, and that very easily could have been put into a more formal poster board or chart but weren't. While testifying, that witness illustrated on the whiteboard for the better part of a day, and then the

102. ME. R. EVID. 616(c) (1976) (amended 2014).

103. *See generally* United States v. Losch, No. CR-19-00294-001, 2022 U.S. Dist. LEXIS 103425 (D. Ariz. June 9, 2022).

whiteboard with his illustrations remained in the back of the courtroom but in view of the jury for most of the trial, and it was a reference point for other witnesses throughout the trial.

The whiteboard wasn't evidence, but the permission for that to occur was probably proper under Rule 611(a). In my view, the court got it right, the government got it right, and I think it was handled correctly under the rules, but there was no record of that made in any way. And no notice was provided.

And in the same trial with a subsequent witness, another whiteboard presentation was made in which, in that instance, the government counsel did the illustration and basically illustrated the evolution of some contracts that were at issue in the trial while one of its witnesses was testifying. And in that instance, once the illustration was done, even before we conducted our cross-examination, the government began to erase the whiteboard. I asked that the judge order that the whiteboard remain in place so that we could illustrate it as well. The judge did so order, but there was no real rule to refer to.

That experience informs my view. I was trying to assess whether to object, what would the impact of the objection be to the jury if it was overruled? All without the benefit of a specific rule.

You know, there's theater, and there are optics in a trial, and if I object two, three, four times to this thing being created, then all of a sudden, sort of regardless of what it is, it's a powerful piece of the trial for the government. And remember that neither of these presentations was entered into the record.

In the government's closing, there was an electronic recreation of the contract evolution chart which didn't quite replicate what had been elicited through the illustrative aid. And that, to me, reflected why a rule that would impose a record requirement is important.

There's been this discussion today about organically created illustrative aids—the prepared-for-use provision. I do think it's unworkable to have a notice requirement for organically created illustrative aids, such as when an attorney is reacting on cross-examination or redirect to what has just occurred. But on direct examination, where there has been thought and preparation given to an illustrative aid created contemporaneously with the witness's testimony, it seems to me that the notice requirement should cover that type of illustrative aid because it just as easily could have been created before trial—but maybe not created in order to avoid the notice requirement—and because the attorney who may want to object can't see the finished product until it's finished. It's very hard to make judgments about the factors that are contemplated in the rule.

PROF. CAPRA: Right. So the reason that you would have a notice requirement is to allow for an objection, right?

MR. MELENDRES: Correct.

PROF. CAPRA: But apparently, if there aren't ever any objections to any kind of illustrative evidence, then this rule is a rule in search of a problem—and I'm wondering if that is so. I mean, haven't you as lawyers and as judges

seen objections to openings, closings, right? Have you not? And what would be the source of authority for such an objection in federal court?

MR. MELENDRES: The judge won't let you do it.

PROF. CAPRA: That the judge won't let you? Yeah, the judge just says no—and then can that be error? It could be error either to allow an aid to be used or to prohibit its use under current law. So, if there is current authority, buried somewhere in Rule 611(a), I suppose, the question is: What is wrong with bringing the authority front and center in a specific rule?

PROF. MURRAY: Another feature that is brought out in a specific rule is whether illustrative aids go to the jury room. That's something that, under current law, some judges will let it go in, some other judges won't.

PROF. CAPRA: Right.

PROF. MURRAY: And so, I think that again that's a point on which it would be wise to have a rule that can be consistently applied. We felt that they shouldn't go to the jury room unless the judge specially ordered or the parties agreed¹⁰⁴ because of the risk that jurors would be drawing unwarranted inferences from the illustrative aid.

PROF. CAPRA: What's your practice, judges—illustrative aids in the jury room?

MS. DUNCAN: If civil lawyers agree, fine, but I don't love that. I think that illustrative aids do not belong in a jury room. Jurors are not going to be able to really distinguish and hair-split between a demonstrative exhibit and an illustrative exhibit. We're having a very heady conversation about it. They are not going to be thinking about that. If it goes back to the jury room, they're going to discuss it, it's going to be absorbed into their deliberations, and it wasn't intended to go back. So, I don't think illustrative aids belong in the jury room.

PROF. CAPRA: And, again, that conclusion is a conclusion in search of a rule. Judge Lanza?

JUDGE SCHROEDER: So I have a question. Where this practice is occurring and judges issue orders or there's some rule, is it by judge order as part of a pretrial conference made orally from the bench? Is it a standing order? Is it a local rule? And my follow-up would be: If there is such an order or rule, it's subject to the same problems that you all have raised, so what's the harm of putting it in the rules and having it uniform?

PROF. CAPRA: What's your source of authority now and how is that better than a codified source of authority in the federal rules? That's a great question, Judge Schroeder.

MS. DUNCAN: It's been a long time since I appeared in federal court, but I can speak on behalf of the state court, which is that we have an extremely detailed trial management scheduling order. Judges can personalize it, but there are some basic things that the management order . . . and I was a very active management judge, so I told lawyers exactly what to expect beforehand, constantly reminded them because mostly, if a case was

104. See ME. R. EVID. 616(d).

going to trial, there would be some substantial contact with counsel and, where practicable, notice was required, and so it became embedded in the court's orders for trial management, and in state court, that's pretty routine.

PROF. CAPRA: But those orders cover all illustrative aids?

MS. DUNCAN: It covers a lot of things. It's an extremely detailed order, but it's really up to the case management judge ultimately to incorporate that and manage it. But, again, in state court and for those who have practiced in state court, it just hasn't been a real problem.

JUDGE SCHILTZ: I think Judge Schroeder's question, though, is, if lawyers are able to follow your order to give notice as practicable, why can't they follow a rule that says, "give notice as practicable"?

MS. DUNCAN: I am concerned that the rule is too rigid, which I've already addressed and many of us have. And I think that because it's so broad, it then potentially precludes what I described as the more organic way trials happen. And judges are rule followers, so once you put it in a rule, you have prescribed what to do, and I think it's overly broad.

PROF. CAPRA: Judge Lanza?

JUDGE LANZA: I was trying to think about how it actually happens in my courtroom and what the source of the rule is, and in one way, I think the reason why I haven't had these notice problems is my order setting the final pretrial conference has a deadline by which the parties need to exchange their exhibits, and it's very clear that if you've not exchanged an exhibit by that deadline, you cannot subsequently try to mark and introduce an exhibit at trial.¹⁰⁵

This has been a very helpful process to sit on this panel and think about these issues because what is an exhibit, what needs to be marked I don't clearly define, and so, I could see how there might be some potential for confusion on that. But I think in a roundabout way, that exhibit-marking deadline, which I didn't create—I think everybody follows on our court. I probably stole it from Judge Teilborg's stock standard order setting pretrial conference when I came on board.

I think parties intuitively sense that if there's something that you prepared in advance of trial, that's something that needs to be marked as an exhibit, and so I'm effectively creating this notice because you need to turn that over before trial, and if you don't, you're going to, at your peril, try to throw something up on the screen that wasn't marked as an exhibit at trial. And so, I think that I might be blundering into a solution to this problem that exists. But I think that, as a result of that deadline for disclosing exhibits, the only types of things that people try to put up at trial that aren't marked as exhibits are these contemporaneously created illustrative aids, which aren't subject to notice requirements for the practical reasons we've talked about. And so, as I sit here right now, I don't know what my source of authority is for creating

105. See ORDER SETTING TRIAL AND FINAL PRETRIAL CONFERENCE 2, <https://www.azd.uscourts.gov/sites/default/files/judge-orders/DWL%20Order%20Setting%20Trial%20and%20Final%20PTC%20Civil%20Bench%20Trial.pdf> [https://perma.cc/4YRF-9R58] (order template used by Judge Lanza).

a pretrial deadline for disclosing exhibits other than that everybody does it. It seems to work pretty well.

PROF. CAPRA: Probably Rule 611(a), inherent authority.

JUDGE LANZA: 611(a), and so I think that that might be one of the existing solutions that already tries to address some of these problems that I think you're hearing from the panel. It's a well-intentioned rule, but it might—because it's trying to be so formal and sweep so broadly—create some unintended problems.

PROF. CAPRA: Judge Teilborg?

JUDGE TEILBORG: Picking up on what Professor Murray was mentioning about the Maine rule, it does seem to me that if this rule is to continue gaining momentum, it should be narrowing that notice requirement to exhibits prepared before—however it's worded—prepared before trial, which would get rid of the ambiguity of whether I've got to give notice of every little thing I might do in the courtroom.

PROF. CAPRA: Right. That's a good thought, and then, I'm wondering if it can be approached as a two-tiered analysis? The first provision is to tell judges that they have to balance instructive value against prejudicial effect. And if it passes that test, then there are all these procedural requirements. You could actually drop the notice provision, and it would still be a valuable rule. If the rule said nothing about notice, this would still be a valuable rule because it still requires the implementation of a balancing test, and it still requires preserving aids for the record, and it still governs use during deliberations.¹⁰⁶

JUDGE TEILBORG: But, if I thought I had a problem with illustrative aids, I would just make sure my pretrial order was very specific—that it included not only evidence, exhibits to be admitted into evidence, but illustrative items too.

PROF. CAPRA: You know, you could have pretrial orders that actually incorporate Rule 403 too. You can do anything you want in a pretrial order, but that doesn't mean that it shouldn't be in the Federal Rules of Evidence. You are just one court. Yes, Judge Lauck?

JUDGE LAUCK: Can I add something?

PROF. CAPRA: Yes.

JUDGE LAUCK: I sit in the Eastern District of Virginia, and we have lots of patent trials, and I can tell you, this comes up all the time in patent trials, and the lawyers do not agree about what is illustrative, what is demonstrative. It's in all of our pretrial orders. They're very specific. And we have fights about this all through the patent trial, and they're good lawyers. They have usually lots of money involved, and they're not making spurious arguments, so I will say that complex trials really would benefit from a rule that gets the lawyers thinking about it in a way that a judge can then refer to the rule and

106. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 1010–11 (providing proposed Rule 611(d)(1)(A), (d)(2), (d)(3)).

manage it. I can manage it through my pretrial order. I tell them not to do it, and then the arguments happen anyway, and I still have to rule.

PROF. CAPRA: Right. Anything further from the panel and then we'll get to the hypotheticals because we spent a lot of time putting those together. Judge Conrad?

JUDGE CONRAD: Bob Conrad, a district court judge in the Western District of North Carolina. Where it comes up in my court all the time is the difference between an illustrative aid and a summary exhibit—

PROF. CAPRA: Right.

JUDGE CONRAD: —under 1006.¹⁰⁷ And there's a lot of confusion in the discussion among lawyers and the court because there is no specific rule for illustrative aids. You know, the lawyers can look to 1006 for their summary exhibit, but when they're trying to describe why the illustrative aid is admissible or not and whether it's going back to the jury or not, there's no specific rule, and so there's a utility, I think, in having a standalone rule that says, "Here's where the argument about illustrative aids will occur." We're not looking for it in 611(a) or perhaps 403.

PROF. CAPRA: Great. Professor Richter drafted a proposed amendment that the Committee approved for release for public comment—a proposal to make changes to 1006, mostly to correlate with this proposed amendment on illustrative aids,¹⁰⁸ and much of the confusion about summary usage under 1006 is because of the confusion you just talked about, Judge Conrad. There was just a recent case where the court said this was admissible under 1006.¹⁰⁹ It was voluminous.¹¹⁰ It had all the criteria, but the error that the judge made was not instructing the jury that it was not evidence.¹¹¹ But of course if it is a Rule 1006 summary, it is evidence. So courts are getting it wrong. Yes, David?

MR. ROSENBAUM: Just one observation that relates to notice and I think the comment about summary exhibits that are admissible as evidence and some of the discussion about the elaborately prepared accident reconstruction video. There are disclosure obligations independent of the Rules of Evidence, right,¹¹² and so that adds a layer of protection, I think, because, if the accident reconstruction video is not admissible as evidence—and maybe it's not—I would be surprised if it gets in if it wasn't disclosed.

PROF. CAPRA: It happens, though. That's exactly the argument: I don't have to disclose under any discovery rule if it's not evidence.

MR. ROSENBAUM: But you also have to disclose the opinion, so it seems to me if what is displayed in the reconstruction wasn't fairly disclosed in the expert report, most judges will exclude it on that basis. And if I'm the one who wants to use it, I'm going to be darn sure that I provide it to the

107. FED. R. EVID. 1006.

108. *See* COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 22.

109. *See* United States v. Bailey, 973 F.3d 548, 568 (6th Cir. 2020).

110. *See id.*

111. *See id.*

112. *See, e.g.*, FED. R. CIV. P. 26.

other side—if not contemporaneously with the expert report—well in advance of trial and well in advance of the time we’re going to be submitting our joint pretrial statement, and likewise, the summary exhibit. Because it is an exhibit that is admissible, I needed to have that disclosed at the time of my final disclosure and needed to list it with the pretrial statement.¹¹³

PROF. CAPRA: But what’s referred to here in this rule is not a disclosure problem. It’s a characterization problem.

MR. ROSENBAUM: Understood, yeah.

MR. COONEY: This has really been a fascinating discussion because, in our state courts, we treat illustrations as evidence, and it’s all under 401, 402, and 403 because, if a witness says this helps illustrate my testimony, it makes the existence of a fact or credibility more likely, and then it’s marked and introduced either for illustration purposes or substantive evidence. And then there’s a specific instruction that says that if it’s for illustration, you can only consider it to the extent you find it illustrates the witness’s testimony. And, admittedly, that grew up under our common law, but when we adopted the Rules of Evidence in 1983, it’s always fit in nicely under Rule 401 and 403,¹¹⁴ and we fight out objections on illustrations on exactly that basis.¹¹⁵ So, I guess I don’t understand necessarily, and I think part of where at least the track is—there’s been an existence, at least in the federal rules, to call these illustrative aids. They’re illustrative evidence. We’re asking the jury to use this to assess the credibility of the witness’s testimony.

PROF. CAPRA: No, they’re not. I mean, you could have a rule that, I guess—but that goes against a lot of federal case law, which has drawn this distinction.¹¹⁶ Moreover, the value of an illustrative aid is in how well it illustrates other evidence. So, the 403 balancing test, focusing on “probative value” is really not an ideal test. The proposed rule specifically instructs the judge to evaluate how illustrative the evidence really is.¹¹⁷ Finally, if you call an illustrative aid “evidence” then when it is used, it will need to be sent back to the jury room with all the other evidence that is actually evidence. And nobody on the panel wants to see that happen.

Michael?

MR. PEREZ-LIZANO: Well, I just wanted to develop that point—whether or not these illustrative aids should go back to the jury room. As I had mentioned at the beginning about the intent of the rule to divide the world into the evidence and not-evidence camps, it almost seems to run counter to or at cross-purposes with the intent of the rule to allow what’s been described as being not evidence to ever go back before the jury. And the rule

113. *See, e.g., id.* r. 26(a)(2).

114. N.C.R. EVID. 401, 402, 403.

115. *See, e.g., State v. Beavers*, No. COA08-550, 2009 N.C. App. LEXIS 500, at *10 (Ct. App. May 5, 2009) (“The decision of whether to admit photographs as illustrative evidence under N.C. Gen. Stat. § 8C-1, Rule 403 is within the sound discretion of the trial court.”).

116. *See, e.g., United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998).

117. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 1010 (providing proposed Rule 611(d)(1)(A)).

as written gives the court authority to allow it to go back to the jury for good cause.¹¹⁸ I think that's actually in direct conflict with what the intent of the rule is. Now, if all the parties agree, I don't see too much of an issue with it, but what does "good cause" mean in practice?

And there might be a concern that one side is going to be perceived to have an advantage if all of their illustrative aids wind up back in the jury room or many of them, while very few, if any, of the other side's do so. I do think you can create at least a perception of some unfairness, not to mention the problem of the illustrative aids going back into the jury room and now the jurors drawing inferences, picking on particular words, what have you, even if you have a limiting instruction. This undermines the purpose for which that illustrative aid was used in the first place.

PROF. CAPRA: It's a good point. The good cause exception is essentially floated out there for public comment,¹¹⁹ and there is certainly an argument to be made about a ban on use by the jury unless all parties consent. Any thoughts on that? A proposal giving the judge no discretion to allow it over an objection. That's basically your position, Michael?

MR. PEREZ-LIZANO: Yeah.

JUDGE CONRAD: Dan, Judge Schroeder and I were just talking about this, but I don't let demonstratives go back, or—I call them demonstratives—illustrative aids go back to the jury room. But the jurors oftentimes really don't like that, and what they ask, and it's a good question: "How come I could see it in that room, but I can't see it in this room? If it was good enough to show me out there, why can't I see it here?" And something like, you know, the map with the cell phone towers pinging, it's really helpful for them to have that visual back in the jury room with them. So, I get the theory of this, but, I mean, I'm sure all of us trial judges have had the experience of jurors being a little frosted that they don't get to see it and not really understanding why we're not letting them see it.

PROF. CAPRA: How about an instruction for why they're not allowed to see it?

JUDGE CONRAD: Right. Here's why we could let you see it in this room.

PROF. CAPRA: Yes, there, but not there.

JUDGE CONRAD: But, because you're twenty feet away from this room, you can no longer see it.

PROF. CAPRA: Right.

JUDGE CONRAD: You know, it's a tricky instruction.

PROF. CAPRA: Maybe the instruction should be something like: "When you deliberate, you will have all the evidence that has been admitted to prove the case. The video played during the plaintiff's expert testimony is not evidence. It is not offered to prove a fact, only to help you understand the expert's testimony. So, you will not have it before you during deliberations."

118. *See id.* (providing proposed Rule 611(d)(2)(B)).

119. *See* COMM. ON RULES OF PRAC. & PROC., *supra* note 5, at 22.

You might even provide the possibility that they can come out and look at it upon request—like a readback of trial testimony.

MS. SORENSEN: I think this gets to another interesting question, which is financial disparity. As an insurance defense lawyer, I pretty much have unlimited means as long as I can convince my adjuster to let me spend their money to come up with these illustrative aids and so on. Wouldn't it be to my benefit, especially if these materials end up in a jury room? Wouldn't it be to my benefit to make as many as I possibly can?

JUDGE SCHILTZ: I share your concern, the concern about disparity when you see one side has sophisticated illustrative aids and the other hasn't, and that's one of the reasons that the default rule is that they don't go to the jury room unless both parties consent. I think it's worthwhile having an out for the judge if there's good cause—and I'm not talking about letting all your aids go into the jury. That wouldn't be good cause. But, for instance, if there is some particular exhibit that's very important to the understanding of a particular witness's testimony—just a simple diagram of the intersection or something like that—should the opponent always be able to veto that and say, "No, I'm not going to consent," just to make it hard for the opponent? That might be a little bit much, so I think having an escape hatch that the judge can use in an unusual situation where it's important to have it considered by the jury will be useful.

PROF. CAPRA: Thanks. So, we spent a lot of time putting the hypos together. Do you want to spend the last fifteen minutes or so going through them?

One hypothetical involves the use of trial management software. Would that be covered by this rule?

JUDGE TEILBORG: I guess I've never thought of that as an illustrative aid. I think of it as like you're taking a light and making something brighter. I don't think that that itself is an aid, when you highlight that language from the contract and you blow it up on the screen. I'm just wondering. I don't think of underlining as . . . I don't think when you point to something on a chart that you're creating an illustrative aid by your pointing, which is what I think the underlining is, but I'd just be curious what other people think. I've never even treated that as an illustrative aid. It never occurred to me.

PROF. CAPRA: Any thoughts? Judge Lanza?

JUDGE LANZA: I thought these hypotheticals were great and a lot of thought went into them, and when reading them, I had that feeling as a panicked law student when I read a law exam question that I didn't know the answer to.

PROF. CAPRA: Sometimes, Judge, there's no right answer, so it's okay.

JUDGE LANZA: And I say that that's truly my reaction to them, but it also illustrates—underscores—my concern, if a rule doesn't provide clarity to judges on what's covered and what's not, that's a problem.

PROF. CAPRA: But, you see, if I may respond?

JUDGE LANZA: Yeah.

PROF. CAPRA: These problems of distinguishing illustrative aids and demonstrative evidence exist today. These hypotheticals are all drawn from real cases. Many of them are from Arizona, and the question of how to decide how to categorize is determinative. If it's illustrative, it's allowed, for example, and if it's demonstrative, it's not. So, these problems exist today, and the question is: Do you want to have a framework for deciding them or do you have to go look at a bunch of cases? I guess that's my response, but I didn't mean to stop the discussion. Are there any other points to be made? Yes, David?

MR. ROSENBAUM: Well, several people have already commented. I mean, the notice requirement alone ought to instruct us that the rule shouldn't apply to the trial aids where you blow up and you highlight and you circle and you cross off—if you're doing that just to a copy of an exhibit that's in evidence, you know: “Page two of the contract has this clause, can you tell us what sentence you were just referring to?” “Here it is.”

PROF. CAPRA: Yeah, I would agree with Judge Schiltz that's not an illustrative aid at all.

So, let's go through some examples quickly. Let's take the hypothetical where a witness sees the defendant out in an apartment hallway by looking through a peephole in his door. The defendant argues that the identification is inaccurate because the peephole is distortive. In response, the government actually brings the peephole into court, and the jury is allowed to look through it during deliberations.¹²⁰ Is the peephole demonstrative evidence or an illustrative aid?

MR. MELENDRES: It is evidence.

PROF. CAPRA: It's just evidence. Would you admit it?

MR. ROSENBAUM: If they lay a foundation.

MS. DUNCAN: Yes.

PROF. CAPRA: Well, the foundation would be, “We took it out from the witness's door, and we didn't alter it.” Here's my argument about that: “Ma'am, you don't live in New York, so you don't have peepholes, but when you look through a peephole, there's a door around the peephole which occludes all other vision, correct? So now these jurors are going to be looking through the peephole and they'll see everything. It will improve their vision.”

MS. DUNCAN: So, the peephole should be excluded.

PROF. CAPRA: Under 403, right? Because it is demonstrative evidence but substantially dissimilar from the disputed event.¹²¹

MS. DUNCAN: Yes.

120. This hypothetical is based on the facts of *People v. McBayne*, 166 N.Y.S.3d 168 (App. Div. 2022).

121. See FED. R. EVID. 403; JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 6.02[4] (2022) (“Unless the proffering party shows that the circumstances of the reconstruction are ‘substantially similar’ to the accident or incident that is at the heart of the case, the evidence’s probative value is outweighed by the likelihood it will confuse the issue or mislead the jury, and it is properly excluded under Rule 403.”).

PROF. CAPRA: Right. Okay. Next one.

JUDGE SCHILTZ: So, one I want to make sure they address is openings and closings because that was the intention of so many comments. When an attorney puts up PowerPoint slides in closing, and it shows four lies told by the defendant while he was testifying—lie one, lie two, lie three, lie four—is that an illustrative aid or is that just a summary of argument?

JUDGE TEILBORG: Well, my rule would be, if the PowerPoint is simply saying what the lawyer could otherwise say with his own mouth, it is not an illustrative aid.

PROF. CAPRA: Professor Murray said that too: if it's just your words, you can put your words down in writing and that will not be an illustrative aid. Then the question is whether the argument itself mischaracterizes the evidence.

JUDGE TEILBORG: That's my view.

MR. ROSENBERG: At what point does it become something that has to be disclosed? Let's say it's a PowerPoint that embeds some of the exhibits, for example. I mean, where do you draw the line at which a lawyer would have to disclose it to the opponent before giving their closing?

JUDGE TEILBORG: If it's something other than the lawyer's words, I expect him to disclose it or at least show it to the other side before trial.

MR. COONEY: But the lawyer, I take it, could take the exhibits themselves and pull them out of the stack and then make an argument and wouldn't have to disclose that, right?

JUDGE TEILBORG: No, of course not, because it's in evidence.

JUDGE SULLIVAN: Right. And so, if the PowerPoint just has evidence, then I take it, it would not need to be disclosed? I'm trying to figure out where you draw the line because it's a big source of contention getting in on the mental thoughts of the lawyers on how they're going to try their case and argue it, and I can see a prosecutor saying I don't want to have to disclose everything in my argument—in my opening, in my closing. I want to make my argument.

MS. SORENSEN: Well, and to your point, I don't want my opposing counsel to see my closing because he's going to be able to react to it and respond and so on. I want to do my thing and not give him much time to react, but is the alternative that all of the closings or the PowerPoints or the posters or whatever need to be previewed in camera? I don't imagine you judges want that work.

PROF. CAPRA: Has somebody ever made an objection to an opening or a closing argument? This discussion is making it sound like that never happened, and this rule will create an avalanche of objections that have never been made. Has anyone ever made an objection on closing?

MS. SORENSEN: Of course.

MS. CISNEROS: Yes.

PROF. CAPRA: And what's the basis for that objection?

AUDIENCE MEMBER #1: Not in evidence.

AUDIENCE MEMBER #2: Not in evidence.

AUDIENCE MEMBER #3: Very frequently not in evidence.

JUDGE TEILBORG: The argument that's always made in closing is, "Your Honor, that isn't what the witness said," right? And you always say to the jury you decide what the witness said. This isn't evidence. But, on openings, I've always had the rule that if you're going to show something to the jury on opening, you have to show it to your opponent before opening, and I've never had a protest from an attorney—never had trouble in that I don't have objections on openings because they've seen each other's visuals.

PROF. CAPRA: Right. You don't get them because they've seen it.

JUDGE TEILBORG: Yes.

PROF. CAPRA: Judge Lanza?

JUDGE LANZA: I recall a case in which the defense lawyer in a criminal trial had a big blow-up of a get-out-of-jail-free card from the Monopoly game, and that was the argument about how you can't trust this cooperating witness. This cooperating witness is just motivated by a desire to get out of jail free, and is anybody suggesting that that should have to be shown before you do your summation? Because I think, if that's the case, most people are not going to want this rule. I think it's probably cleaner to just say this rule doesn't apply to closings.

PROF. CAPRA: There's certain handwriting on certain walls that probably indicate that that's where this rule is going, you know?

PROF. MURRAY: I think that they might not object to a get-of-jail-free card, but they might object to Willie Horton in the closing or something like that. There are presentations that could properly be used to make a point like that—like to get out of jail. But sometimes, there could be a presentation that is highly prejudicial, that they could put on their PowerPoint slides that are not in evidence—such as the Willie Horton example. Are you going to let this man go out on the street or something like that?

PROF. CAPRA: That's a good point. What's that objection grounded in, Peter?

PROF. MURRAY: It's something that is not in evidence, and it is highly prejudicial. It's making reference to something that's not in evidence, but as you're saying, it's kind of a literary way of making a point, and the point is that you don't want to be lenient because of the possible consequences of the accused being out on the street.

PROF. CAPRA: I think you locate it under 611(a) if you locate it anywhere.

PROF. MURRAY: That's what I got. Yeah, so I think it's worth underscoring the judge's ability to control that kind of making ideas visual.

PROF. CAPRA: Let's try the hypothetical of the searchlight. A coast guard official identifies two defendants on the deck of a boat full of drugs. They jump into the water and are later detained. The defendants attack the identification on the ground that the searchlight used by the official was too weak for him to get a good look at the defendants. And what the government

proposes and the judge allows is shining the light in a darkened courtroom.¹²² Is that an illustrative aid, or is that demonstrative evidence? What do you think? And it's the light that actually is the light that was used that night. Anybody?

JUDGE LANZA: My initial reaction, qualified by my terror about what I described earlier, is that this is akin to an accident reconstruction.

PROF. CAPRA: Yes.

PROFESSOR MURRAY: Or a recreation, and so this is not an illustrative aid. This is demonstrative evidence, and admissibility would depend on whether the conditions at trial are substantially similar to those at the time of the crime.¹²³ And, if admitted, the searchlight could be used by the jury during deliberations.¹²⁴

PROF. CAPRA: Yes, I think that's right, and so what would the ruling be? Should the demonstration be allowed in court?

JUDGE LANZA: The devil's in the details. It seems really hard to replicate the conditions at sea, but I'd really need to know all the facts of the case, such as whether there was a moon out that night.

PROF. CAPRA: Well, the judge allowed it as a demonstrative, substantially similar, but the argument from the defendant was, there's light bouncing back off the wall which is not bouncing anywhere outside.¹²⁵ As to that argument, the judge said that that's prejudice but it doesn't substantially outweigh the probative value.¹²⁶ An interesting side note is that the government argued that the best way to see how strong the light was would be to put the defendants in the corner so the light would shine on the defendants.¹²⁷ Thankfully the judge said, "No, we're not going to do that."¹²⁸ So anyway, how about another hypothetical?

AUDIENCE MEMBER #4: I think maybe we should just have Judge Lanza answer all nineteen. And then after each one we can vote on whether he got it right or not.

PROF. CAPRA: Let's try the example of the car accident in which the ball joint disengages from the steering in the plaintiff's car. The parties disagree about what happens when the ball joint disengages. The plaintiff argues that it causes the car to spin out of control, and the defendant argues that it causes the car to stop. The defendants do a video demonstration of the same model of car as in the accident, with a professional driver, and the ball joint disengaging, and the car coming to a stop. A major difference is that the ball joint disengagement was triggered by the driver in the demonstration. So, he knew it was coming. The video would be played during the defense

122. This hypothetical is based on the facts of *United States v. Lopez-Lopez*, 282 F.3d 1 (1st Cir. 2002).

123. See *supra* note 121 and accompanying text.

124. See WEINSTEIN'S EVIDENCE MANUAL, *supra* note 1, at 1010 (providing proposed Rule 611(d)(2), which limits illustrative, not demonstrative, evidence's use in jury deliberations).

125. *Lopez-Lopez*, 282 F.3d at 16.

126. See *id.*

127. See *id.*

128. See *id.*

expert's testimony. The expert would be explaining ball joints and what they do, and what happens when they fail to the jury.¹²⁹ Is the video a demonstrative, or is that an illustrative? What do you think? The defendant argued both.¹³⁰ Yeah?

JUDGE LANZA: I think it's evidence.

PROF. CAPRA: It's demonstrative?

JUDGE LANZA: Yes.

PROF. CAPRA: So, would you admit it?

JUDGE LANZA: Probably, again, subject to knowing more about the differences, it looks like on the face of it probably I would.

PROF. CAPRA: So, the trial court said that the evidence was not admissible as a demonstrative because of the fact that the disengagement had to be manually done, whereas at the time of the accident it was a complete surprise.¹³¹ So the element of surprise was missing from the demonstration, and that was a critical element, limiting its probative value and raising the risk of confusion. Moreover, the demonstration was done on a dry track, whereas the plaintiff had an icy track,¹³² so there were too many differences. So now you can't get it admitted as a demonstrative. Can you admit it as an illustrative? In other words, I'm going to call an expert who's going to testify to ball joints and how ball joints work, and we can play this video to illustrate the expert's testimony. What do you think?

MS. DUNCAN: I would say no. If it's not substantially similar, then it's going to mislead.

PROF. CAPRA: But illustratives don't have to be substantially similar. Actually, that's one of the mistakes that occur in the case law¹³³—there is a different standard for demonstratives and illustratives. Illustratives don't have to be substantially similar. They just have to assist in presentation of evidence.¹³⁴ Moreover, the closer that illustratives are to the actual facts, the more problematic they are, because the jury is more likely to consider them as proof of a fact.

PROF. MURRAY: On this example, it would appear to me that, as an illustrative, it would be prejudicial because it would give the wrong impression.

PROF. CAPRA: So what's the prejudice, Peter?

129. This hypothetical is based on the facts of *Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir. 1993).

130. *See id.* at 263–64.

131. *See id.* at 263.

132. *See id.* at 260, 264.

133. *Compare* Quagliarello v. Dewees, No. 09-4870, 2011 U.S. Dist. LEXIS 86914, at *12 (E.D. Pa. Aug. 4, 2011) (“[E]vidence that is merely illustrative need not be substantially similar to the incident.”), *with* Behlke v. Conwed Corp., 474 N.W.2d 351, 358–59 (Minn. Ct. App. 1991) (“To be admissible, the illustrative evidence must be substantially similar to the aspects being illustrated.”).

134. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 1, at 1012 (providing proposed Rule 611 Committee Note: “This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence”).

PROF. MURRAY: The fact is you're going to see something that seems to work in a particular way under conditions that are not the same—as though, if we're not seeing that, they're unduly persuasive.

PROF. CAPRA: Yes, the prejudice is that the jury will treat it as a demonstrative when it's not. To then apply the balancing test in the proposed rule, the judge would have to consider how valuable it is as an illustrative. How much does it help the jury understand what the expert is talking about. Any thoughts on that? The expert is testifying to ball joints and how they work and then, as the expert's testifying to that, the video is going of the car that stops down a dry track. My own view is that's the worst illustrative ever because you're trying to describe how ball joints work, and all you see is a car just driving and stopping, right? So, in that particular case, called *Fusco v. General Motors Corp.*,¹³⁵ the court rejected both arguments, not close enough to be a demonstrative and not very helpful as an illustrative.¹³⁶

MR. ROSENBAUM: Is that treated the same way under this proposed rule because you could have something you will try to get into evidence, and the judge rules insufficiently similar for other reasons not admissible? Okay. I'll just show it as an illustrative.

PROF. CAPRA: That's what they were trying to do in *Fusco*.¹³⁷ The judge prohibited it.¹³⁸ But the judge prohibited it under Rule 403 as to the demonstrative and apparently under 611(a) as to the illustrative.¹³⁹ Under the proposed rule, the result would be the same, but the court would probably have an easier time of rejecting the video as an illustrative, because there is a particularized, standardized balancing test to apply. Michael?

MR. PEREZ-LIZANO: As we have this discussion, what I keep coming back to as a practitioner is, if I'm intending in my trial to offer something, however you categorize it, whether it's evidence or an illustrative aid, and it's so important to my case that I really need to get this in front of the jury, I'm going to do everything I can to lay the proper foundation to have it admitted as evidence so that it can go back into the jury room and could be considered as proof of a fact.

PROF. CAPRA: I agree. And I think that this rule can help with that. In other words, you can figure out from the rule that if you want to get it admitted as evidence, don't use this rule. You know to comply with Rule 403 and make sure that it is substantially similar to the disputed event.

MR. PEREZ-LIZANO: Right. Right. Right.

PROF. CAPRA: Judge Teilborg?

JUDGE TEILBORG: Well, this is another example—and I think Mr. Rosenbaum mentioned it earlier—but this would be previewed under the obligation to make your expert disclosures because it would be any exhibit

135. 11 F.3d 259 (1st Cir. 1993).

136. *See id.* at 264.

137. *See id.*

138. *See id.*

139. *See id.* at 263–64.

that would be used to summarize or support them.¹⁴⁰ And so it's going to have to be disclosed, and there may well be a motion in limine on it, but it seems to me it's going to get resolved before trial.

PROF. CAPRA: Right. So, insofar as the notice requirement, to go back to that, it wouldn't be necessary in a case like this because it would happen anyway under Rule 26. I think that's a good point.

JUDGE TEILBORG: And, indeed, there's a category of examples here which do tend to be linked to expert testimony.

JUDGE SCHILTZ: Thank you. I want to thank, on behalf of the Committee, thank you very, very much for coming and spending time. You've given us a lot to think about, and we really appreciate it.

140. FED. R. CIV. P. 26(a)(2)(B)(iii).