

10-2024

Painting a Clearer Picture: Introducing New Federal Rule of Evidence 107 Regulating Illustrative Aids

Daniel J. Capra

Liesa L. Richter

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Law Commons](#)

Recommended Citation

Daniel J. Capra and Liesa L. Richter, *Painting a Clearer Picture: Introducing New Federal Rule of Evidence 107 Regulating Illustrative Aids*, 77 *Vanderbilt Law Review* 1469 (2024)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol77/iss5/2>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Painting a Clearer Picture: Introducing New Federal Rule of Evidence 107 Regulating Illustrative Aids

*Daniel J. Capra**
*Liesa L. Richter***

They say a picture is worth a thousand words—and charts, drawings, diagrams, computer animations, and even tangible items are utilized at trial in virtually every case tried in the federal and state court systems. Litigants have come to depend heavily upon such aids to engage visual learners in the jury box and to present a compelling narrative. And the creative use of trial aids has only increased with the rapid technological advancements of recent decades. The ubiquity of such aids notwithstanding, there is no written standard governing their use, no agreed-upon lexicon for describing them, and no set of uniform principles guiding courts and litigants in navigating their presentation at trial. Instead, trial lawyers and judges rely on a murky set of latent norms that can be learned only through literal trial—and unavoidable error. When difficult questions arise that require litigants to make concrete arguments about the use of such aids and trial judges to issue definitive rulings and to craft comprehensible jury instructions, those vague norms often prove inadequate to the task.

The increasing reliance on illustrative aids in the courtroom has only amplified the risks inherent in vague and inconsistent standards. As PowerPoint presentations, interactive charts, graphs, and computer animations and recreations have become pervasive, the need for clear and predictable standards governing their use has grown. An elegant and promising solution to the problems created by the nebulous and inconsistent common law standards

* Philip Reed Professor of Law, Fordham Law School. Reporter to the Judicial Conference Advisory Committee on Evidence Rules. All views expressed in this Article are those of the authors individually and do not represent the official views of the Advisory Committee on Evidence Rules.

** George Lynn Cross Research Professor, Floyd & Martha Norris Chair in Law, University of Oklahoma College of Law. Academic Consultant to the Judicial Conference Advisory Committee on Evidence Rules.

governing the use of illustrative aids is a new Federal Rule of Evidence. The Federal Rules were tailor-made to provide an antidote to the complexity and inconsistency of the common law. And a new evidence rule is an optimal vehicle for creating a shared vernacular that distinguishes trial aids from evidence and that sets a uniform standard guiding the deployment of illustrative aids in every federal court. To help bring much-needed coherence to trial practice surrounding illustrative aids, the federal Evidence Advisory Committee has proposed Federal Rule of Evidence 107, the first brand-new provision since 2008. Rule 107 is on track to take effect on December 1, 2024, under the rulemaking procedures established by the Rules Enabling Act. This Article unveils new Federal Rule of Evidence 107, offering insights into the significant modifications made to proposals originally published for notice and comment and revealing the critical features of the final provision that promise to bring clarity and uniformity to the regulation of illustrative aids, while preserving the creativity and flexibility prized by trial counsel.

INTRODUCTION.....	1471
I. FEDERAL COURTS' CONFOUNDING COMMON LAW	
REGULATION OF ILLUSTRATIVE AIDS	1477
A. <i>A Vexing Vocabulary</i>	1478
B. <i>A Gatekeeping Standard for Illustrative Aids</i>	1480
C. <i>Conflating Illustrative Aids and Rule 1006</i>	
<i>Summaries</i>	1484
1. <i>Erroneous Holdings That Rule 1006</i>	
<i>Summaries Are "Not Evidence"</i>	1486
2. <i>Admission of the Underlying Documents</i>	
<i>or Recordings into Evidence</i>	1488
D. <i>Illustrative Aids in the Jury Room</i>	1490
E. <i>Foul or Fair: Advance Notice of Illustrative Aids</i> ..	1493
II. NEW FEDERAL RULE OF EVIDENCE TO PAINT A CLEARER	
PICTURE FOR ILLUSTRATIVE AIDS	1495
A. <i>Rulemaking to the Rescue</i>	1495
B. <i>Proposed Amendments to the Federal Rules of</i>	
<i>Evidence: Rules 611(d) and 1006</i>	1499
1. <i>Proposed Rule 611(d)</i>	1499
2. <i>Proposed Amendment to Rule 1006</i>	1506
III. SOUND AND FURY: PUBLIC COMMENTARY ON THE PACKAGE	
OF ILLUSTRATIVE AIDS RULES	1508
A. <i>Opposing Advance Notice of Illustrative Aids</i>	1509
B. <i>Defining Illustrative Aids Covered by the Rule</i>	1510

C.	<i>A Hostile Environment for Illustrative Aids</i>	1513
D.	<i>A New Home for an Illustrative Aid Rule</i>	1516
E.	<i>The Interplay with Rule 1006</i>	1518
IV.	INTRODUCING NEW FEDERAL RULE OF EVIDENCE 107	1520
A.	<i>Eliminating Notice and Expanding the Rule to Cover Aids Used During Opening Statements and Closing Arguments</i>	1520
B.	<i>A Warm Welcome for Illustrative Aids</i>	1522
C.	<i>Defining “Illustrative Aids”</i>	1523
D.	<i>Rule 107: A New Home for an Illustrative Aids Rule</i>	1525
	CONCLUSION	1527

INTRODUCTION

Imagine a routine products liability case in which a plaintiff sues the manufacturer of a folding ladder for injuries suffered due to an alleged design defect. The manufacturer defends by denying any defect and arguing that the plaintiff used the ladder improperly. To illustrate his testimony at trial, an expert for the defense utilizes a ladder of the same make and model as the one used by the plaintiff. The expert sets up the ladder in the courtroom, climbs onto it, and takes it down to demonstrate the proper operation of the ladder. After they retire to deliberate, the jurors request access to the ladder used by the defense expert. The plaintiff objects. Should the judge allow the jury access to the ladder to aid in its deliberations? If so, how is the ladder to be characterized? Is it demonstrative evidence? Is it *evidence* at all? How should the trial judge instruct the jury regarding proper use of the ladder if she does allow access?

Charts, drawings, diagrams, PowerPoints and even tangible items, like the ladder in the above example, are utilized at trial in virtually every case tried in the federal and state court systems. Lawyers rely upon such aids to engage visual learners in the jury box and to present a compelling narrative.¹ And the creative use of trial aids has only increased with the rapid technological advancements of recent decades. Yet despite prevalent use of trial aids, there is no written standard governing them, no agreed-upon lexicon for describing them,

1. Baugh *ex rel.* Baugh v. Cuprum S.A. de C.V., 730 F.3d 701, 706 (7th Cir. 2013) (“As jurors have become more visually oriented, counsel in modern trials seek to persuade them with an ever-expanding array of objects, maps, charts, displays, summaries, video reconstructions, computer simulations, and so on.”).

and no set of uniform principles guiding courts and litigants in navigating their presentation at trial. Instead, trial lawyers and judges make do with a vague set of principles that can be learned only through literal trial—and unavoidable error.

Indeed, the factual scenario involving the exemplar ladder is no law school hypothetical. It was taken directly from *Baugh v. Cuprum S.A. de C.V.*, in which the trial judge permitted the jury access to the ladder during deliberations over the Plaintiff's objection, resulting in a verdict for the defense.² The U.S. Court of Appeals for the Seventh Circuit reversed, finding that the trial judge abused her discretion in granting jurors' request for the ladder because it was used solely for illustrative purposes and was not admitted as evidence in the case.³ On retrial, the Plaintiff won an \$11 million verdict, suggesting that the proper handling of illustrative aids at trial can truly be a game changer.⁴

Federal opinions reveal several points of confusion and inconsistency regarding the proper treatment of items like the ladder. First, there is the problem of identifying accurate nomenclature to describe items in a manner that signifies their proper purpose at trial. Federal courts have never coalesced around a reliable, uniform terminology for such aids. Courts reference "demonstrative evidence," "demonstrative aids," "illustrative aids," and "pedagogical devices."⁵ Any one of these terms may be defined in varying ways by different

2. *Id.* at 703.

3. *Id.*

4. *Baugh v. Cuprum S.A. de C.V.*, 845 F.3d 838, 842 (7th Cir. 2017).

5. *Baugh*, 730 F.3d at 706:

The term "demonstrative" has been used in different ways that can be confusing and may have contributed to the error in the District Court. In its broadest and least helpful use, the term "demonstrative" is used to describe any physical evidence. *See, e.g.*, *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1231 (7th Cir. 1996) (using "demonstrative evidence" as a synonym for physical exhibits). . . . As Professors Wright and Miller lament, the term "demonstrative" has grown "to engulf all the prior categories used to cover the use of objects as evidence. . . . As a result, courts sometimes get hopelessly confused in their analysis." 22 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 5172 (2d ed. 1982); *see also* 5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 9:22 (3d ed. 2003) (identifying at least three different uses and definitions of the term "demonstrative" evidence, ranging from all types of evidence, to evidence that leaves firsthand sensory impressions, to illustrative charts and summaries used to explain or interpret substantive evidence). The treatises struggle to put together a consistent definition from the multiple uses in court opinions and elsewhere. *See* 2 McCormick on Evidence § 212 n. 3 (Kenneth S. Broun ed., 7th ed. 2020) (recognizing [a] critique of its own use of "single term 'demonstrative evidence,'" noting that this approach "joins together types of evidence offered and admitted on distinctly different theories of relevance").

courts.⁶ And yet there is a fundamental distinction to be drawn between a chart, diagram, drawing, or tangible item admitted into evidence to help its proponent establish a disputed fact and a similar object utilized only to illustrate witness testimony or other admitted evidence. The former must meet the standards of relevance and admissibility established by the Federal Rules of Evidence.⁷ The latter need not because it does not qualify as evidence in its own right and serves only as a catalyst for understanding other admitted evidence.⁸ In resolving the issues surrounding the presentation of charts, graphs, diagrams, and tangible items, judges and litigants would benefit from a shared lexicon that conveys the purpose for which a particular item is used in the courtroom.

Because aids for understanding do not constitute evidence, there is no rule of admissibility or balancing test in the Evidence Rules guiding courts and litigants regarding the propriety of their presentation. The Rule 403 balancing test, upon which some courts rely in regulating illustrative aids, is inapplicable on its face because it governs the admissibility of “evidence” based on its “probative value.”⁹ Because they are not evidence, illustrative aids possess no probative value of their own. To oversee illustrative aids in the courtroom, many federal courts depend on their vast discretion to regulate the mode and order of examination of witnesses and presentation of evidence under Rule 611(a).¹⁰ But this amorphous grant of discretion offers no standard by which illustrative aids may be judged.

As in the *Baugh* case described above, it is not uncommon for jurors to request illustrative aids during deliberations.¹¹ But federal courts disagree about juror access to such aids when jurors weigh the

6. See CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE § 9.32, at 1142 (Wolters Kluwer ed., 6th ed. 2018).

7. See, e.g., *United States v. Stewart-Carrasquillo*, 997 F.3d 408, 420–22 (1st Cir. 2021) (finding it proper to exclude a demonstration of a disputed event where it was substantially different from the disputed event itself); *Krause v. County of Mohave*, 459 F. Supp. 3d 1258, 1271 (D. Ariz. 2020) (“At a minimum, the animation’s proponent must show the computer simulation fairly and accurately depicts what it represents” (quoting *Friend v. Time Mfg. Co.*, 2006 WL 2135807, at *20 (D. Ariz. July 28, 2006))).

8. See, e.g., *United States v. James*, 955 F.3d 336, 344 (3d Cir. 2020) (noting that an illustrative aid is not evidence).

9. See FED. R. EVID. 403.

10. See, e.g., *United States v. Mendez*, 643 F. App’x 418, 424 (5th Cir. 2016) (“The photographs were part of a demonstrative aid to assist the jury in following along during the foreign language conversations. They are thus subject to FED. R. EVID. 611.”).

11. See, e.g., *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 703 (7th Cir. 2013) (noting juror request for the ladder); *United States v. Robinson*, 872 F.3d 760, 779–80 (6th Cir. 2017) (explaining that jurors requested aid).

evidence in a case. The Seventh Circuit in *Baugh* held that it was an abuse of discretion to hand such a trial aid over to jurors, which resulted in a reversal, a retrial, and a wholly different outcome for the Plaintiff.¹² Other federal courts afford discretion to the trial judge to send illustrative aids to the jury room, even over objection.¹³ Given the potentially outcome-determinative effect on proceedings, courts and litigants deserve guidance on the issue of illustrative aids in the jury room.

When illustrative aids are presented at trial, and certainly when they are provided to the jury during deliberations, the court must offer instructions to guide jurors in their consideration of them. Some federal courts trip over the appropriate characterization and use of such trial aids, particularly when they are offered in the form of a “summary.” An illustrative summary of evidence that has already been admitted at trial is, of course, not evidence in its own right and should be discounted in favor of actual evidence in the case.¹⁴ Rule 1006 of the Federal Rules of Evidence governs a very different type of “summary,” however, that may be admitted into evidence to prove the content of admissible underlying materials that are too voluminous to be conveniently examined in court.¹⁵ Rule 1006 summaries frequently provide the *only* proof of such voluminous materials, and jurors must be instructed that such summaries are “evidence” upon which they may rely. For example, a summary of thousands of financial transactions may be admissible as a substitute for entering all those transactions into evidence. In comparison, a summary of transactions already entered into evidence is not itself evidence—it is an illustrative aid. Federal courts commonly conflate illustrative summaries and Rule 1006 summaries, mixing and mismatching the instructions that accompany each into the jury room.¹⁶

It is also unclear whether and in what circumstances a party should receive advance notice of the illustrative aids to be utilized by her adversary during trial. For aids crafted by a witness on the fly

12. *Baugh*, 730 F.3d at 706; *see Baugh v. Cuprum S.A. de C.V.*, 845 F.3d 838, 852 (7th Cir. 2017) (affirming lower court’s denial of Defendant’s motions for judgment as a matter of law and for new trial).

13. *See, e.g., United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980) (stating that the “better practice” is not to allow illustrative aids during deliberation but that the trial court has discretion to do otherwise).

14. *See United States v. James*, 955 F.3d 336, 344 (3d Cir. 2020) (noting that an illustrative aid is not evidence).

15. FED. R. EVID. 1006.

16. *See infra* note 57 and accompanying text (providing opinions showing confusion in the courts).

during her testimony, like the “chalks” of yesteryear, such notice seems impossible and unnecessary. For a PowerPoint slide deck created to highlight a lawyer’s arguments during closing, any advance notice raises concerns regarding proper respect for attorney work product. But for a complex computer animation created to illustrate an expert witness’s opinion regarding an accident, advance notice to the opposing party may be not only reasonable and practicable but also essential to fairness. While some federal courts require advance notice of illustrative aids, there is very little guidance in the case law regarding notice obligations.

Finally, because illustrative aids do not constitute “evidence,” they sometimes may be omitted from the trial record that is compiled for purposes of appeal.¹⁷ But as powerfully illustrated by the Seventh Circuit’s opinion in *Baugh*, an illustrative aid can make or break a trial. Although it may be difficult to include certain illustrative aids in the trial record—such as a witness’s extemporaneous markings on a white board—incorporating such aids into the trial record certainly reflects best practices.¹⁸ But nowhere in the case law or Federal Rules of Evidence is such a directive expressed.

The increasing reliance on illustrative aids in the courtroom has only amplified the risks inherent in vague and inconsistent standards. As PowerPoint presentations, interactive charts, graphs, and computer animations and recreations have become pervasive, the need for clear and predictable standards governing their use has grown. Additional decades of common law development are unlikely to resolve the myriad issues that can impede the optimal deployment of illustrative aids in the trial process.

An elegant and promising solution to the problems created by the nebulous and inconsistent common law standards governing the use of illustrative aids is a new Federal Rule of Evidence. The Federal Rules were tailor-made to provide an antidote to the complexity and inconsistency of the common law. A new evidence rule is an optimal vehicle for creating a shared vernacular that distinguishes trial aids from evidence and for setting a uniform standard that guides the

17. Rule 10(a) of the Federal Rules of Appellate Procedure states that the record on appeal must include “exhibits filed with the district court.” But PowerPoints used in closing argument, or markings on a chalkboard, are examples of illustrative aids that are not trial exhibits. *See Exhibit*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/exhibit> (last visited Sept. 19, 2024) [<https://perma.cc/YBW3-2J5N>] (“A document, photograph, object, animation, or other device formally introduced as evidence in a legal proceeding.”).

18. MUELLER ET AL., *supra* note 6, § 9.33, at 1186 (Illustrative aids “should be preserved as part of the record of trial to the extent possible”).

deployment of illustrative aids in every federal court. Lawyers would no longer be required to take a crash course on the proper use of illustrative aids in the heat of trial or adapt to markedly different practices deployed by different federal judges. And a rule of evidence could provide direction for trial judges on some of the critical and unresolved details regarding the proper handling of aids in the courtroom, including proper jury instructions and the provision of trial aids to jurors during deliberations.

To help bring much-needed coherence to trial practice surrounding illustrative aids, the federal Evidence Advisory Committee has proposed new Federal Rule of Evidence 107.¹⁹ Rule 107 is on track to take effect on December 1, 2024, under the rulemaking procedures established by the Rules Enabling Act.²⁰ Rule 107 helps to resolve the pesky problem of taxonomy that has often exacerbated confusion regarding the proper use of charts, summaries, diagrams, and tangible items at trial. Rule 107 makes clear that items used solely to illuminate and amplify witness testimony, other evidence, or attorney arguments are properly classified as “illustrative aids” that do not constitute “evidence.” Similar items offered instead as proof of a disputed fact are classified as “demonstrative evidence” that must meet the standards of relevance and reliability set by the Federal Rules of Evidence. Rule 107 creates a uniform balancing test to determine the propriety of utilizing an item solely as an illustrative aid, focusing on the value of the aid in advancing the comprehension of other evidence by the trier of fact. The Rule stresses the need for limiting instructions when illustrative aids are utilized. Rule 107 also provides that illustrative aids should ordinarily *not* be sent to the jury during deliberations absent consent by all parties, while preserving the discretion of the trial judge to do so for “good cause.” The new Rule also provides that illustrative aids should be entered into the record to facilitate appellate review where practicable. Finally, Rule 107 reinforces the distinction between illustrative summaries utilized only to amplify other admitted evidence and Rule 1006 summaries offered as substitute proof for admissible documents too voluminous to be conveniently examined at trial.

19. Memorandum from the Hon. John D. Bates, Chair, Comm. on Rules of Prac. and Proc., to Scott S. Harris, Clerk, U.S. Sup. Ct. 1080–81 (Oct. 23, 2023), https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf [<https://perma.cc/7GXE-QPKY>] [hereinafter “Final Proposal”].

20. See 28 U.S.C. § 2074 (“The Supreme Court shall transmit to the Congress not later than May 1 . . . Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.”).

Importantly, Rule 107 does not erect obstacles that will impede the use of helpful illustrative aids. Pedagogical devices have only become more important in conveying complex evidence to jurors, and Rule 107 is designed to facilitate their presentation. The balancing test codified in Rule 107 favors the use of such devices, providing that they should be rejected only when their utility in aiding juror comprehension is substantially outweighed by risks of prejudice or juror confusion. Rule 107 preserves the trial judge's discretion both to balance the need for an illustrative aid and to provide the aid to the jury during deliberations in appropriate cases. Although the commentary to Rule 107 flags the issue of notice for courts and counsel, the Rule does not impose any notice requirements around illustrative aids, leaving it to trial judges to determine on a case-by-case basis whether notice is necessary at all and, if so, what notice may be reasonable.

This Article introduces Federal Rule of Evidence 107 in four parts. Part I examines the thicket of cases that currently control the use of illustrative aids in federal court, exploring the multifarious standards, terminologies, and practices implemented in various jurisdictions. Part II demonstrates that rulemaking offers an optimal solution to the unnecessary complexity that plagues common law regulation of illustrative aids. Part II also describes the proposed amendments to Federal Rules of Evidence 611 and 1006, which were published for notice and comment in August of 2022 and were intended to establish a straightforward and uniform standard for evaluating illustrative aids. Part III explores the flood of concerns and criticisms that followed publication of the proposed amendments, carefully analyzing the merits and demerits of each. Part IV unveils new Federal Rule of Evidence 107, offering insights into the significant modifications made to the proposals that were designed to bring clarity and uniformity to the regulation of illustrative aids while preserving the creativity and flexibility prized by trial counsel. The Article then briefly concludes.

I. FEDERAL COURTS' CONFOUNDING COMMON LAW REGULATION OF ILLUSTRATIVE AIDS

Illustrative aids are presented in virtually every modern trial. Yet the drafters of the original Federal Rules included no provision that explicitly covered their use or guided judges and litigants in their proper deployment. As a result, federal courts have been left to regulate the appropriate use of illustrative aids on a case-by-case and courtroom-

by-courtroom basis. The lack of a standard tailor-made for regulating illustrative aids at trial has led to many points of confusion that undermine the fact-finding process.

A. A Vexing Vocabulary

The foundational problem with the current treatment of illustrative aids is one of vernacular. Federal courts deploy a variety of terms interchangeably to describe charts, summaries, diagrams, and other tangible items utilized at trial without clarifying the evidentiary import of such terminology. Courts have long referred to tangible items utilized in the process of proof as “demonstrative evidence.”²¹ But this term carries with it many connotations; it has been broadly deployed to cover everything from simulations to exemplars to PowerPoint presentations.²² One treatise has explained:

There are at least three definitions of demonstrative evidence in current use. One describes demonstrative evidence as anything that “appeals to the senses,” but this definition seems too broad because it reaches essentially everything (even testimony must be heard to be understood). An intermediate definition says that evidence is demonstrative if it conveys a “firsthand sense impression,” thus excluding testimony because it is a secondhand recounting of the witness[s] perceptions. An even narrower definition equates demonstrative evidence with “illustrative evidence,” thus limiting its scope to evidence used to explain or illustrate testimony (or other evidence) but lacking any substantive force of its own. Under such a definition, demonstrative evidence serves merely to add color, clarity, and interest to a party’s proof.²³

Other courts utilize additional terminology to refer to trial aids, referencing “demonstrative aids,” “illustrative evidence,” “illustrative aids,” “pedagogical aids,” and “pedagogical devices.” There is no shared understanding of the meanings of these varied terms or of the distinct

21. See *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 706 (7th Cir. 2013) (“In its broadest and least helpful use, the term ‘demonstrative’ is used to describe any physical evidence.”).

22. Professors Wright and Miller complain that the term “demonstrative” has grown “to engulf all the prior categories used to cover the use of objects as evidence. . . . As a result, courts sometimes get hopelessly confused in their analysis.” 22 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5172 (2d ed. 1982); see also 2 MCCORMICK ON EVIDENCE § 212 n.3 (Kenneth S. Broun ed., 8th ed. 2020) (recognizing critique of its own use of “single term ‘demonstrative evidence,’” noting that this approach “joins together types of evidence offered and admitted on distinctly different theories of relevance”).

23. MUELLER ET AL., *supra* note 6, § 9.33, at 1184 (footnotes omitted); see also MCCORMICK, *supra* note 22, § 212 n.3 (recognizing critique of its own use of “single term ‘demonstrative evidence,’” noting that this approach “joins together types of evidence offered and admitted on distinctly different theories of relevance”).

evidentiary significance each carries.²⁴ Scholars have lamented the disorganized state of the law surrounding illustrative aids arising from this loose nomenclature:

Some judges use the term demonstrative evidence to refer to any physical evidence, while others restrict the term's use to any nonadmissible exhibit to aid in understanding testimony or argument, and still others use the words demonstrative evidence to describe substantive physical evidence (such as the weapon in a murder trial). To add to the confusion, some judges use the term "illustrative" to refer to an entire subset of this evidentiary universe, sometimes using the terms demonstrative and illustrative interchangeably, yet at other times to describe discrete subparts of this evidentiary universe. Still other jurisdictions talk of "admitting" demonstrative evidence as shorthand for permitting its use at trial without formally admitting it into evidence.²⁵

The appellate panel in *Baugh* hypothesized that the trial court's abuse of discretion in sending the ladder to the jury during deliberations might have been caused by the vagueness of the term "demonstrative evidence."²⁶ The *Baugh* court emphasized the important distinction between exhibits that are admitted into evidence at trial to prove a fact and illustrative aids that are presented only to help the fact finder understand a witness's testimony or a party's presentation.²⁷ The former must meet the standards of relevance and reliability set by the Federal Rules of Evidence and *should* be sent to the jury to help form the basis for a verdict. The latter need not satisfy the admissibility standards of the Federal Rules and do *not* constitute evidence upon which the jury may rely in arriving at an appropriate outcome.²⁸ The absence of any uniform terminology that properly categorizes the ubiquitous charts, diagrams, PowerPoints, graphs, exhibits, and other tangible items utilized at trial and their appropriate evidentiary import undermines the otherwise significant value of such trial devices. Without a uniform vocabulary that clearly distinguishes exhibits and other tangible items introduced as substantive evidence from items that

24. See STEVEN GOODE & OLIN GUY WELLBORN III, *COURTROOM HANDBOOK ON FEDERAL EVIDENCE* 282 (2023) (offering confusing signals about what is meant by demonstrative evidence: "[w]ith respect to an item used *demonstratively or illustratively*, the foundation must establish that the item depicts relevant information that is or will be proven by other, substantive evidence; that it is accurate; and that it will probably aid the trier of fact in understanding the evidence") (emphasis added).

25. Maureen A. Howard & Jeffrey C. Barnum, *Bringing Demonstrative Evidence in from the Cold: The Academy's Role in Developing Model Rules*, 88 TEMP. L. REV. 513, 520 (2016) (footnotes omitted).

26. See *Baugh*, 730 F.3d at 709; see also Howard & Barnum, *supra* note 25, at 516 (noting that "without a uniform lexicon and agreed-upon rules, trial judges arrived at vastly different conclusions about the categorization, admissibility, and use of demonstrative evidence").

27. *Baugh*, 730 F.3d at 709–10.

28. See *id.*

are presented only to amplify and clarify other admitted evidence (but that themselves carry no probative weight), courts and litigants are doomed to struggle and err.²⁹

B. A Gatekeeping Standard for Illustrative Aids

The imprecise and variable terminology discussed above exacerbates federal courts' confusion regarding the proper standards to apply to courtroom exhibits. Some trial exhibits are substantive evidence designed to be utilized by the jury in deciding disputed issues of fact. Other trial exhibits and items are presented solely to amplify and clarify admitted evidence. The standards governing the use of these distinct types of exhibits are murky at best.³⁰

For exhibits and other tangible evidence offered to prove disputed issues of fact, parties must satisfy the Federal Rules of Evidence. The proponent of a tangible item involved in underlying events, like the weapon used to commit a murder, will need to establish its relevance and authenticity before the item is admitted into evidence and given to the jury during deliberations.³¹ When a litigant offers a demonstration (whether performed live in court or recorded outside of the courtroom prior to trial) in an effort to show how an incident in question occurred, courts typically rely on Rule 403 in weighing admissibility.³² The most important question will be whether the demonstration is conducted in circumstances bearing sufficient similarity to the facts in dispute.³³ Any demonstration that fails to

29. See *United States v. Prothro*, 41 F.4th 812, 822 (7th Cir. 2022) (referring confusingly to “demonstrative videos [the expert] created as pedagogical summaries to aid the jury in its understanding of admitted evidence”); *GCIU-Emp’r Ret. Fund v. Quad Graphics, Inc.*, 2019 WL 7945594, at *4 (C.D. Cal. Oct. 29, 2019) (“Demonstrative evidence is physical evidence that has no independent probative value, but which illustrates or demonstrates a party’s testimony or theory of the case. . . . [It] is simply used as a testimonial aid. . . .”); *Bayes v. Biomet, Inc.*, 2020 U.S. Dist. Lexis 171325, at *13 (E.D. Mo. Sept. 18, 2020) (stating that “demonstrative exhibits are not substantive evidence”).

30. See, e.g., *Lillie v. United States*, 953 F.2d 1188, 1190 (10th Cir. 1992) (“[A]ny kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence.”).

31. See, e.g., *United States v. Salerno*, 108 F.3d 730, 742 (7th Cir. 1997) (admitting scale model of crime scene into evidence as a demonstrative exhibit); see also FED. R. EVID. 401, 901.

32. FED. R. EVID. 403.

33. See, e.g., *United States v. Stewart-Carrasquillo*, 997 F.3d 408, 421–22 (1st Cir. 2021) (affirming exclusion under Rule 403 of a proposed demonstration of pulling large bales of drugs out of the ocean and into a boat); *Krause v. County of Mohave*, 459 F. Supp. 3d 1258, 1271 (D. Ariz. 2020) (“At a minimum, the animation’s proponent must show the computer simulation fairly and accurately depicts what it represents” (quoting *Friend v. Time Mfg. Co.*, 2006 WL 2135807, at *20 (D. Ariz. July 28, 2006))); see also *More JC, Inc. v. Nutone Inc.*, 2007 WL 4754173, at *7 n.5

replicate the context involved in the underlying case is likely to confuse the jury and unfairly prejudice the opposing party. If a recorded demonstration satisfies Rule 403, it should be submitted to the jury for consideration as substantive evidence during deliberations.³⁴

Exhibits and aids offered solely to illustrate and clarify witness testimony or other substantive evidence admitted in a case should be evaluated differently. Such aids are not evidence in their own right and possess no probative force beyond the witness testimony or other evidence they are designed to illuminate.³⁵ For that reason, the provisions regulating the substantive admissibility of trial exhibits are ill-suited to regulate the use of these trial aids. It is true that Rule 403 confers broad discretion upon trial judges, allowing them to exclude otherwise relevant evidence when its “probative value is substantially outweighed by” certain dangers.³⁶ And federal courts sometimes cite Rule 403 in regulating the use of illustrative aids at trial.³⁷ But the Rule 403 standard is a poor fit for the regulation of trial aids because it requires the court to assess the “probative value” of “evidence” in order to determine admissibility.³⁸ Illustrative aids are not “evidence,” have no “probative value,” and are not to be “admitted” at trial.

Many courts instead regulate the use of illustrative aids in the courtroom under Rule 611(a).³⁹ Conferring broad authority to run a

(W.D. Tex. Mar. 21, 2007) (collecting cases) (“The more the experiment appears to simulate the accident, the more similar the conditions of the experiment must be to the actual accident conditions.”).

34. See *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 704 (7th Cir. 2013) (“The district judge then overruled plaintiff’s objection and allowed the jurors to view the exemplar ladder in the courtroom.”). But as evidence of confusion on this point, see *United States v. Towns*, 913 F.2d 434, 445–46 (7th Cir. 1990) (admitting mask and gun as substantive instrumentalities of the crime in bank robbery prosecution, but refusing to allow them to go to the jury during deliberations); *Dachman v. Grau*, 2022 U.S. Dist. LEXIS 172836, at *2 (D.P.R. Sept. 21, 2022) (admitting a chart as “probative” “demonstrative evidence” but declaring that “in keeping with the designation of the chart as demonstrative evidence, it will not be admitted into evidence or go to the jury room”).

35. See, e.g., *United States v. Harms*, 442 F.3d 367, 375 (5th Cir. 2006) (explaining that an illustrative aid is not evidence because it is not offered to prove a fact in dispute).

36. FED. R. EVID. 403.

37. See, e.g., *United States v. Bakker*, 925 F.2d 728, 737 (4th Cir. 1991) (citing Rule 403, summaries properly excluded as they did not fairly represent the evidence); *United States v. Nelson*, 533 F. Supp. 3d 779, 801–02 (N.D. Cal. 2021) (finding that although an illustrative aid regarding cellphone company records was helpful, it should be excluded under Rule 403 because a statement on one of the slides that two Defendants were “traveling together” suggested concerted action that was not supported by the underlying data).

38. FED. R. EVID. 403.

39. See, e.g., *United States v. Kaley*, 760 F. App’x 667, 681–82 (11th Cir. 2019) (finding under Rule 611(a) and Rule 403 that the illustrative aid fairly represented the evidence); *United States v. Mendez*, 643 F. App’x 418, 423–24 (5th Cir. 2016) (“The photographs were part of a

trial, Rule 611(a) gives the trial court power to exercise “reasonable control over the mode and order of examining witnesses and presenting evidence.”⁴⁰ But Rule 611(a) does not explicitly address illustrative aids and offers no standard trial judges may apply in ascertaining their value. Because there is no rule that explicitly governs the presentation of illustrative aids at trial, federal courts have long utilized generalized common law principles to regulate their use.

Courts have typically demanded that illustrative aids be helpful to the fact finder and not inflammatory or misrepresentative of the underlying evidence they aim to highlight. For drawings, diagrams, charts, summaries, and other exhibits offered solely for their pedagogical or illustrative value, the trial judge has discretion to allow them to be presented to the jury. The judge must consider the extent to which the exhibits promise to assist the jury in understanding a witness’s testimony or a party’s presentation and balance that helpfulness against the risks of confusion, delay, and jury misuse.⁴¹ One particularly salient concern is whether the fact finder is likely to treat a mere illustrative aid as demonstrative evidence that possesses probative force in its own right.⁴² Federal courts are attuned to the risks

demonstrative aid to assist the jury in following along during the foreign language conversations. They are thus subject to FED. R. EVID. 611.”); *Apple, Inc. v. Corellium, LLC*, 2021 WL 2712131, at *1–2 (S.D. Fla. July 1, 2021) (citing Rule 611(a) and allowing the use of an illustrative aid that would help the jury understand a difficult concept); *United States v. Edwards*, 525 F. Supp. 3d 864, 868 (N.D. Ill. 2021) (relying on Rule 611(a) and informing the jury that a firearm used as an aid to illustrate “racking” a gun was not evidence); *United States v. Crinel*, 2017 WL 490635, at *11–12 & Attach. 2 (E.D. La. Feb. 7, 2017) (citing Rule 611(a) and ordering that an illustrative aid be modified so that it would not be misleading); *Johnson v. BLC Lexington SNF*, 2020 U.S. Dist. LEXIS 233263, at *40–43 (E.D. Ky. Dec. 11, 2020) (relying on Rule 611(a) to prohibit the use of an illustrative aid in opening and closing presentations because the illustrative aid was inflammatory and conclusory).

40. FED. R. EVID. 611(a).

41. See, e.g., *King v. Skolness (In re King)*, 2020 Bankr. LEXIS 2866, at *8 (Bankr. N.D. Ga. Oct. 14, 2020) (ruling that a spreadsheet was not admissible as an illustrative aid because “it presents cherry picked information . . . to present a conclusion about where the money included therein was spent,” making it “an ineffective method for determining the truth of the evidence presented as well as highly prejudicial to the Plaintiff”).

42. See, e.g., *Fusco v. Gen. Motors Corp.*, 11 F.3d 259, 264 & n.5 (1st Cir. 1993) (holding that a video offered as an illustrative aid was properly precluded because it was “rife with the risk of misunderstanding” as it looked “very much like a recreation of the event that gave rise to the trial,” and yet was not similar enough to the actual event to be admissible as substantive evidence); *Arup Lab’y, Inc. v. Pac. Med. Lab’y Inc.*, 2022 WL 3082908, at *5 (D. Utah Aug. 3, 2022) (precluding an illustrative aid because it was not a “fair and accurate” representation of the evidence); *Crinel*, 2017 WL 490635, at *11–12 & Attach. 2 (determining that an illustrative aid must be modified as it was misleading).

presented by prejudicial illustrative aids in bench trials and jury trials alike.⁴³

The case of *Rodriguez v. Village of Port Chester*⁴⁴ provides a good example of the prevailing approach to the regulation of illustrative aids. In that case, the Plaintiff sought to utilize a medical illustration of his injuries as an aid to “help the jury understand the anatomy of the ankle and exactly which bones were broken and how the injury affected the entirety of the ankle.”⁴⁵ The illustration of course played no part in underlying events and was created solely for use at trial. The Defendants objected to the use of the illustration, arguing that it improperly conveyed the artist’s “interpretive . . . spin to verbal descriptions of x-rays and CT scans.”⁴⁶ The Court found this argument meritless and concluded that the illustrative aid could be displayed to the jury. In so doing, the Court emphasized its obligation to “carefully weigh whether the exhibits are unduly prejudicial because the jury will interpret them as real-life recreations of substantive evidence that they must accept as true.”⁴⁷ The Court explained that the risk of such juror misuse of illustrative aids can be reduced by an instruction that tells jurors the exhibit is not evidence and reminds jurors of their “obligations to judge the facts themselves.”⁴⁸

The U.S. Court of Appeals for the Sixth Circuit also captured the proper role of illustrative aids and a court’s task in regulating them in *United States v. Bray*:

We understand the term “pedagogical device” to mean an illustrative aid such as information presented on a chalkboard, flip chart, or drawing, and the like, that (1) is used to summarize or illustrate evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary’s proponent. This type of exhibit is “‘more akin to argument than evidence’ since it organizes the jury’s examination of testimony and documents already admitted in evidence.” Trial courts have discretionary authority to permit counsel to employ such pedagogical-device “summaries” to clarify and simplify complex testimony or other

43. See *United States ex. rel. Morrell v. NortonLifeLock, Inc.*, 2022 WL 278773, at *5 n.6 (D.D.C. Jan. 31, 2022) (excluding as improper argument that PowerPoints were to be used in a bench trial as illustrative aids); *Houser v. Oceaneering Int’l, Inc.*, 2022 WL 3162205, at *1–4 (W.D. La. Aug. 8, 2022) (excluding an illustrative aid in a bench trial because “the plaintiff will not be able to sustain his burden of showing that the test/experiment depicted in the video is a fair and accurate depiction or representation of whatever it purports to depict or represent”).

44. 535 F. Supp. 3d 202 (S.D.N.Y. 2021).

45. *Id.* at 217.

46. *Id.* at 218.

47. *Id.* at 219.

48. *Id.*

information and evidence or to assist counsel in the presentation of argument to the court or jury.⁴⁹

Notwithstanding the great volume of federal cases reciting various factors to be weighed in evaluating illustrative aids, the cases are inconsistent in the methodology to be applied. Some courts treat such aids like other substantive evidence, relying on Rule 403 to gauge their fitness for trial. Many more depend on the amorphous Rule 611(a) that confers seemingly limitless discretion on the trial judge and contains no unifying or limiting principles. Judges and lawyers must look to a tangled mass of common law recitations regarding trial aids to uncover any consistent principles. The lack of a standard tailor-made for illustrative aids can lead to missteps, confusion, and inefficiency.⁵⁰ A universal balancing approach that distinguishes illustrative aids from true substantive exhibits and sets a standard applicable to their use could enhance and streamline the presentation of such aids in the courtroom.

C. Conflating Illustrative Aids and Rule 1006 Summaries

One common type of illustrative aid is the “summary”: a chart, diagram, graph, list, or other illustrative aid that helps jurors review, organize, and understand complex evidence. Summaries may take many forms, including charts, diagrams, graphs, and lists. As described above, summaries offered for illustrative purposes are permissible subject to the court’s discretion as currently exercised predominantly under Rule 611(a).⁵¹ They may be considered by the fact finder so long as they are consistent with the evidence, not misleading, and sufficiently helpful to the jury in understanding the evidence. Such a summary presented solely to clarify, connect, or illustrate admitted

49. 139 F.3d at 1104, 1111 (6th Cir. 1998) (citations omitted).

50. See *United States v. Towns*, 913 F.2d 434, 445–46 (7th Cir. 1990) (affirming the trial court’s ruling that admitted a mask and a gun as substantive evidence in a bank robbery prosecution as instrumentalities of the crime, but prohibited them from going to the jury during deliberations); *Dachman v. Grau*, 2022 U.S. Dist. LEXIS 172836, at *2 (D.P.R. Sept. 21, 2022) (admitting a chart as “probative” “demonstrative evidence,” but declaring that “in keeping with the designation of the chart as demonstrative evidence, it will not be admitted into evidence or go to the jury room”).

51. *Does I-XIX v. Boy Scouts of Am.*, 2019 WL 2448318, at *2 (D. Idaho June 11, 2019) (noting that “a summary ‘prepared by a witness from his own knowledge to assist the jury in understanding or remembering a mass of details . . . is admissible, not under Rule 1006, but under such general principles of good sense as are embodied in Rule 611(a)’” (quoting 5 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE* ¶ 1006[03] (1993))).

evidence is a pedagogical device that does not constitute evidence and that must be accompanied by a limiting instruction.⁵²

The Federal Rules of Evidence contain a provision specifically regulating the use of “summaries” of a very different nature, however. Rule 1006 is an exception to the “Best Evidence” Rule that permits a party to admit into evidence a “summary, chart, or calculation to prove the content” of admissible writings, recordings, or photographs that are too voluminous to be conveniently examined in court.⁵³ The Rule is designed to allow a summary to *substitute* for proof of the underlying materials themselves in order to improve trial efficiency.⁵⁴ Whereas an illustrative aid is not evidence but only serves to explain evidence or argument, a “summary” admitted through Rule 1006 *is evidence* that should be sent to the jury room and used by the jury to determine the content of the underlying documents it summarizes.⁵⁵ A properly admitted Rule 1006 summary, therefore, requires no limiting instruction cautioning jurors against its substantive use. Indeed, such an instruction undermines the very purpose of the Rule 1006 summary device.⁵⁶

Notwithstanding the simple elegance of the efficiency-driven Rule 1006 summary, there is a great deal of confusion regarding the device, stemming from opinions that conflate the principles governing use of a Rule 611(a) illustrative or pedagogical summary with the requirements for using the very different Rule 1006 summary.⁵⁷ The absence of a provision expressly regulating pedagogical or purely

52. See *United States v. Wood*, 943 F.2d 1048, 1053–54 (9th Cir. 1991) (affirming trial judge’s ruling allowing the Prosecution to utilize pedagogical summaries in a complex tax-fraud prosecution, but prohibiting the Defense’s use of summaries where the chart prepared by the defense witness was based on an incomplete analysis).

53. FED. R. EVID. 1006.

54. See 5 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN, DANIEL J. CAPRA & JESSICA BERCH, *FEDERAL RULES OF EVIDENCE MANUAL* 1006–07 (13th ed. 2023) (“Rule 1006 allows admission of summaries in lieu of having the voluminous records presented at trial.”).

55. *Id.* (“Because the summary itself is evidence, it may go to the jury room during deliberations, and no limiting instruction is necessary.”).

56. *Id.* Of course, the proponent of a Rule 1006 summary must lay a proper foundation for its admission. FED. R. EVID. 1006.

57. See, e.g., *United States v. James*, 955 F.3d 336, 344 (3d Cir. 2020) (holding that an objection to a summary under Rule 1006 was misplaced because the summary was not evidence but was presented as an illustrative aid, and noting that “this is hardly a subtle evidentiary distinction”); *White Indus. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1069–70 (W.D. Mo. 1985) (“[T]here is a distinction between a Rule 1006 summary and a so-called ‘pedagogical’ summary. The former is admitted as substantive evidence, without requiring that the underlying documents themselves be in evidence; the latter is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted.”).

illustrative aids and summaries, therefore, undermines the proper operation of the powerful Rule 1006 in important respects.

1. Erroneous Holdings That Rule 1006 Summaries Are “Not Evidence”

As noted above, a Rule 1006 summary is an evidentiary substitute for proof of writings and recordings that are too voluminous to be conveniently examined in court. To stand in as a substitute for the voluminous materials, the summary must be admitted as evidence, and the jury must be allowed to rely on it for proof of the content of the underlying voluminous materials. The Advisory Committee’s 1973 Note to Rule 1006 emphasizes that summaries covered by the Rule are proof: “The *admission* of summaries of voluminous books, records, or documents offers the only practicable means of making their content available to . . . [the] jury.”⁵⁸ And most courts have properly recognized the status of a Rule 1006 summary as evidence.⁵⁹ For instance, the U.S. Court of Appeals for the Fourth Circuit explained in *United States v. Janati*:

Because the underlying documents need not be introduced into evidence, the chart itself is admitted as evidence in order to give the jury evidence of the underlying documents.⁶⁰

Opinions in the Second and Sixth Circuit Courts of Appeals have mixed and matched illustrative summaries and Rule 1006 summaries, however, by holding that a Rule 1006 summary is not evidence; consequently, the use of the summary must be accompanied by a limiting instruction. For example, in *United States v. Ho*, the Second Circuit held that it is “proper[]” for the jury to be instructed that Rule 1006 charts “d[o] not [themselves] constitute independent evidence.”⁶¹

And in *United States v. Bailey*, the Sixth Circuit discussed the proper use of a Rule 1006 summary, stating that a Rule 1006 “summary should be accompanied by a limiting instruction which informs the jury

58. FED. R. EVID. 1006 advisory committee’s 1973 note (emphasis added).

59. *See, e.g.*, *United States v. White*, 737 F.3d 1121, 1135 (7th Cir. 2013) (“[T]he summary itself is substantive evidence—in part because the party is not obligated to introduce the underlying documents themselves.”); *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004) (“Because the underlying documents need not be introduced into evidence, the chart itself is admitted as evidence in order to give the jury evidence of the underlying documents.”); *United States v. Weaver*, 281 F.3d 228, 232–33 (D.C. Cir. 2002) (“As to Weaver’s claim that the court should have issued some sort of ‘safeguards’ with respect to [a Rule 1006 summary], we think he misapprehends the Rules of Evidence. . . . We therefore do not understand Weaver’s point that an instruction was needed because the exhibit constituted inadmissible evidence.”).

60. *Janati*, 374 F.3d at 273.

61. 984 F.3d 191, 210 (2d Cir. 2020).

of the summary's purpose and *that it does not constitute evidence.*"⁶² While finding the error harmless, the Court held that the trial court erred in admitting a summary of voluminous recordings without a limiting instruction.⁶³

The U.S. Court of Appeals for the Fifth Circuit has an intracircuit conflict on the evidentiary status of a Rule 1006 summary and the need for a limiting instruction. In *United States v. Bishop*, the Fifth Circuit held that a Rule 1006 summary "should be accompanied by a cautionary jury instruction."⁶⁴ That same year, in *United States v. Williams*, however, the Fifth Circuit wrote that a "summary chart that meets the requirements of Rule 1006 is itself evidence and no instruction is needed."⁶⁵ More recently, the Court in *United States v. Spalding* acknowledged the confusion in the Fifth Circuit case law, ultimately concluding that a Rule 1006 summary constitutes "substantive evidence" that jurors may bring to the jury room.⁶⁶

The federal opinions that deny Rule 1006 summaries their proper substantive evidentiary status are confusing them with summaries that are illustrative aids.⁶⁷ Rule 1006 summaries are frequently robbed of their power by the inappropriate application of the

62. 973 F.3d 548, 567 (6th Cir. 2020) (emphasis added) (quoting *United States v. Vasilakos*, 508 F.3d 401, 412 (6th Cir. 2007)).

63. *Id.* Cases conflict within the Sixth Circuit, however. In *United States v. Bray*, the Sixth Circuit explained that "[s]ince Rule 1006 authorizes the admission in evidence of the summary itself, it is generally inappropriate to give a *limiting* instruction for a Rule 1006 summary." 139 F.3d 1104, 1111 (6th Cir. 1998). The Court acknowledged that the Sixth Circuit had been "less than clear" on this point. *Id.*

64. 264 F.3d 535, 547 (5th Cir. 2001); *see also* *United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985) (approving an instruction that a Rule 1006 summary was "not to be considered as the evidence in the case").

65. 264 F.3d 561, 575 (5th Cir. 2001).

66. *See* 894 F.3d 173, 185 n.17 (5th Cir. 2018).

67. *Compare* *United States v. Yousef*, 327 F.3d 56, 63 (2d Cir. 2003) (finding that charts were properly admitted as summaries of admissible evidence under Rule 1006 and that the trial judge properly informed the jury that the charts were not evidence), *and* *United States v. White*, 737 F.3d 1121, 1126 (7th Cir. 2013) (affirming the trial court ruling admitting summaries under Rule 1006, instructing the jury that the summaries were not evidence, and allowing the jury to consider the summaries during deliberations), *with* *United States v. Manahe*, 2023 WL 2314950, at *4 (D. Me. Mar. 1, 2023) ("Generally, a Rule 1006 summary chart is secondary evidence used as a substitute for the originals and thus can be used during jury deliberation, while a Rule 611(a) summary chart is not itself evidence and cannot replace the underlying documents during jury deliberation because of its argumentative nature."), *and* *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985) (distinguishing between summaries that are admitted under Rule 1006 and "other visual aids that summarize or organize testimony or documents that have already been admitted in evidence"; concluding that summaries admitted under Rule 1006 should go to the jury room with other exhibits, but summaries used as visual aids should not be sent to the jury room without the consent of the parties).

standards applicable to the very different illustrative summary. Lawyers trip over the nebulous distinction between illustrative summaries and those admissible through Rule 1006 as well.⁶⁸

2. Admission of the Underlying Documents or Recordings into Evidence

Rule 1006 allows a summary of voluminous documents to be admitted *as a substitute* for the underlying documents themselves. Indeed, Rule 1006 is designed to dispense with the cumbersome task of admitting materials too “voluminous” to be “examined in court.”⁶⁹ In contrast, illustrative summaries utilized only to aid in understanding must summarize underlying information that is itself admitted into evidence.⁷⁰

Many courts have correctly recognized that the voluminous materials underlying a Rule 1006 summary need not themselves be introduced into evidence. For example, in *United States v. Appolon*, the U.S. Court of Appeals for the First Circuit explained as follows:

Federal Rule of Evidence 1006 does not require that the documents being summarized also be admitted. . . . Accordingly, whether the documents themselves were introduced is of no consequence.⁷¹

The Seventh Circuit, in *United States v. White*, likewise emphasized that a party submitting a proper Rule 1006 summary “is

68. See, e.g., *Arup Lab’s, Inc. v. Pac. Med. Lab’y Inc.*, 2022 WL 3082908, at *5 (D. Utah Aug. 3, 2022) (party arguing that an exhibit is an admissible “illustrative exhibit[] under Rule 1006”—which the Court found “overlooks the fact that illustrative exhibits are not necessarily the same as Rule 1006 summaries”).

69. FED. R. EVID. 1006.

70. See, e.g., *Fairholme Funds, Inc., v. Fed. Hous. Fin. Agency*, 636 F. Supp. 3d 144, 162 (D.D.C. 2022) (“[Where the chart is illustrative] and plaintiffs do not argue that the home price index data are sufficiently voluminous to warrant summarization under Rule 1006, the Court will not allow Hartman to present her charts summarizing those data unless the data are first offered into evidence.”).

71. 715 F.3d 362, 374 (1st Cir. 2013); see also *United States v. White*, 737 F.3d 1121, 1135 (7th Cir. 2013) (stating that a party relying on a proper Rule 1006 summary “is not obligated to introduce the underlying [evidence]. . . .”); *United States v. Hemphill*, 514 F.3d 1350, 1358 (D.C. Cir. 2008) (same); *United States v. Manamela*, 463 F. App’x 127, 132 (3d Cir. 2012) (“Rule 1006 does not require that the underlying materials actually be admitted into evidence.”); *United States v. Rizk*, 660 F.3d 1125, 1131 (9th Cir. 2011):

Rule 1006 permits admission of summaries based on voluminous records that cannot readily be presented in evidence to a jury and comprehended. It is essential that the underlying records from which the summaries are made be admissible in evidence, and available to the opposing party for inspection, but the underlying evidence does not itself have to be admitted in evidence and presented to the jury.

not obligated to introduce the underlying [evidence] . . . ”⁷² And in *United States v. Hemphill*, the U.S. Court of Appeals for the D.C. Circuit rejected an argument that the proponent must introduce the documents underlying a Rule 1006 summary, because the whole point of Rule 1006 is to *avoid* introducing all the documents.⁷³

In contrast, some federal courts have mistakenly held that, before a Rule 1006 summary may be used, the underlying voluminous writings or recordings themselves *must be admitted* into evidence. For example, a number of cases in the U.S. Court of Appeals for the Eighth Circuit employ a standard for admitting a Rule 1006 summary that requires admission of underlying materials:

Summary evidence is properly admitted when (1) the charts “fairly summarize” voluminous *trial evidence*; (2) they assist the jury in “understanding the *testimony already introduced*”; and (3) “the witness who prepared the charts is subject to cross-examination *with all documents used to prepare the summary.*”⁷⁴

Some cases from the Fifth Circuit also declare that Rule 1006 summaries must be “based on competent evidence already before the jury.”⁷⁵ Thus, in *United States v. Mazkouri*, the Court upheld the use of Rule 1006 summary charts, in part because “the charts were based on data in two spreadsheets that the court admitted into evidence.”⁷⁶ Similarly, in *United States v. Bishop*, a prosecution for tax evasion, the government presented charts “summarizing and clarifying the government witnesses’ analysis.”⁷⁷ The Fifth Circuit analyzed the charts’ admissibility under Rule 1006 and held that a Rule 1006 summary “must have an adequate foundation in evidence that is

72. 737 F.3d 1121, 1135 (7th Cir. 2013).

73. 514 F.3d 1350, 1358 (D.C. Cir. 2008).

74. *United States v. Green*, 428 F.3d 1131, 1134 (8th Cir. 2005) (emphasis added); *see also* *United States v. Fechner*, 952 F.3d 954, 959–60 (8th Cir. 2020) (applying this standard); *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 771 (8th Cir. 2020), *cert. denied*, 209 L. Ed. 2d 577 (2021) (same). *But see* *United States v. Shorter*, 874 F.3d 969, 978 (7th Cir. 2017) (noting that the *Green* opinion mistakenly recited the requirements for admission of a Rule 1006 summary because it “misapplied its earlier decision . . . which was a case involving the admissibility of pedagogical charts”).

75. *United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018); *see also* *United States v. Mazkouri*, 945 F.3d 293, 301 n.1 (5th Cir. 2019); *United States v. Harms*, 442 F.3d 367, 375 (5th Cir. 2006). *But see* *United States v. Buck*, 324 F.3d 786, 790 (5th Cir. 2003) (“Th[e] use of summaries [allowed under Rule 1006] should be distinguished from charts and summaries used only for demonstrative purposes to clarify or amplify argument based on evidence that has already been admitted . . . ” (quoting 5 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 1006.02[5], at 1006–06 (8th ed. 2002))).

76. *See* 945 F.3d at 301 n.1.

77. *See* 264 F.3d 535, 546 (5th Cir. 2001).

already admitted[] and should be accompanied by a cautionary jury instruction.”⁷⁸

Decisions that require the admission of the voluminous underlying records supporting a summary misunderstand the purpose of a Rule 1006 summary. A Rule 1006 summary substitutes for those records after the trial judge has determined that they are so voluminous that they cannot be conveniently examined in court.⁷⁹ This misunderstanding arises from confusion about the distinction between illustrative summaries (which must be based on admitted evidence and are not themselves evidence) and Rule 1006 summaries (which offer alternate proof of the “content” of voluminous admissible records).⁸⁰ The lack of a rule that specifically regulates the use of illustrative aids, clarifies the foundation required for their use, and distinguishes them from Rule 1006 summaries perpetuates this longstanding confusion in the courts.

D. Illustrative Aids in the Jury Room

Another area of confusion and disagreement plaguing the use of illustrative aids and threatening courtroom efficiency involves the trial court’s discretion to send an illustrative aid to the jury during deliberations over objection. Precisely because illustrative aids are so helpful, jurors sometimes request access to them during deliberations.

78. *Id.* at 547; *see also* *United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985) (approving admission of Rule 1006 summary with instruction that it was “not to be considered as the evidence in the case”); *United States v. Hart*, 295 F.3d 451, 454 (5th Cir. 2002) (“The trial court has discretion to determine whether *illustrative* charts may be used pursuant to Fed. R. Evid. 1006.”) (emphasis added). For another example of confusion, *see United States v. Osborne*, 677 F. App’x 648, 656 (11th Cir. 2017):

[T]he [Rule 1006] exhibits were supported by the record, the supporting evidence was presented to the jury (and, in fact, included with the summary exhibits), and the court properly instructed the jury on the role of the summary exhibits, explaining that the jury could rely on them only to the extent that it found them helpful but that the summaries should not replace the source evidence.

Confusion often arises when a case analyzing a Rule 611(a) summary is later used in analyzing the admissibility of a Rule 1006 summary. *See, e.g., United States v. Lauria*, 541 F. Supp. 3d 311, 316 (S.D.N.Y. 2021). In *Lauria*, the Court cited *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989), which analyzed the admissibility of Rule 611(a) summaries, when a party sought to admit summary charts of voluminous phone records through Rule 1006. *Id.*

79. *See* SALTZBURG ET AL., *supra* note 54, at 1006–07 (“Rule 1006 allows admission of summaries in lieu of having the voluminous records presented at trial.”).

80. *See United States v. Shorter*, 874 F.3d 969, 978 (7th Cir. 2017) (noting that the Eighth Circuit’s opinion in *Green* mistakenly recited the requirements for admission of a Rule 1006 summary because it “misapplied its earlier decision . . . which was a case involving the admissibility of pedagogical charts”).

Some courts have held that an illustrative aid may not be given to the jury for use in deliberations because it is not evidence and because access to an aid during deliberations amplifies the risk that jurors will rely on it substantively to resolve disputed questions.⁸¹ Other courts have found that a trial judge has flexibility in determining whether and under what circumstances to allow jurors access to purely illustrative aids.

The Seventh Circuit confronted this issue in *Baugh v. Cuprum* involving the exemplar ladder, erecting a per se prohibition on the transmission of illustrative aids to the jury during deliberations over objection.⁸² As described above, the trial court permitted the defense expert in the case to utilize a ladder of the same make and model as the one involved in the Plaintiff's accident to illustrate "for demonstrative purposes" the proper operation of the ladder and the expert's opinion about the Plaintiff's use of the ladder.⁸³ When the jury retired to deliberate, they were not given the exemplar ladder. During deliberations, the jurors asked the trial judge for access to the ladder to aid in their inquiry. The Plaintiff objected to the request, arguing that the exemplar ladder had only been permitted in the courtroom to help jurors comprehend the testimony of the defense expert, that the ladder had not satisfied the requirements for admission into evidence, and that "the practice in this courthouse, as far as I have known," has never been to send demonstrative aids to the jury.⁸⁴ After three days of back and forth regarding this issue, the trial judge ultimately sent the ladder to the jury, instructing them that "[p]ursuant to your request, I am allowing the exemplar ladder to be taken into the jury room. You may

81. See, e.g., *United States v. Fults*, 639 Fed. App'x 366, 370 (6th Cir. 2016) (explaining that only exhibits admitted into evidence may go to the jury room); *United States v. Buck*, 324 F.3d 786, 791 (5th Cir. 2003) ("It was proper for the diagram to be shown to the jury, to assist in its understanding of testimony and documents that had been produced, but the diagram should not have been admitted as an exhibit or taken to the jury room." (footnotes omitted)); *United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980):

It would appear to be the better practice . . . to have excluded the illustrative evidence from the jury room. The role of such evidence is preferably that of a testimonial aid for a witness or as an aid to counsel during argument. Otherwise, evidence of this sort may cause error in that it can present an unfair picture of the testimony at trial and can be a potent weapon for harm due to its great persuasiveness;

H & L Farms, LLC v. Silicon Ranch Corp., 2023 WL 1795705, at *2 (M.D. Ga. Feb. 7, 2023) (ordering that "only exhibits that are admitted as evidence shall go to the jury room," though referring to illustrative aids as "demonstrative evidence").

82. See *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 704 (7th Cir. 2013).

83. See *id.* (explaining that the expert jumped on the ladder "as if it were a pogo stick" and tipped it in different directions).

84. See *id.*

fully examine the ladder. Under no circumstances are you to endeavor to reconstruct the occurrence.”⁸⁵ The jury returned a defense verdict approximately three hours later.

The Plaintiff appealed, arguing that it was harmful error to provide the ladder to the jury when the ladder was utilized at trial solely as an illustrative device. The Seventh Circuit agreed, reversing the judgment in favor of the defendant ladder manufacturer. The panel reasoned: “We would not allow a lawyer to accompany the jury into the deliberation room to help the jurors best view and understand the evidence in the light most favorable to her client. The same goes for objects or documents used only as demonstrative exhibits during trial.”⁸⁶ The Court also predicted that a lawyer may object more aggressively to an opponent’s trial aids if she knows they will accompany the jury into deliberations, thus aggravating disputes over trial aids and undermining their use. The Court thus concluded that the “general rule is that materials not admitted into evidence simply should not be sent to the jury for use in its deliberations.”⁸⁷ Therefore, the trial judge lacked discretion to send an illustrative aid to the jury room—even upon the jury’s request—over the Plaintiff’s objection.⁸⁸ As noted above, the Plaintiff won an \$11 million verdict on retrial where jurors lacked access to the ladder. Because illustrative aids do not satisfy evidentiary requirements and lack probative force, other courts have aligned with the Seventh Circuit in denying trial judges discretion to send aids to the jury room.⁸⁹

Other federal opinions suggest that trial judges *do* possess discretion to send a helpful illustrative aid to the jury room to aid in deliberations—even over objection—so long as it is accompanied by an instruction cautioning jurors that the aid is not evidence. The Sixth Circuit, in *United States v. Robinson*, highlighted disagreement and confusion about the discretion of the trial judge to send illustrative aids to the jury room.⁹⁰ In *Robinson*, the Defendant argued that the District

85. *See id.* at 705.

86. *See id.* at 708.

87. *See id.* at 705 (citing *Bankcard Am., Inc. v. Universal Bancard Sys., Inc.*, 203 F.3d 477, 483 (7th Cir. 2000)).

88. *See id.* at 703.

89. *See, e.g., United States v. Harms*, 442 F.3d 367, 375 (5th Cir. 2006) (stating that illustrative aids “should not go to the jury room absent consent of the parties”); *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004) (“[Pedagogical devices are considered] under the supervision of the district court under Rule 611(a), and in the end they are not admitted as evidence.”).

90. *See* 872 F.3d 760, 779–80 (6th Cir. 2017).

Court erred when it allowed illustrative aids to be used by the jury during deliberations. The aids consisted of bullet points and a flowchart displayed during the testimony of an FBI agent. As in *Baugh*, the jurors requested access to the aids. Over a defense objection, the District Court sent these aids to the jury but also read a pattern jury instruction stating that “[the demonstrative aids] were offered to assist in the presentation and understanding of the evidence” and “[were] not evidence [themselves] and must not be considered as proof of any facts.”⁹¹

In reviewing the trial court’s handling of the illustrative aids, the Sixth Circuit acknowledged that “the law is unclear as to whether it is within a district court’s discretion to provide a deliberating jury with demonstrative aids that have not been admitted into evidence.”⁹² The Court found it unnecessary to rule on the practice because any error was harmless, as the summaries sent to the jury merely reiterated evidence already admitted at trial. Other courts have opined that the “better practice” is to keep illustrative aids from the jury room but have ultimately held that it is not error to submit them for deliberation if the trial court gives an appropriate limiting instruction.⁹³

This debate regarding juror access to illustrative aids during deliberations reflects yet another point of confusion that has the potential to undermine a fair and efficient trial process. As seen in *Baugh*, the otherwise effective trial of a straightforward products liability case can be tripped up at the finish line by an improvident decision regarding juror access to illustrative aids. Regardless of the position it takes, a uniform and clear rule regulating juror access to illustrative aids would ensure that all litigants and trial judges throughout the federal court system are playing from the same musical score and would prevent wasteful retrials necessitated by a lack of clear standards.

E. Foul or Fair: Advance Notice of Illustrative Aids

Providing adversaries notice of the illustrative aids to be used at trial has proved a complex and controversial issue. On the one hand, many illustrative aids are created extemporaneously during trial, making any advance notice impossible. Witnesses may draw on

91. See *id.* at 779.

92. See *id.* at 779–80.

93. See, e.g., *United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980).

photographs or other exhibits as they testify or may craft diagrams of a crime scene or intersection to help the jury visualize the events the witnesses describe.⁹⁴

Notice of aids that *are* developed in advance may be inappropriate if they reflect a lawyer's trial strategy. Counsel increasingly depend on PowerPoint presentations to help highlight themes during opening statements and closing arguments.⁹⁵ Forcing trial counsel to share such sensitive, strategic material ahead of its use may undermine protections for attorney work product.⁹⁶ In criminal cases, documents made by an attorney for the government in connection with investigating or prosecuting a case and "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent[] during the case's investigation or defense" are not subject to advance disclosure.⁹⁷

Yet, illustrative aids are designed to make a strong impression on the fact finder. And such aids can inject significant unfair prejudice into a case if they mischaracterize the evidence or seek to inflame the jury.⁹⁸ If trial lawyers display such aids to the jury without affording their opponents and the court any opportunity to review them and to object in advance, they may inflict irreversible harm.⁹⁹ Although trial judges may thereafter instruct jurors to "ignore" an inflammatory aid, mere mortals may find that instruction difficult to obey.¹⁰⁰ Trial judges thus often demand *some* advance disclosure—even if only moments before a trial aid is unveiled—to ensure an opportunity for counsel to object and for the court to review the aid before it is shared with

94. CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE § 9.33 at 1185 (Aspen 6th ed. 2018) ("A witness might make a drawing to clarify her testimony.")

95. See, e.g., Benjamin K. Bergman, *The Effective Use of PowerPoint Presentation*, JACKSON BERGMAN ATT'Y AT L. (Aug. 10, 2017), <https://www.jacksonbergman.com/blog/2017/august/the-effective-use-of-powerpoint-presentations-in/> [<https://perma.cc/2UJJ-G6HV>] (noting and advocating for the increasing use of PowerPoints in argument).

96. FED. R. CIV. P. 26(b)(3) (protection for trial-preparation materials); see also SEVEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE, RULES & COMMENTARY 852 (West, 2022) ("A lawyer's . . . mental impressions, conclusions, legal theories, or opinions are provided special protection under the work-product doctrine.")

97. FED. R. CRIM. P. 16 (a)(2), (b)(2)(A).

98. See, e.g., *King v. Skolness (In re King)*, 2020 Bankr. LEXIS 2866, at *8 (Bankr. N.D. Ga. Oct. 14, 2020) (finding that an illustrative aid presenting "cherry picked information" was "an ineffective method for determining the truth of the evidence presented as well as highly prejudicial to the Plaintiff").

99. See ME. R. EVID. 616 advisers' note.

100. See *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (Jackson, J., concurring).

jurors.¹⁰¹ Some federal courts have held that illustrative aids must be disclosed in civil cases well in advance of trial, either as part of mandatory pretrial disclosures or expert disclosures.¹⁰² At the other end of the spectrum, some federal courts have found that illustrative aids are not subject to formal disclosure requirements at all because they are not evidence.¹⁰³ Thus, the notice required of an illustrative aid under current common law regulation will depend on the type of case, the type of aid, and the particular court in which a case is pending.

II. NEW FEDERAL RULE OF EVIDENCE TO PAINT A CLEARER PICTURE FOR ILLUSTRATIVE AIDS

A. Rulemaking to the Rescue

The natural antidote to the confusion and inconsistency plaguing the use of illustrative aids at trial is a new Federal Rule of Evidence. The Federal Rules of Evidence were enacted in 1975 to resolve the inefficiencies and unfairness inherent in a purely common law system for the regulation of trial evidence.¹⁰⁴ In its Preliminary Report, the committee that convened to study the desirability of an evidence code characterized the common law of evidence as “an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists”; as “a mass not capable of being perfectly mastered and used by everyday judges and practitioners”; as “too extensive, too complex, and too uncertain to apply accurately on the spur of the moment”; and as a “spawning mass of rulings and statutes

101. MUELLER ET AL., *supra* note 6, § 9.33, at 1185 (stating that illustrative aids require “particularly careful judicial monitoring because of [their] capacity to mislead and because of the potent and often inalterable image [they] leave[] in jurors’ minds”).

102. *See, e.g.,* Dahlberg v. MCT Transp., LLC, 571 Fed. App’x 641, 646–47 (10th Cir. 2014) (affirming trial court’s exclusion of animations that were to be used only to “make [the expert’s] testimony clear” as untimely under Rule 26(a)(2)(B)(iii) because Plaintiff disclosed them “just before trial”); United States *ex rel.* Morsell v. NortonLifeLock, Inc., No. 12-800, 2022 WL 278773, at *4–5 (D.D.C. Jan. 31, 2022) (explaining that Rule 26(a)(2)(B) requires, as part of pretrial expert disclosures, notice of illustrative aids used in support of an expert’s findings; excluding illustrative aid due to lack of notice); Lasher v. Wippefurth, No. 16-cv-03158, 2018 WL 10911500, at *2 (D. Colo. Nov. 3, 2018) (excluding animation of collision depicting Plaintiff’s expert’s opinions that was provided to Defendant one month before trial).

103. *See, e.g.,* Baugh *ex rel.* Baugh v. Cuprum S.A. de C.V., 730 F.3d 701, 703 (7th Cir. 2013) (noting that the Plaintiff objected to the use of the ladder as an illustrative aid because it had not been disclosed as part of the expert’s report, but the trial court found that “since the ladder was being offered only as a demonstrative exhibit, plaintiff’s objections to untimely disclosure were irrelevant”).

104. An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

which tend increasingly to clog trial machinery.”¹⁰⁵ Trial judges and lawyers were hard pressed to locate and apply controlling standards efficiently in the haze of the common law.¹⁰⁶

The Federal Rules of Evidence drastically improved the state of the trial process with a set of concise, common sense standards applicable to all federal proceedings.¹⁰⁷ In the almost fifty years since they became effective, the Federal Rules of Evidence have not only streamlined and unified federal practice but also have served as an important model for state evidence codes as well.¹⁰⁸ But the Rules do not cover all aspects of trial practice exhaustively. For example, the Federal Rules contain no provisions regulating impeachment of trial witnesses on the basis of bias, sensory perception, or contradiction, leaving the regulation of these well-accepted methods to the broad standards of relevance and probative value found in Rules 401 and 403.¹⁰⁹

The original drafters of the Rules afforded illustrative aids similar treatment, including no provision expressly regulating their use and thus leaving their management to trial judges and litigants on a case-by-case basis. But the confusion and inconsistency that continue to burden the effective use of illustrative aids demonstrate that such trial aids would benefit from their own dedicated Federal Rule of Evidence. A broad, common sense standard in keeping with the tenor of the Rules could bring consistency and clarity to the use of illustrative aids without hamstringing litigant efforts to maximize the persuasive force of their presentations. If Rules of Evidence are about anything, they are about the existence of a single, identifiable standard that assists the parties and the court in ensuring that information is properly and fairly presented to the trier of fact. The existing patchwork of provisions used variably to oversee illustrative aids has proven unequal to the task of bringing needed clarity and efficiency to the law of trial aids. And, as demonstrated above, the lack of a provision

105. Judicial Conference, Special Comm. on Evidence, Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts, 30 F.R.D. 73, 109 (1962) [hereinafter “Preliminary Study”].

106. See Edward J. Imwinkelried, *The Golden Anniversary of the “Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts”: Mission Accomplished?*, 57 WAYNE L. REV. 1367, 1370 (2011) (noting the common law problem of the lack of any rule governing certain questions).

107. *Id.*

108. See GREGORY P. JOSEPH & STEVEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (Michie, 1989) for an account of the impact of the Federal Rules on the state rules of evidence.

109. *United States v. Abel*, 469 U.S. 45, 54 (1984).

explicitly covering illustrative aids is undermining the intended and proper use of summaries of voluminous information that *is* provided for through Rule 1006. Indeed, a Federal Rule of Evidence regulating illustrative aids may be overdue as scholars have previously called for rulemaking to bring sense to the law of illustrative aids, arguing that “law professors should confer and agree on Model Rules for Demonstrative Evidence (Model Rules). They should present proposed amendments both to the Advisory Committee and to their state counterparts for consideration, debate, and adoption.”¹¹⁰

A bespoke Federal Rule of Evidence could resolve the most basic errors that threaten effective use of illustrative aids and encourage the proper use of true demonstrative evidence and Rule 1006 summaries. A rule could untangle the terminological difficulties surrounding trial aids, clarifying that nonevidentiary presentations offered solely to illuminate witness testimony, attorney argument, or other admitted evidence are “illustrative aids” and distinct from demonstrations and other tangible evidence admitted into evidence to resolve disputed questions. A new illustrative aid rule could also alleviate the errors that plague application of Rule 1006, delineating the line between pedagogical summaries offered to enhance the presentation of other evidence and Rule 1006 summaries that stand in for proof of underlying voluminous materials. An evidence rule could set a standard for weighing the utility of trial aids, unifying all federal courtrooms around identical factors and considerations. The provision could educate both judges and lawyers on the need for appropriate limiting instructions and could address the thorny issues of notice and of illustrative aids in the jury room during deliberations.

Although the federal system has historically relied on common law regulation of illustrative aids, one state has successfully employed rulemaking to govern illustrative aids. To address confusion surrounding the use of illustrative aids, Maine adopted an evidence rule to simplify and clarify their proper implementation:

110. Howard & Barnum, *supra* note 25, at 518; *see id.* at 518 (noting that “without a uniform lexicon and agreed-upon rules, trial judges arrived at vastly different conclusions about the categorization, admissibility, and use of demonstrative evidence”); *see also* Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 1018–19 (1992) (proposing that Rule 401 be revised to recognize different admissibility standards for what the authors term “primarily relevant evidence” and “derivatively relevant proof”).

Maine Rule of Evidence 616. Illustrative Aids

(a) Otherwise inadmissible objects or depictions may be used to illustrate witness testimony or counsel's arguments.

(b) The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time.

(c) Opposing counsel must be given reasonable opportunity to object to the use of any illustrative aid prepared before trial.

(d) The jury may use illustrative aids during deliberations only if all parties consent, or if the court so orders after a party has shown good cause. Illustrative aids remain the property of the party that prepared them. They may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.¹¹¹

This provision blesses the use of illustrative aids and sets a standard by which they are measured. It also offers guidance regarding an opponent's opportunity to object to illustrative aids and for their provision to the jury and preservation for the record on appeal. The commentary to Maine Rule of Evidence 616 helpfully describes and distinguishes demonstrative evidence, illustrative aids, and Rule 1006 summaries of voluminous materials, minimizing the opportunity for misconception and misapplication of distinct evidentiary principles. The Maine provision appears to have served its intended function, minimizing errors and litigation concerning the use of illustrative aids in Maine courts.¹¹²

Although the states often take their evidentiary cues from the Federal Rules of Evidence, the states may also serve as helpful laboratories for experimentation with novel evidentiary approaches. The Federal Rules of Evidence could benefit from Maine's avant-garde effort to clarify the regulation of illustrative aids and include a similar provision to bring more order not only to federal treatment of

111. ME. R. EVID. 616.

112. Since its enactment in 1997, Maine Rule 616 has generated only a handful of reported cases concerning its meaning or application, and few reversals. *See, e.g.*, *Irish v. Gimbel*, 743 A.2d 736, 738–39 (Me. 2000) (finding error under Rule 616 where the trial court permitted a two-by-three foot blowup of a medical malpractice panel's finding and the blowup was to be displayed during the entirety of the trial); *Merrill v. Sugarloaf Mtn. Corp.*, 745 A.2d 378, 386 (Me. 2000) (affirming decision to allow Defendant to display an illustrative aid depicting areas of ski slope unrelated to the Plaintiff's accident for the purpose of educating the jury on the difference between groomed and ungroomed snow conditions); *State v. Irving*, 818 A.2d 204, 210–11 (Me. 2003) (upholding decision to allow the Prosecution to display an enlarged high school graduation photo of the victim during its opening statement); *Jacob v. Kippax*, 10 A.3d 1159, 1165 (Me. 2011) (affirming decision to allow a blowup of a medical malpractice panel's opinion to be shown during closing argument, stating that "the display of the enlargement for limited periods during Kippax's closing . . . was also permissible pursuant to *Irish* []and M.R. EVID. 616").

illustrative aids but also to the use of true demonstrative evidence and Rule 1006 summaries.

*B. Proposed Amendments to the Federal Rules of Evidence:
Rules 611(d) and 1006*

In an effort to bring order to the confusion surrounding illustrative aids in federal court, the Federal Advisory Committee on Evidence Rules unanimously approved two Rules for public comment in the Spring of 2022: (1) a new Rule 611(d) to regulate illustrative aids and articulate the distinction between illustrative aids and demonstrative evidence and (2) an amendment to Rule 1006 to differentiate summaries offered solely as illustrative aids from summaries admitted into evidence to prove the content of voluminous underlying materials. This was the first step for the Advisory Committee on the road to the ultimate adoption of a new Rule 107.

1. Proposed Rule 611(d).

As released for public comment, proposed Rule 611(d) read as follows:

Proposed Federal Rule of Evidence 611(d). 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.¹¹³

113. Comm. on Rules of Prac. and Proc., *Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure and the Federal Rules of Evidence*, JUD. CONF. OF THE U.S. 286 (Aug. 15, 2022), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_

This draft of an illustrative aid provision was located within existing Rule 611 because Rule 611(a) is the provision most courts have used to regulate illustrative aids. A litigant looking for case law on illustrative aids will naturally be drawn to Rule 611 and the amended provision. Rule 611 also represents a mix of standards that govern the form and sequence in which evidence is presented, but these standards do not determine the admissibility of evidence *per se*.¹¹⁴ A rule regulating the presentation of illustrative aids—which are not evidence in their own right but serve only to facilitate the presentation of other admitted evidence—fits neatly within the overall purpose of Rule 611.

The balancing test included in proposed Rule 611(d) borrows from the balancing construct and dangers articulated in Rule 403 but tailors the test to trial aids that possess no “probative value” standing alone. Illustrative aids are not probative in the Rule 401 sense—they do not tend to make facts that are of consequence to an action “more or less likely than [they] would be without the evidence”—simply because they are *not evidence*.¹¹⁵ Therefore, in assessing the propriety of illustrative aids, judges should not focus on probative value as they do in evaluating evidence under Rule 403. But, as all experienced trial lawyers know, illustrative aids add significant value to the trial process in helping the trier of fact digest and comprehend admitted evidence or appreciate a lawyer’s argument. Thus, proposed Rule 611(d) fine-tuned the balancing test, directing judges to weigh a trial aid’s *utility in assisting the fact finder to understand admitted evidence* against its potential to inject unfair prejudice or other risks into the trial process. Illustrative aids can present the very dangers that are well articulated in Rule 403. They can be unfairly prejudicial when they are misleading, inflammatory, or likely to be misinterpreted as evidence.¹¹⁶ And some illustrative aids may not be worth the time and effort they take to

proposed_amendments_to_the_federal_rules_2022final.pdf
[hereinafter “Proposed Amendments”].

[<https://perma.cc/EW25-ENSP>]

114. Rule 611(a) confers broad authority to handle issues concerning the mode and order of examining witnesses and the presentation of evidence. Rule 611(b) limits the scope of cross-examination but does not deal with admission or exclusion of evidence. And Rule 611(c) deals with the form of questioning on direct and cross-examination.

115. Rather than authorizing the “admission” of illustrative aids, proposed Rule 611(d) provides that “the court may allow” their use. This is consistent with Rules 405(a) and 608(b) that also regulate the use of information at trial that is not admitted into evidence. FED. R. EVID. 405(a), 608(b) (“allow[ing]” inquiry into specific acts for the purpose of testing witnesses).

116. *See, e.g., Johnson v. BLC Lexington SNF, LLC* 2020 U.S. Dist. LEXIS 233263, at *41 (E.D. Ky. Dec. 11, 2020) (barring the use of an inflammatory and conclusory illustrative aid; finding the need to “police the line between demonstration of evidence and demonization of an opposing party or witness”).

present. For these reasons, proposed Rule 611(d) juxtaposes the utility of a trial aid to the risks set forth in Rule 403 that are well understood by courts and litigants.

Proposed Rule 611(d) invited input from the public-comment process regarding the outcome to be favored by the balancing test. Rule 403 justifies the exclusion of relevant evidence, but the Rule is weighted in favor of admissibility because it demands that the risks associated with an item of evidence “substantially” outweigh its probative value. On the one hand, it makes sense to strike the same balance in an illustrative aid rule, allowing courts to foreclose the use of a trial aid only when it presents dangers that *substantially* outweigh its utility. First and foremost, this balance has become second nature to both judges and lawyers, ensuring immediate familiarity with the balancing approach enshrined in the new provision. In addition, having two distinct balancing tests in Rules 403 and 611, one that applies to probative evidence and another for illustrative aids, is certain to cause confusion and possibly error. The line between demonstrative evidence admitted to resolve disputed issues and illustrative aids presented merely to complement other evidence can be a fine one in certain cases.¹¹⁷ Applying the same balancing to both presentations through Rules 403 and 611 ensures that courts engage in the appropriate weighing, regardless of their characterization. Finally, the goal of an amended provision is to enhance and streamline the use of illustrative aids, and an amended provision should encourage the helpful practice of utilizing illustrative aids in the courtroom. A balancing test that is akin to Rule 403 and puts a thumb on the scale in favor of illustrative aids best serves that purpose.

On the other hand, an argument can be made for treating illustrative aids less favorably than probative evidence. It makes sense to keep probative evidence from the jury only if the danger it presents strongly outweighs the value it adds. The trial process tolerates some potential for unfair prejudice if the evidence furthers the search for truth. But an illustrative aid is not evidence, and it has been argued that a mere trial aid should not be permitted if it presents risks that outweigh its usefulness to any degree, however slightly.¹¹⁸ Proposed

117. See Symposium, *Discussions on Juror Questions of Witnesses and the Use of Illustrative Aids at Trial*, 91 *FORDHAM L. REV.* 2131, 2186–93 (2023) (exploring trial presentations that might be characterized as either demonstrative evidence or illustrative aids).

118. See *FED. JUD. CTR., EFFECTIVE USE OF COURTROOM TECHNOLOGY: A JUDGE’S GUIDE TO PRETRIAL AND TRIAL* 193 (2001) (arguing against a “substantial” tilted test because illustrative

Rule 611(d) included the word “substantially” in brackets in the balancing test to seek guidance from the public-comment process as to whether illustrative aids should be rejected when they present risks that outweigh their utility even slightly or whether their use should be foreclosed only when those risks “substantially” outweigh their usefulness.¹¹⁹

Proposed Rule 611(d) also contained a notice requirement. Maine Rule of Evidence 616 requires that parties receive a “reasonable opportunity to object” to an illustrative aid, and Rule 611(d) included a related requirement that litigants receive “notice and a reasonable opportunity to object” subject to a “good cause” exception.¹²⁰ Because illustrative aids are designed to emphasize argument or other evidence, such as witness testimony, they may be displayed to the jury contemporaneously—flashing onto a screen during opening statements or appearing on an easel during a direct examination—before an opponent can review them and object.¹²¹ Because of the very power that illustrative aids possess to sway the fact finder, any damage done by a prejudicial aid may be irreversible once the aid has been revealed. The Advisers’ Note to Maine Rule of Evidence 616 explains the need for notice to prevent unfair surprise:

One of the primary means of safeguarding and regulating the use of the illustrative aids is to require advance disclosure. The rule [] proposes that illustrative aids prepared before use in court be disclosed prior to use so as to permit reasonable opportunity for objection. The rule applies to aids prepared before trial or during trial before actual use in the courtroom. Of course, this would not prevent counsel from using the blackboard or otherwise creating illustrative aids right in the courtroom. . . . The idea is to permit opposing counsel the opportunity to raise any issues of fairness or prejudice with the court

aids “are supposed to be useful, and they cannot be useful if they do not convey information clearly and without attendant distraction”).

119. See Advisory Comm. on Evidence Rules, *Committee Meeting of October 28, 2022*, at 12 n.2 (Oct. 28, 2022), https://www.uscourts.gov/sites/default/files/2022-10_evidence_rules_committee_agenda_book_final_0.pdf [<https://perma.cc/N3VQ-KEM5>]:

“Substantially” is in brackets to invite discussion about how the balancing test should be set. “Substantially” tracks Rule 403, thus rendering relevant evidence presumptively admissible. But there is a question as to whether the same permissive standard should apply when the information presented is not probative of any disputed issue in the case, but is offered solely to assist the factfinder to understand evidence already presented.

120. See Proposed Amendments, *supra* note 113.

121. See ME. R. EVID. 616 advisory committee’s 1976 note on former rule:

Ordinary discovery procedures concentrate on the actual information possessed by the witnesses and known exhibits. Illustrative aids as such are not usually subject to discovery and often are not prepared far enough in advance of trial. Their sudden appearance at trial may not give sufficient opportunity for analysis, particularly if they are complex, and may cause unfair surprise.

out of the presence of the jury and before the jury may have been tainted by the use of the illustrative aid.¹²²

Based on concerns regarding the sudden appearance of potentially prejudicial illustrative aids, proposed Federal Rule 611(d) required reasonable notice and an opportunity to object to an aid. The Advisory Committee's Note echoed the Note to Maine Rule 616, emphasizing the trial judge's discretion with respect to the notice appropriate for any particular aid.¹²³ Further, proposed Rule 611(d) recognized that a notice requirement could not realistically be applied to all illustrative aids, and therefore included a "good cause" exception. Many illustrative aids, such as a witness's markings on a photograph, are prepared on the fly, in the heat of trial without any advance opportunity for review.¹²⁴ Proposed Rule 611(d) permitted a trial judge to reject any notice obligation in such a context.

Illustrative aids are not used only to amplify witness testimony and other admitted evidence. They are commonly used by creative counsel to drive home a narrative during opening statements and closing arguments.¹²⁵ Prior to their presentation in court, such aids developed for use in upcoming litigation are considered by trial counsel as sensitive work product information.¹²⁶ Trial lawyers may chafe at any demand that they produce such strategic material in advance of trial.¹²⁷ Proposed Rule 611(d) sidestepped this controversial issue by defining illustrative aids as only those presented to help understand "admitted evidence," carving out aids utilized solely to support attorney argument. By narrowing the Rule's coverage, the Advisory Committee sought to exempt openings and closings from the new notice requirement, leaving the propriety of such aids to continued regulation through the trial court's broad Rule 611(a) authority. Courts have held that trial devices utilized during attorney argument must fairly

122. *See id.*

123. *See* Proposed Amendments, *supra* note 113, at 289–90 (emphasizing the trial court's discretion to determine how and when notice is given).

124. *See id.*

125. *See* Public Comment to Proposed Federal Rules of Evidence, Comment of Samuel Cannon, Esq. (2022-EV-0004-0090), <https://www.regulations.gov/docket/USC-RULES-EV-2022-0004/comments?sortBy=postedDate> [<https://perma.cc/UN4A-2HZV>] (noting the importance of illustrative aids during lawyer argument) [hereinafter "Public Comment"].

126. *Id.* Comment of Thomas Ryan, Esq., (2022-EV-0004-0044) (arguing that the notice requirements would allow one lawyer to improperly obtain the work product of another lawyer).

127. *Id.* Comment of Anthony Gallucci, Esq., (2022-EV-0004-0051) (asserting that advanced disclosure "would unfairly tip off opposing counsel on the contents of the presenter's opening statement . . . and/or closing argument").

represent the evidence and must assist the fact finder.¹²⁸ Therefore, proposed Rule 611(d)—with its notice requirement—would have regulated trial aids used to illustrate and amplify admitted evidence, while Rule 611(a) would have continued to control aids used to support attorney argument.

Proposed Rule 611(d) also addressed illustrative aids in the jury room. As discussed above, the Seventh Circuit’s opinion in *Baugh* held that it was error to allow an illustrative aid to be sent over objection to the jury during deliberations and ignited a reexamination of the inconsistencies plaguing common law regulation of trial aids.¹²⁹ But proposed Rule 611(d) did not incorporate an absolute prohibition on illustrative aids in the jury room. Rather, the provision set a default rule forbidding the transmission of trial aids to the jury absent consent by all parties in the usual case but authorizing the trial judge to send them to the deliberation room over objection for “good cause.” The Evidence Rules by their nature are flexible, containing very few absolute prohibitions.¹³⁰ An illustrative aid that accurately and graphically organizes and illuminates a thicket of complex evidence may do more good than harm in the jury room, particularly in a complex case where the jurors’ task is challenging.¹³¹ In such circumstances, proposed Rule 611(d) preserved the trial court’s discretion to send a purely illustrative aid to the jury room, even over objection.¹³²

128. See *Johnson v. BLC Lexington SNF, LLC*, 2020 U.S. Dist. LEXIS 233263, at *41 (E.D. Ky. Dec. 11, 2020) (relying on Rule 611(a) to bar use of an inflammatory and conclusory illustrative aid during opening statements and closing argument; saying the Court may “police the line between demonstration of evidence and demonization of an opposing party or witness”).

129. See *Howard & Barnum*, *supra* note 25, at 516.

130. Apart from witnesses, character may not be used to prove a party’s conduct in civil cases. FED. R. EVID. 404(a). Rule 608(b) prohibits extrinsic evidence when offered to impeach a witness’s character for untruthfulness. The hearsay rule has many exceptions, as does the rule barring character evidence. See *id.* at 404(a)(2), 413, 803. And the major source of exclusionary power in the Federal Rules of Evidence, Rule 403, is highly discretionary and fact dependent. *Id.* at 403.

131. See, e.g., *United States v. Cox*, 633 F.2d 871, 874 (9th Cir. 1980) (explaining that while the better practice is to the contrary, it was not error for the trial court to submit an illustrative aid for deliberation given the judge’s limiting instruction that it was not evidence).

132. See Proposed Amendments, *supra* note 113, at 290:

The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint 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

Finally, proposed Rule 611(d) specified that illustrative aids must be made part of the record and preserved for appeal. The use of an improper illustrative aid can surely affect the outcome of a trial. And appellate courts do hear appeals claiming improper use of an illustrative aid—as was the case in *Baugh*.¹³³ But because illustrative aids are not evidence, they may or may not be made part of the record available for review at the appellate level. Proposed Rule 611(d) sought to rectify this potential oversight by requiring such aids to be made a part of the trial record when possible. Circumstances may arise in which an illustrative aid cannot be included as part of the trial record. For example, an illustration on a whiteboard may first be marked up by one party and then by another. Such markings might ultimately reflect two separate illustrative aids difficult to separate in the hurly-burly of trial. Or perhaps such markings may inadvertently be erased during a witness's testimony. Consequently, the proposed Rule excused the record requirement when it is not practicable.

The Advisory Committee's Note to proposed Rule 611(d) also added helpful clarifications. Like the Maine Advisers' Note, the Rule 611(d) Note sought to establish a consistent vocabulary for distinguishing tangible items offered to resolve disputed facts from those utilized only for illustrative purposes, referring to the former as “demonstrative evidence” and the latter as “illustrative aids.”¹³⁴ Further, the Note sought to highlight the appropriate evidentiary treatment of items within each category, emphasizing that demonstrative evidence must satisfy the admissibility requirements of the Federal Rules, while illustrative aids need not.¹³⁵ The Note further emphasized that illustrative aids are not evidence and that they should be accompanied by limiting instructions cautioning the jury against their substantive use.¹³⁶ Finally, the Committee's Note highlighted the distinction between a Rule 611 summary that is designed to illustrate admitted evidence and a Rule 1006 summary of voluminous materials

instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

133. *See supra* note 3 and accompanying text.

134. *See id.* at 287.

135. *See id.* at 287–88 (“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.”).

136. *See id.* at 290.

that is admitted into evidence to provide proof of the content of the underlying materials.¹³⁷

2. Proposed Amendment to Rule 1006

Alongside proposed Rule 611(d), the Evidence Advisory Committee also proposed a companion amendment to Rule 1006. The companion proposal was designed to eliminate the improper limitations that have been placed on Rule 1006 summaries when courts conflate them with summaries utilized solely for illustrative purposes, and it was intended to direct courts and litigants to proposed Rule 611(d) when evaluating a summary or chart used only to illustrate other evidence.

The proposed amendment to Rule 1006, as released for public comment, provided as follows:¹³⁸

Proposed Federal Rule of Evidence 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 611(d).¹³⁹

This companion proposal to Rule 611(d) made three principal changes to address the confusion between illustrative summaries and Rule 1006 summaries. First, the proposal expressly provided that Rule 1006 summaries are admitted “as evidence.”¹⁴⁰ As described above, some circuit courts have deprived Rule 1006 summaries of their essential purpose by instructing juries that they are “not evidence” and may not be considered apart from other evidence presented in the case.¹⁴¹ To stand in as alternate proof of the underlying voluminous documents they summarize, Rule 1006 summaries must be considered

137. *See id.* at 288–89.

138. New text added by the proposed amendment appears underlined, while text deleted from the original Rule by the proposed amendment is stricken.

139. Proposed Amendments, *supra* note 113, at 300–01.

140. In addition to the substantive changes made to Rule 1006, the proposal also separated the provision into user-friendly subsections in keeping with the Restyling of the Federal Rules of Evidence. *See id.*

141. *See, e.g.,* United States v. Ho, 984 F.3d 191, 210 (2d Cir. 2020).

“evidence” on which jurors may rely in resolving disputed facts, and courts that offer a limiting instruction are mistakenly treating them as illustrative aids.¹⁴² In stating that litigants “may use” a summary, the existing Rule’s text invites confusion about the evidentiary significance of a proper Rule 1006 summary. Amended Rule 1006 offers superior guidance, stating directly that Rule 1006 summaries are admitted “as evidence” and explaining in the Committee Note that such summaries should *not* be accompanied by limiting instructions cautioning against their substantive use.¹⁴³

Second, the proposed amendment clarifies that a Rule 1006 summary may be admitted into evidence even if the underlying voluminous materials summarized *have never been* introduced at trial. The inherent purpose of a Rule 1006 summary is to serve as a substitute for underlying documentation that is “too voluminous to be conveniently examined [at] trial” to save counsel and the court from the inefficient and, perhaps, impossible task of admitting them.¹⁴⁴ Again, confusing Rule 1006 summaries with purely illustrative summaries, some courts have held that documentation underlying a Rule 1006 summary must be *in evidence* before a Rule 1006 summary may be used. To remedy the confusion and to preserve the powerful tool provided by Rule 1006, the amendment specifies that an otherwise appropriate Rule 1006 summary may be admitted “whether or not” the underlying materials have themselves been admitted.¹⁴⁵

Finally, the proposed amendment to Rule 1006 included a textual cross-reference to Rule 611(d), directing courts and litigants to the appropriate governing provision when summaries, charts, or calculations are offered solely to illustrate admitted evidence. As demonstrated above, a Rule 1006 summary is deprived of its essential

142. See *United States v. Bailey*, 973 F.3d 548, 567 (6th Cir. 2020) (stating incorrectly that a Rule 1006 summary is not evidence).

143. See FED. R. EVID. 1006 advisory committee’s note to 2024 amendment (“The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.”).

144. See *id.*; see also *id.* advisory committee’s note to 1972 proposed rules (“The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury.”).

145. Proposed Amendments, *supra* note 113, at 300. The proposed amendment specifically provides that a Rule 1006 summary may be admitted “whether or not” the underlying materials have been admitted, leaving open the possibility that a Rule 1006 summary may be admitted even in cases where some or all of the underlying documents *have* made their way into evidence. See Memorandum from Liesa L. Richter to Advisory Committee on Evidence Rules Regarding Rule 1006, at 180 (Oct. 1, 2022), https://www.uscourts.gov/sites/default/files/2022-10_evidence_rules_committee_agenda_book_final_0.pdf [<https://perma.cc/N3VQ-KEM5>] (noting that some courts prohibit use of a Rule 1006 summary where underlying materials have been admitted into evidence).

function when it is mistaken for a mere illustrative aid.¹⁴⁶ And purely illustrative summaries and charts are not subject to the limitations provided in Rule 1006. Thus, the proposed amendment to Rule 1006 included a rare textual guidepost to assist courts and counsel in managing the important distinction between summaries of voluminous underlying materials and summaries that help the jury understand evidence that has already been admitted.

III. SOUND AND FURY: PUBLIC COMMENTARY ON THE PACKAGE OF ILLUSTRATIVE AIDS RULES

If there was any question about the importance of illustrative aids to the trial process, the public comment to proposed Rule 611(d) resolved it. The proposed amendment to regulate illustrative aids received 137 public comments, as well as a number of oral statements at a public hearing.¹⁴⁷ Some comments recognized and applauded the important clarifying purpose of the illustrative aids proposal. The Federal Magistrate Judges' Association, whose members encounter illustrative aids regularly, noted that "[t]he addition of Rule 611(d) imposing disclosure requirements for illustrative aids and guidance regarding their use is an improvement which will help clarify a sometimes contentious topic."¹⁴⁸ The Federal Bar Council strongly

146. Conversely, confusion concerning the distinction between Rule 1006 summaries and illustrative summaries has led some federal courts to be too lax with respect to Rule 1006 summaries of voluminous materials, allowing them to be admitted even when they contain inference or argument not reflected in the underlying materials. *See, e.g.*, *United States v. Mazkouri*, 945 F.3d 293, 301 (5th Cir. 2019) ("We have held that for Rule 1006, the 'essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record.'" (quoting *United States v. Armstrong*, 619 F.3d 380, 384 (5th Cir. 2010))); *United States v. Fechner*, 952 F.3d 954, 959 (8th Cir. 2020) ("Any assumptions or conclusions contained in a Rule 1006 summary must be based on evidence already in the record." (citing *United States v. Green*, 428 F.3d 1131, 1134 (8th Cir. 2005))). Because a Rule 1006 summary is designed to substitute for evidence of originals too voluminous to be examined conveniently themselves, most federal courts have recognized that a Rule 1006 summary must accurately reflect the underlying documents and must not include assumptions, conclusions, or arguments not reflected in those underlying documents. *See, e.g.*, *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013); *United States v. Milkiewicz*, 470 F.3d 390, 395–98 (1st Cir. 2006) ("Charts admitted under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently, they must fairly represent the underlying documents and be 'accurate and nonprejudicial.'"). The proposed amendment to Rule 1006 addressed this concern in the committee note, emphasizing that a Rule 1006 summary may be excluded "if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative." FED. R. EVID. 1006 advisory committee's note to 2024 amendment.

147. *See* Public Comment, *supra* note 125.

148. *See id.* Comment of Federal Magistrate Judges Association (2022-EV-0004-0015).

avored the proposed amendment, opining that it “will provide an important service to courts and litigants.”¹⁴⁹

But trial lawyers prize creative and strategic control over the use of illustrative aids in the courtroom and expressed concern from both sides of the “v.” that a new rule regulating illustrative aids would limit their ability to present cases in a persuasive manner.

A. Opposing Advance Notice of Illustrative Aids

Rule 611(d)’s proposed requirement that litigants receive “notice and a reasonable opportunity to object” to the use of illustrative aids drew fire from many quarters. While amendment proposals are not infrequently derided by one side of the litigation aisle due to a perceived benefit to the opposing side, criminal and civil litigators—plaintiffs’ and defense bar alike—took aim at the notice requirement in proposed Rule 611(d).¹⁵⁰

Detractors expressed a litany of concerns about a notice obligation. Lawyers opined that a notice requirement for illustrative aids is simply not feasible given the reality of the trial process. They emphasized that many illustrative aids are created and used extemporaneously in a manner that prevents any meaningful advance notice.¹⁵¹ And commenters complained that such a requirement would require litigants to provide notice of illustrative aids that they may never use at trial.¹⁵² The public comment also revealed efficiency concerns created by a notice requirement, predicting that an advance notice requirement would generate motions, objections, and costly litigation over illustrative aids that would delay (rather than expedite) the trial of a case.¹⁵³ Most importantly, the public comment opined that

149. *Id.* Comment of Federal Bar Council (2022-EV-0004-0108).

150. *See id.* (comments from plaintiffs’ bar and defense bar objecting to notice requirement).

151. *See, e.g., id.* Comment of Wayne Parsons, Esq. (2022-EV-0004-0106) stating that illustrative aids

are often developed just before trial, or during trial, based upon the evidence in the case, the lawyer observations of the jury during testimony, and the attorneys’ trial judgment. Notice requirements will force the parties to decide on an Illustrative Aid, before the lawyers know what will be helpful to the fact finder.

152. *See, e.g., id.* Comment of Jessica Ibert, Esq. (2022-EV-0004-0066) (contending that the notice requirement will result in “increased litigation expenses if parties are forced to create illustrative aids (that may or may not be used) well in advance of trial to meet the notice requirement in the proposed amendment”).

153. *See, e.g., id.* Comment of Jackson Pahlke (2022-EV-0004-0069) (contending that the notice requirement would lead to motion practice and would “likely result in attorneys forgoing many

a notice requirement would unfairly restrict litigants' ability to present a trial narrative in the most compelling manner available, depriving them of effective and appropriate aids simply because they failed to offer pretrial notice.¹⁵⁴

Lawyers reserved their most strident objections for notice of aids utilized to illustrate attorney theories and arguments during opening statements or closing arguments, lamenting that such notice would invade a trial lawyer's sensitive work product material prior to the start of trial. Work product protection is designed to provide counsel with a zone of privacy within which to develop strategy "in anticipation of litigation" and to prevent adversaries from free riding on their trial preparation.¹⁵⁵ And the need for protection would seem to be at its height in the weeks and days prior to the start of trial when litigation is more than "anticipated" and is truly imminent. Trial lawyers emphasized their need for protection during public comment on Rule 611(d), urging that "illustrative aids/demonstratives are often indicative of a trial lawyer's work product and/or legal strategy, which opposing counsel and the Court have no right to obtain prior to its presentation at Court."¹⁵⁶ In sum, most negative public comments attacked proposed Rule 611(d)'s requirement that litigants receive "notice and a reasonable opportunity to object" to illustrative aids.

B. Defining Illustrative Aids Covered by the Rule

Various public comments complained that proposed Rule 611(d) failed to offer a comprehensive definition of the term "illustrative aids," arguing that the lack of a textual definition would generate confusion about the trial exhibits and tools covered by the provision.¹⁵⁷ A few

useful and well thought out illustrations and instead having witnesses or experts just freehand draw on the spot which will be less effective in aiding the jurors in making their determination").

154. *See, e.g., id.* Comment of Paul Byrd (2022-EV-0004-0096) (opposing the notice requirement because "[i]t is not fair to the client to handcuff their lawyer to only the arguments and visual aids that the lawyer might with the benefit of 20/20 hindsight could or should have thought of weeks before the trial started").

155. *See Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *see also* FED. R. CIV. P. 26(b)(3) (protecting trial-preparation materials).

156. Public Comment, *supra* note 125, Comment of Bryce Montague, Esq. (2022-EV-0004-0107); *see also id.* Comment of Matt Leckman, Esq. (2022-EV-0004-0058) ("[The notice requirement] is directly at odds with the generally held truth that your opponent shouldn't be permitted to see your cross-examination playbook before you conduct it.").

157. *See, e.g., id.* Comment of Arias, Sanguinetti, Wang & Torrijos, LLP (2022-EV-0004-0113) (arguing that the Rule should contain a specific definition of illustrative aids); *id.* Comment of Bill Rossbach, Esq. (2022-EV-0004-0136) (complaining that the text of the Rule does not set forth an explicit and all-encompassing definition of illustrative aids).

public comments opposed any rule regulating illustrative aids on the ground that illustrative aids *defy* precise definition and that it is often difficult to distinguish an illustrative aid from demonstrative evidence admitted to prove facts in dispute.¹⁵⁸ It is undoubtedly true that it can be difficult to distinguish between demonstrative evidence and illustrative aids and that a single item offered at trial could potentially serve in either or both capacities. For example, the ladder in the *Baugh* case was used only as an illustrative aid to help jurors understand the general operation of the ladder and the expert's testimony.¹⁵⁹ But an expert who manipulates the ladder to demonstrate how the Plaintiff's accident occurred may be offering demonstrative evidence.

The mere fact that it can be difficult to distinguish between the two is no reason to reject a rule that clarifies the standards that apply to each. It is extremely difficult at times to distinguish between expert and lay opinion testimony, and a single witness may alternate between both within the same trial, depending on what the witness is testifying about in a given moment.¹⁶⁰ But the foundation necessary to support each is distinct, and Rules 701 and 702 impose different requirements for the admission of lay and expert opinion.¹⁶¹ Likewise, it is sometimes challenging to draw the fine line between habit and character evidence. Still, Rule 404(a) places a prohibition on character evidence while Rule 406 blesses the admission of habit evidence.¹⁶² It is entirely appropriate and, indeed, necessary to distinguish related concepts in rule text. Proposed Rule 611(d) was not intended to legislate clear lines or to establish precise definitions. Instead, it was designed to arm courts and lawyers with a lexicon and a standard to enhance comprehension of the distinction between illustrative aids and demonstrative evidence. A new illustrative aids rule should help litigants focus on the purpose for which they are using a tangible item or demonstration at trial and identify the foundation required for its presentation. Surely that is an

158. *See, e.g., id.* Comment of Professor Richard Friedman (2022-EV-0004-0105) (opposing the amendment on the ground that some presentations that might be considered illustrative aids might also be considered evidence).

159. *See supra* note 3 and accompanying text.

160. *See* Daniel J. Capra & Jessica Berch, *It's a Code: Amending the Federal Rules of Evidence to Achieve Uniform Results*, 58 WAKE FOREST L. REV. 549, 567 (2023) (analyzing the difficulty of navigating "the line between lay and expert opinion testimony").

161. *Id.*

162. *Compare* FED. R. EVID. 404(a) (prohibiting admission of character evidence used to prove a person's conduct), *with id.* at 406 (authorizing admission of habit evidence used to prove a person's conduct).

improvement from lurching from case to case to uncover appropriate standards.

Other public comments revealed confusion about whether proposed Rule 611(d) sought to regulate aids used by trial counsel to enhance and illustrate their opening statements and closing arguments. Although proposed Rule 611(d) was drafted to regulate only aids used to illustrate “evidence” and omitted any textual reference to attorney argument, public comment opined that the proposal was unclear as to its regulation of aids used during attorney argument.¹⁶³ Public comment proposed changes to the Advisory Committee’s Note to clarify that the proposed Rule would *not* cover such materials.¹⁶⁴

Even assuming that the proposed provision could be modified to clearly exclude from coverage those aids used during attorney argument, excluding such aids to argument from regulation under the new Rule could generate confusion and inefficiency. Like illustrative aids used during trial, devices utilized for persuasion during opening and closing must advance fact finders’ understanding and should not inject unfair prejudice into a case.¹⁶⁵ Like aids displayed during the presentation of evidence, those used in argument should ordinarily not be allowed in the jury room and ought to be entered into the record. If such aids to argument are excluded from the new Rule, they will require continued regulation under the amorphous Rule 611(a) standard. It would add complexity and confusion to have a new provision that applies to the oversight of aids used during the presentation of evidence while a similar but amorphous common law standard continues to apply to aids used during opening statements and closing arguments. Courts would be required to classify aids as supportive of either “evidence” or “argument,” when any such distinction is elusive at best and perhaps impossible in practice—particularly when the same aid is displayed during both the presentation of evidence and during opening and closing.

163. See Public Comment, *supra* note 125, Comment of Federal Magistrate Judges Association (“[T]he FMJA suggests greater clarity regarding application of Rule 611(d) to Power Point presentations or other visual aids used by attorneys in opening statements or closing arguments.”).

164. *Id.*

165. See, e.g., *Johnson v. BLC Lexington SNF, LLC*, 2020 U.S. Dist. LEXIS 233263, at *41 (E.D. Ky. Dec. 11, 2020) (barring the use of an inflammatory and conclusory illustrative aid sought to be used during opening statement and closing argument).

C. A Hostile Environment for Illustrative Aids

Much of the public commentary on proposed Rule 611(d) lamented the provision's "hostility" to the use of illustrative aids at trial.¹⁶⁶ Lawyers emphasized the mounting data showing the critical impact that visual aids and other pedagogical devices have on juror understanding, particularly in complex cases.¹⁶⁷ They opined that proposed Rule 611(d) would restrict their ability to deploy helpful devices to maximum advantage.¹⁶⁸

To a large extent, the claim that proposed Rule 611(d) would undermine the use of illustrative aids was a response to the notice provision, which imposed a limitation on the presentation of illustrative aids—a limitation which may not have existed previously in every court.¹⁶⁹ Lawyers predicted that a notice requirement, particularly if it were to be strictly enforced, would curb the use of illustrative aids in the long run, or at least make their employment more difficult and costly.¹⁷⁰

The balancing test created by the proposed Rule to control the use of illustrative aids reflected no hostility toward them, however. The singular innovation of the balancing standard is that it places the *illustrative value* of a trial aid on the positive side of the time-honored Rule 403 balancing paradigm. Thus, the balancing test simply articulates a more accurate characterization of the values to be weighed. That said, the way the balancing test is *pitched* will determine how favorable it will be to the use of illustrative aids. A test that allows a trial judge to reject an illustrative aid whenever its potential for unfair prejudice outweighs its value to *any degree* will be more hostile

166. See, e.g., Public Comment, *supra* note 125, Comment of Matt Leckman (2022-EV-0004-0058) (“[T]he inevitable outgrowth of this rule will be to restrict, not expand, the use of visual aids at trial.”).

167. See, e.g., *id.* Comment of Robert Collins, Esq. (2022-EV-0004-0009) (opposing the proposed amendment on the ground that “[l]imiting information that any party submits to show their position impugns the 7th Amendment right to a fair and impartial jury trial”); *id.* Comment of Charles Kettlewell, Esq. (2022-EV-0004-0045) (arguing that the amendment “would drastically limit the effectiveness and use of illustrative aids/exhibits in Federal Court”).

168. *Id.* Anonymous Comment (2022-EV-0004-0006) (arguing that the amendment “would severely limit the ability of trial lawyers to present their evidence to a jury”).

169. See, e.g., *id.* Comment of Tim Riley, Esq. (2022-EV-0004-0030) (opposing the amendment because it sets forth “a new framework by which practitioners will be precluded from using such demonstrative aids due to lack of prior notice to opposing counsel”).

170. See, e.g., *id.* Comment of Alexander Melin, Esq. (2022-EV-0004-0033) (contending the amendment “will create unnecessary motion practice, substantially increase the expense and burden of litigation, and basically make it unfeasible to use illustrative exhibits that are in all actuality noncontroversial and that have been used for years”).

to the use of an illustrative aid than one that counsels its rejection only when such negative factors *substantially outweigh* its utility. As noted above, the word “substantially” was placed in brackets in the balancing test published for notice and comment precisely to seek input as to how inviting the standard should be.¹⁷¹ Although very few public comments weighed in on this debate, those that did were strongly in favor of including the word “substantially” in the balancing test to lower any barriers to the use of trial aids and to avoid confusion generated by a new balance foreign to the existing Federal Rules of Evidence.¹⁷²

Some comments expressed concern that the proposed Rule 611(d) language providing that “the court *may allow*” use of illustrative aids is unduly strict because it will require advance permission from the court every time counsel seeks to display a trial aid. Some commentary went so far as to suggest that Rule 611(d) would require a hearing prior to the display of every illustrative aid.¹⁷³ These arguments ring hollow, however, when viewed in the context of the Federal Rules’ scheme. Most of the Rules governing admissibility are cast in terms of what the court may (or must) do. Under Rule 405, “the court may allow an inquiry into relevant specific instances of [a] person’s conduct” on cross-examination of a character witness.¹⁷⁴ Under Rule 406, “[t]he court may admit” habit evidence regardless of whether it is corroborated or whether there was an eyewitness.¹⁷⁵ Under Rule 407, “the court may admit” evidence of a subsequent remedial measure if offered for a proper purpose.¹⁷⁶ The same goes for

171. *See supra* note 119 and accompanying text.

172. *Id.* Comment of Parker Lipman LLP (2022-EV-0004-0064) (arguing that any balancing test in the Rule should use the word “substantially” to align with Rule 403. Otherwise, “it will be confusing to have two different, yet substantially similar, standards—proposed Rule 11(d)’s merely outweighed standard and Rule 403’s substantially-outweighed standard”).

173. *Id.* Comment of Dov Sacks, Esq. (2022-EV-0004-0132) (claiming the language that the court may allow use of an illustrative aid “effectively requires the party presenting the illustrative aid to make a prima facie showing before the court can even consider allowing it”); *id.* Comment of Bill Rossbach, Esq. (2022-EV-0004-0136) (stating that the amendment is hostile toward illustrative aids because it states that “the court may allow” them; preferring a rule that a party may use illustrative aids, with the court having the authority to exclude them).

174. FED. R. EVID. 405(a). Rule 405 provides a good comparison with the proposed illustrative aids rule. It too regulates the use of information that is not formally offered to prove a fact. The specific instances of conduct may be inquired into only to test the adequacy of the character witness. In Rule 405, therefore, “the court may allow” language is used to cover a situation in which information may be used at trial but not admitted as substantive evidence.

175. *Id.* at 406.

176. *Id.* at 407.

Rules 408, 410, 411 and 412.¹⁷⁷ Similarly, under Rule 608(b), “the court may . . . allow” inquiry into specific acts for impeachment.¹⁷⁸

But making an inquiry or admitting evidence under these Rules has never required advance permission from the trial court, let alone a hearing. When a pretrial hearing or motion in limine *is* required, the Rules so specify. For example, Rule 412(c) sets out a detailed procedure for considering the admissibility of evidence of a sexual assault victim’s sexual history in advance of a trial proffer.¹⁷⁹ Absent such an express prior-permission requirement, all information runs through the court pursuant to the Federal Rules of Evidence only after an opponent, by objection, has brought the matter to the court’s attention. Attorneys offer evidence and make inquiries throughout the course of a trial without seeking prior permission, and the trial court will rule only upon objection in the absence of hen’s-teeth-rare plain error.¹⁸⁰ The language of Rule 611(d) providing that the “court may allow” the use of illustrative aids is therefore in keeping with the verbiage employed throughout the Federal Rules of Evidence and cannot fairly be read to require prior court approval of all illustrative aids.

Some commenters questioned the need for an evidence rule on illustrative aids, arguing that courts and litigants already possess a shared understanding of the proper functioning of illustrative aids and thus need no guidance on the subject.¹⁸¹ They further argued that

177. *Id.* at 408, 410, 411, 412.

178. *Id.* at 608(b).

179. *See id.* at 412(c).

180. *See id.* at 103 (requiring timely and specific objections in order to claim an error in admitting evidence and providing for the possibility of plain error review in subdivision (e)). There is no precedent for requiring litigants to ask permission before presenting a particular piece of evidence once trial has begun. For example, parties are required to have a “good faith basis” for cross-examination questions concerning a witness’s prior bad acts under Rule 608(b). *See United States v. Oti*, 872 F.3d 678, 694 (5th Cir. 2017). But nothing in the Evidence Rules requires a cross-examiner to vet her “good faith basis” with the court before posing such a question to a witness. *See United States v. Zidell*, 323 F.3d 412, 426 (6th Cir. 2003) (“Although the courts have required that there be a ‘good faith basis’ for cross-examination under Rule 608(b), Defendant’s lack of objection at trial deprived the District Court of any opportunity to determine whether such a basis existed, and hence precludes any meaningful consideration of this question by this Court.”), *called into question on other grounds by Alleyne v. United States*, 570 U.S. 99 (2013); *United States v. Davis*, 77 F. App’x 902, 905 (7th Cir. 2003) (“There is no evidence in the record that the government was lacking a good faith basis for asking the questions, and without an objection or request by the court, the government was under no obligation to reveal the bases for the questions.”). A decision to ask for permission is a matter of strategy rather than of obligation.

181. Public Comment, *supra* note 125, Anonymous Comment (2022-EV-0004-0006) (arguing that Rule 611(d) “would severely limit the ability of trial lawyers to present their evidence to a jury” and that lawyers “have been using visual aids in courtrooms forever and it seems unnecessary to put parameters on the use of visual aids now”).

rulemaking around illustrative aids is unnecessary where the existing Rules already confer discretion to control the use of illustrative aids.¹⁸² As described above, federal precedent defining illustrative aids and regulating their use suggests otherwise.¹⁸³ Confusing terminology, inconsistent jury instructions, and contrasting approaches to illustrative aids in the jury room abound. Nor is there current agreement on the source of authority that controls illustrative aids. Some courts rely on Rule 403 to regulate illustrative aids—a Rule that is not applicable on its face because it regulates the admissibility of evidence.¹⁸⁴ Courts also depend on Rule 611(a) to regulate illustrative aids, but that provision is a standardless grab-bag of authority.¹⁸⁵ As examined above, an evidence rule tailored to illustrative aids adds value because it sets forth a balancing test particularized to the review of illustrative aids—it is a governing rule in a single place with clear guidelines.

D. A New Home for an Illustrative Aid Rule

Some public commentary questioned the decision to locate a proposed provision on illustrative aids in Rule 611. For example, the Federal Bar Council suggested that a rule on illustrative aids would be better placed in Article X of the Federal Rules of Evidence, which covers the “Contents of Writings, Recordings, and Photographs,” rather than in Article VI that relates to “Witnesses.”¹⁸⁶

As noted above, Rule 611 was chosen as the location for the proposed Rule because most federal courts have invoked Rule 611(a) when regulating illustrative aids.¹⁸⁷ Lawyers and judges looking for authority on illustrative aids will thus naturally gravitate to Rule 611. And most illustrative aids are used to make witness testimony more understandable, so placement of the provision in Article VI seems

182. *See id.*; *see also id.* Comment of Anthony Petru, Esq. (2022-EV-0004-0139) (contending that the balancing test is unnecessary because courts are currently using Rule 403 to control illustrative aids); *id.* Comment of Richard Cook, Esq. (2022-EV-0004-0005) (contending that the proposed amendment is unnecessary because “[r]ules 403 and 611 already empower a trial judge in his discretion to admit or exclude such evidence and decide whether the evidence should go back to the jury room”).

183. *See supra* Part I.

184. *See supra* notes 37–38 and accompanying text.

185. *See supra* notes 39–40 and accompanying text.

186. *Id.* Comment of the Federal Bar Council (2022-EV-0004-0108).

187. *See, e.g.*, *United States v. Mendez*, 643 F. App’x 418, 423–24 (5th Cir. 2016) (“The photographs were part of a[n] [illustrative] aid to assist the jury in following along during the foreign language conversations. They are thus subject to FED. R. EVID. 611.”).

sensible. It is true that some illustrative aids are not tied to witness testimony—most obviously those presented during opening statements and closing arguments. But courts have nonetheless cited Rule 611(a) to regulate the use of illustrative aids during argument, even though no “witness” was involved.¹⁸⁸ Notably, federal courts have often invoked their Rule 611(a) powers to control other trial matters wholly unrelated to witnesses.¹⁸⁹ Finally, the only other rule of evidence in the United States that regulates illustrative aids is found in the Maine Rules of Evidence—in Article VI.¹⁹⁰ So there is much to be said for locating the illustrative aid rule within familiar Rule 611 territory.

But in the end, the placement of the Rule in Article VI is not a perfect fit. Burying the new provision designed to promote clarity and ease of administration in a subsection at the bottom of an already lengthy Rule may undermine its utility and make clean drafting more challenging. And though for many applications of the Rule it is rational to place a provision on illustrative aids in an Article of the Rules covering “Witnesses,” it is a standard that will apply to presentations throughout trial that may or may not include witnesses. A freestanding rule of evidence covering the use of illustrative aids in all contexts could offer distinct advantages.

Locating a Rule on illustrative aids in Article X, covering the “Contents of Writings, Recordings, and Photographs,” is also an uncomfortable fit, however. For one thing, illustrative aids may not appear in the form of “writings, recordings or photographs.” A classic example is the ladder in *Baugh*. The expert used an actual exemplar ladder to illustrate the construction and operation of the ladder in question.¹⁹¹ It was an illustrative aid—but not a writing, recording, or photograph. More importantly, Article X is designed to enforce the “Best Evidence” Rule. The Article ensures that parties offer originals or duplicates of writings, recordings, or photographs—such that jurors

188. See *Johnson v. BLC Lexington SNF, LLC*, 2020 U.S. Dist. LEXIS 233263, at *41 (E.D. Ky. Dec. 11, 2020).

189. See, e.g., *United States v. Hofstetter*, 2019 WL 5256883, at *4 (E.D. Tenn. Oct. 16, 2019) (invoking Rule 611(a) to admit electronic duplicates rather than original documents); *In re Quality Lease & Rental Holdings, LLC*, 2020 WL 1975349, at *1 (S.D. Tex. Apr. 25, 2020) (invoking Rule 611(d) to realign parties, changing Plaintiffs into Defendants and Defendants into Plaintiffs); *Green v. City of Chicago*, 2017 WL 5894203, at *6 (N.D. Ill. Mar. 17, 2017) (invoking Rule 611(a) to allow three Defendants, found not liable mid-trial, to sit with the remaining Defendant at the defense table for the remainder of the trial).

190. See ME. R. EVID. 616.

191. See *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 703 (7th Cir. 2013).

may evaluate them firsthand, rather than relying on substitutes for the underlying proof, which may mischaracterize the originals.¹⁹²

An illustrative aids provision would surely be a square peg in a round hole if placed in Article X. Illustrative aids have nothing to do with demanding presentation of original evidence; to the contrary, illustrative aids are created to maximize the impact of underlying evidence, often in a distinct and more succinct fashion. And, of course, illustrative aids by definition are *not evidence*, making them ill-suited to placement in an Article requiring the “Best Evidence.” Finally, burying an illustrative aid rule in the back of Article X would impede the accessibility and user-friendliness of the amendment. The end of the rule book is where rules go to die. While a freestanding provision governing illustrative aids may make eminent sense, a new provision in Article X seems a poor fit.

E. The Interplay with Rule 1006

Although most public comments took aim at proposed Rule 611(d) and the addition of a provision regulating illustrative aids, a handful of public comments focused on the companion amendment to Rule 1006 and the interaction between illustrative aids and summaries of voluminous materials.¹⁹³

As explored above, the proposed amendment to Rule 1006 included a new subsection directing litigants to the illustrative aids

192. For a discussion of the “Best Evidence” Rule, see SALTZBURG ET AL., *supra* note 54, at 1001–04 (13th ed. 2023).

193. Very few public comments addressed the substance of the proposed amendment to Rule 1006. One well-accepted part of the foundation for a Rule 1006 summary is the admissibility of the underlying materials. *See, e.g.*, *United States v. Trevino*, 7 F.4th 414, 430 (6th Cir. 2021) (stating that a Rule 1006 summary of voluminous marijuana sales records is appropriate where the underlying sales records would have been admissible under the business records exception to the hearsay rule). Because the case law reflects no confusion on this point, this part of the Rule 1006 foundation was not made explicit in the proposed amendment published for comment. Some public comments expressed concern that adding some parts of the Rule 1006 foundation and operation to rule text while omitting its longstanding “admissibility” requirement could be viewed as eliminating it. *See* Public Comment, *supra* note 125, Comment of the FMJA (2022-EV-0004-0015) (supporting the amendment but suggesting that language be added expressly stating that “the summary may only address evidence which would itself be admissible”). The Evidence Advisory Committee had already seized upon this concern prior to the return of public comment and unanimously agreed to add the “admissibility” requirement of the underlying voluminous records to the text of amended Rule 1006 to avoid any negative inference. *See* Memorandum from Liesa L. Richter to Advisory Committee on Evidence Rules Regarding Rule 1006, at 142 (April 1, 2023), https://www.uscourts.gov/sites/default/files/evidence_rules_agenda_book_3-31-23.pdf [<https://perma.cc/Y8RS-V6QD>] (noting that Committee had already decided to add an “admissible” records requirement to rule text).

Rule, Rule 611, when a “summary” is *not* offered as a substitute for proof of underlying voluminous materials.¹⁹⁴ That proposed subsection was added to resolve confusion in the case law regarding the proper foundation for a summary offered at trial. Proposed Rule 611(d) contained no similar cross-reference to Rule 1006, however. One public comment suggested adding a complementary reference to Rule 1006 within the illustrative aids provision to further untangle the confusion regarding the proper foundation for a summary offered at trial.¹⁹⁵

On one hand, an argument can be made that including a corresponding “directional loop” in the illustrative aids provision is unnecessary. Internal cross-references are not a common feature of the Federal Rules of Evidence.¹⁹⁶ Where cross-references do exist, they are typically a one-way street. For example, Rule 404(a)(2)(B) governing evidence of victim character in a criminal case directs the reader to Rule 412 when victim character evidence is offered in a case involving sexual assault.¹⁹⁷ But Rule 412 contains no parallel cross-reference to Rule 404.¹⁹⁸

Furthermore, practitioners seeking guidance as to the proper foundation for a “summary” are likely to start with Rule 1006—the only Federal Rule of Evidence expressly addressed to “summaries.” A litigant seeking to utilize a summary merely as an illustrative aid who consults Rule 1006 would encounter the reference to the illustrative aid provision, enabling her to determine which provision controls the summary in question. In contrast, a litigant who realizes that she is seeking to utilize a summary merely to illustrate admitted evidence and starts with the illustrative aids provision will have little need for a reference to Rule 1006—an exception to the “Best Evidence” Rule that permits admission of a summary in place of voluminous underlying materials.

On the other hand, it does no harm to cross-reference Rule 1006 in an illustrative aids provision. And it is possible that a litigant seeking to offer a summary in the place of voluminous underlying content may happen upon the illustrative aids provision first. Given the

194. See Proposed Amendments, *supra* note 113, at 301.

195. Public Comment, *supra* note 125, Comment of American Association for Justice (2022-EV-0004-0089) (suggesting that a cross-reference to Rule 1006 should be added to the rule).

196. See Memorandum from Liesa L. Richter, *supra* note 193, at 143 (discussing proposals to add or eliminate cross-references).

197. See FED. R. EVID. 404(a)(2)(B) (providing that it is “subject to the limitations [of] Rule 412”).

198. See *id.* at 412. Compare *id.* at 404(a)(2)(C) (referencing Rules 607, 608, and 609), with *id.* at 607, 608, 609 (containing no reference to Rule 404).

longstanding conflation of illustrative summaries and Rule 1006 summaries, parallel signposting could ensure that courts and litigants properly distinguish the two.

IV. INTRODUCING NEW FEDERAL RULE OF EVIDENCE 107

As it is designed to do, the public-comment process offered many helpful insights and led to numerous modifications to the proposed amendment governing illustrative aids. The Evidence Advisory Committee met in April 2023 to consider the concerns and ideas raised by the public-comment process and fine-tuned proposed Rule 611(d) in several respects, some significant and others modest.¹⁹⁹ The result is new Federal Rule of Evidence 107, scheduled to take effect on December 1, 2024.²⁰⁰

A. Eliminating Notice and Expanding the Rule to Cover Aids Used During Opening Statements and Closing Arguments

After careful consideration, the Advisory Committee eliminated the controversial notice requirement from the Rule and expanded the provision to govern aids used during opening statements and closing arguments. The requirement that parties provide advance notice of illustrative aids to be used at trial was at the root of essentially all opposition to the new Rule, and the Advisory Committee was persuaded that the amendment would be better received and more effective without it.

Still, the notice requirement was not without justification. Proposed Rule 611(d) was designed to reflect the existing standards and requirements for regulating illustrative aids found in the case law. And some courts have held that litigants are entitled to notice of illustrative aids and a reasonable opportunity to object to their presentation.²⁰¹ As discussed above, Maine Rule of Evidence 616—the only existing rule regulating illustrative aids in the United States—includes a notice requirement to prevent the unfair prejudice that can occur if a litigant springs an improper aid on the court and the jury.²⁰² There is no

199. See Advisory Comm. on Evidence Rules, *infra* note 204.

200. Final Proposal, *supra* note 19, at 1080. For the full text of Rule 107, see *infra* note 222 and accompanying text.

201. See, e.g., *Berkley Ins. Co. v. Suffolk Constr. Co.*, 2023 WL 7009832, at *5 (S.D. Fla. Oct. 23, 2023) (setting timelines for disclosure of illustrative aids).

202. See ME. R. EVID. 616.

indication that Maine's notice requirement has undercut the use of illustrative aids in Maine courtrooms or has generated costly disputes regarding appropriate notice. Furthermore, the notice requirement included in proposed Rule 611(d) incorporated a "good cause" exception, giving trial judges discretion to dispense with notice in appropriate circumstances. Thus, the notice requirement was a flexible one designed to accommodate the wide array of illustrative aids deployed in the courtroom. And the Advisory Committee Note to proposed Rule 611(d) reinforced this flexibility, making it clear that advance notice is simply impracticable for many types of trial aids.

On balance, however, a rule regulating the use of illustrative aids may operate more optimally in the absence of any textual notice requirement. First and foremost, trial lawyers objected vehemently to providing their adversaries advance notice of the aids they plan to use during opening statements and closing arguments.²⁰³ And assessing the propriety of such notice will embroil the court in complicated questions regarding the appropriate limits of work product protection. It was for these reasons that proposed Rule 611(d) sought to exclude illustrative aids used during opening statements and closing arguments from its ambit. As examined above, regulating aids used during the presentation of evidence under the new Rule while continuing to police aids used during opening and closing under common law standards is suboptimal to say the least. A principal goal of the amendment is to collect the standards for regulating illustrative aids in one user-friendly location. Deleting the notice requirement allows the amendment to bring aids used during opening statements and closing arguments under one tent.

Furthermore, notice of illustrative aids may be one aspect of their regulation better left to case-by-case consideration. The notice appropriate for illustrative aids may be as varied as the aids themselves. As explained by the Advisers' Note to Maine Rule of Evidence 616, a party should not have to give advance notice of a witness's markings on a photograph made from the witness stand but may need to provide advance notice of a complex computer animation. The Advisory Committee's Note to proposed Rule 611(d) likewise recognized the significant variability in the need for notice of illustrative aids. A requirement that applies so variably and that can

203. See, e.g., Public Comment, *supra* note 125, Comment of Andrew Lampros (2022-EV-0004-0119) (objecting to the amendment in saying that a notice requirement would "impinge on the right to a thorough and sifting cross examination, a cornerstone of our jury system").

be dispensed with so easily is perhaps no “requirement” at all. There may be little value, therefore, in incorporating notice into rule text as a default requirement for the use of illustrative aids. Notice may be a feature of the regulation of illustrative aids that is administered more effectively on a case-by-case basis.

For these reasons, the Advisory Committee deleted the notice requirement from the text of the Rule²⁰⁴ and flagged the important issue of notice in the explanatory Note, emphasizing a trial judge’s broad discretion concerning notice of illustrative aids:

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. 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. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.²⁰⁵

Deleting the notice requirement paved the way to extending the amendment to illustrative aids utilized during opening statements and closing arguments, ensuring that a single standard is applied to all aids presented in the courtroom.²⁰⁶ The text of the Rule was then altered to apply to aids used by a party to illustrate “evidence or argument.”²⁰⁷

B. A Warm Welcome for Illustrative Aids

The Evidence Advisory Committee carefully considered public criticism that the new Rule reflects hostility toward illustrative aids. The Rule was designed merely to collect and clarify existing standards applicable to the consideration of illustrative aids. It definitely was not intended to discourage or diminish resort to the many visual, auditory, and other pedagogical devices that have become a staple in the trial lawyer’s toolbox. Again, the advance notice requirement included in proposed Rule 611(d) was the source of much of the concern about the

204. Advisory Comm. on Evidence Rules, *Minutes of the Meeting of April 28, 2023*, at 3 (Apr. 28, 2023), https://www.uscourts.gov/sites/default/files/2023-04_advisory_committee_on_evidence_rules_meeting_minutes_final_0.pdf [<https://perma.cc/K67P-23KG>].

205. Final Proposal, *supra* note 19, at 1083.

206. Advisory Comm. on Evidence Rules, *supra* note 204, at 4.

207. The committee note also clarified the amendment’s application to all trial aids. Final Proposal, *supra* note 19, at 1084 (“This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.”).

Rule's hostility to illustrative aids.²⁰⁸ Deletion of the notice requirement thus went a long way toward correcting any misimpression that the Rule was designed to put a damper on the use of courtroom aids.

The balancing standard that grants access to illustrative aids does have the power to encourage or discourage their use, however. A test that forecloses access to an aid whenever its potential for unfair prejudice outweighs its utility—to even a slight degree—is more restrictive than one that permits the use of an aid so long as its utility is not “substantially outweighed” by its risk of unfair prejudice. As discussed above, the modifier “substantially” was included in brackets in proposed Rule 611(d) to invite input as to the appropriate balance for aids that serve only as pedagogical devices. Although little public commentary addressed this precise issue, it makes eminent sense to include “substantially” in the balance, if only to eliminate any misperception that the new Rule reflects “hostility” to illustrative aids. Furthermore, it could prove confusing to apply Rule 403 balancing—which employs the modifier “substantially” to favor admissibility—to demonstrative evidence, yet to apply a distinct and less forgiving balancing to illustrative aids. Accordingly, the Advisory Committee decided to lift the brackets from the term “substantially” in the final version of the proposed amendment, ensuring that the balancing standard puts a thumb on the scale in favor of illustrative aids.

C. Defining “Illustrative Aids”

The Advisory Committee also carefully considered commentary urging a definition of illustrative aids be added to the proposed Rule. The Committee ultimately concluded that adding a precise definition of the term “illustrative aid” to the text of the Rule would be unwise and inconsistent with the Federal Rules of Evidence generally. Still, to offer guidance to both courts and litigants, the Committee Note amplified the description of the aids to which the amended Rule applies.

It is rare to find a Federal Rule of Evidence that begins with a definition.²⁰⁹ For example, Rule 404(a) prohibits evidence of “character” when offered to prove a person’s conduct but makes no attempt to define

208. See *supra* notes 150–155 and accompanying text.

209. Rule 101(b) is a definitions section added in the restyling, but the purpose was exactly that—restyling. The definitions are intended for convenience so that other Rules did not have to be amended to have exactly consistent terminology. FED. R. EVID. 101. Rule 801 does define hearsay and Rule 401 sets forth a “test” for determining relevance. *Id.* at 401, 801(a)-(c).

the term “character.”²¹⁰ Similarly, Rule 406 admits evidence of a person’s “habit” to prove his conduct but includes no definition of “habit.”²¹¹ Although the lack of precise definitions may bedevil law students and create much fodder for law professors, avoiding precise textual definitions makes eminent sense from a rulemaking perspective. Predicting with precision all potential evidentiary permutations is an impossible task, and any attempt to craft a rigid, comprehensive definition of a key term risks being over- or underinclusive. Determining whether a particular piece of evidence fits the mold is a question best left to adjudication. Given the wide variety of illustrative aids—encompassing everything from scrawls on a photo to complex computer animations—it would be perilous to try to provide a formal, specific definition. The risks are especially acute given likely advances in technology that promise to support the use of currently unforeseen illustrative aids in the future.

Importantly, however, the amendment *does* provide a functional description of what it covers. It allows a party “to present an illustrative aid *to help the trier of fact understand the evidence or argument.*”²¹² Further along, the Rule emphasizes that an illustrative aid “*is not evidence.*”²¹³ Beyond those textual descriptions, a portion of the Committee Note helps courts and litigants appreciate the distinction between illustrative aids and demonstrative evidence:

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. . . . An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. “Demonstrative evidence” is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

The . . . category covered by this rule . . . is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, 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 trier of fact understand evidence or argument that is being or has been presented.²¹⁴

Including such a detailed discussion in rule text would obviously be problematic. The Federal Rules of Evidence are famously concise, so

210. *See id.* at 404.

211. *See id.* at 406.

212. *See* Final Proposal, *supra* note 19, at 1080 (emphasis added).

213. *Id.* (emphasis added).

214. Final Proposal, *supra* note 19, at 1081–82.

that they may be employed effectively in the heat of trial. Including a treatise-like discussion in the body of the Rule would undermine that important feature of the Federal Rules. And any textual language that details the types of aids to which it applies would risk becoming outmoded by constant advances in technology and courtroom culture. Including outdated discussions of aids like “chalks” does little harm in a Committee Note, while the same language in rule text risks obsolescence for the Rule.

Therefore, in keeping with the Federal Rules, the amendment does not include a precise definition of the term “illustrative aid.” Instead, it offers a functional description of the term in rule text and a lengthy, complementary Note discussion.

D. Rule 107: A New Home for an Illustrative Aids Rule

Location, location, location. Finding the optimal home for a rule on illustrative aids was a significant concern during the rulemaking process. Its original placement in a new subsection of Rule 611 was rational given the courts’ historic resort to Rule 611(a) in regulating illustrative aids, as well as the connection between witness testimony and many types of illustrative aids. Still, public comment suggested that placement at the end of an already busy provision may undermine the effectiveness of the groundbreaking, new illustrative aids rule from the start.

The Evidence Advisory Committee ultimately concluded that an entirely new, freestanding rule of evidence governing illustrative aids would best promote the goals of the amendment. The Federal Rules of Evidence are all about ease of access, and judges and lawyers are more likely to discover and utilize a prominent new provision dedicated exclusively to illustrative aids than one added to the end of a crowded provision covering numerous topics. An independent illustrative aids rule also offers a better structure for uncluttered rulemaking, avoiding complicated enumeration involving romanettes.²¹⁵

If a freestanding, new rule of evidence is the optimal vehicle for regulating illustrative aids, it must be located within an existing Article of the Federal Rules of Evidence. Although Article VI governing witnesses is one possible location, not all illustrative aids accompany witness testimony, and the new provision now expressly encompasses aids to argument as well. As examined above, an illustrative aids

215. Advisory Comm. on Evidence Rules, *supra* note 204, at 7.

provision is a poor fit for Article X too, both because the provision is conceptually distinct from the “Best Evidence” Rule set forth in that Article and because burying the new Rule in the back of the rule book threatens its utility. And none of the other Articles that address specific issues of relevance, opinion testimony, hearsay, and authenticity are conceptually compatible.

A far better location for a rule on illustrative aids is Article I, entitled “General Provisions.” Adding a new illustrative aids provision to the first Article features it prominently at the front of the line. Outside of its prominent placement, Article I is a perfect conceptual fit as well. Most of the Article I provisions do not deal with admitting or excluding evidence.²¹⁶ For example, Rule 103 describes how to preserve an objection and make an offer of proof.²¹⁷ Rule 104 apportions responsibility for evidence rulings and governs the standards of proof applicable to such rulings.²¹⁸ And Rule 105 covers limiting instructions offered when evidence is admitted for one purpose or against one party but not another.²¹⁹ As highlighted by the proposed amendment, illustrative aids are “used” by a party to illustrate admitted evidence, but the aids are “not evidence” in the case.²²⁰ Placing the new illustrative aids Rule in Article I alongside other general provisions that do not regulate admissibility emphasizes the Rule’s unique focus.

For all of these reasons, the Evidence Advisory Committee determined that Article I constitutes the prime spot for the new illustrative aids Rule and thus relocated it from Rule 611(d) to a new Rule 107.²²¹ After a years-long rulemaking project, Rule 107, as submitted to the U.S. Supreme Court for approval, reads as follows:

Federal Rule of Evidence 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid’s 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.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:

- (1) all parties consent; or

216. Rule 106, the sole Rule in Article I dealing with the admission of evidence, authorizes the admission of completing statements. FED. R. EVID. 106.

217. *See id.* at 103.

218. *See id.* at 104.

219. *See id.* at 105.

220. Final Proposal, *supra* note 19, at 1064.

221. Advisory Comm. on Evidence Rules, *supra* note 204, at 7.

- (2) the court, for good cause, orders otherwise.
- (c) **Record.** When practicable, an illustrative aid used at trial must be entered into the record.
- (d) **Summaries of Voluminous Materials Admitted as Evidence.** A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.²²²

The companion amendment to Rule 1006 that helps untangle the distinctions between illustrative summaries and admissible summaries of voluminous underlying materials reads as follows:²²³

Federal Rule of Evidence 1006. Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. ~~The proponent court may admit as evidence use a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.~~

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.²²⁴

CONCLUSION

New Federal Rule of Evidence 107 promises to bring clarity and consistency to the all-important use of illustrative aids in the courtroom. Until now, the Federal Rules of Evidence have left the regulation of illustrative aids to common law development. Trial judges and lawyers share a hazy understanding of the considerations that apply to the presentation of such aids. But the devil is in the details, and courts differ in important respects. Courts utilize widely divergent vocabulary in describing trial aids, which often leads to confusion regarding their proper evidentiary status in a case. Courts draw on

222. See Final Proposal, *supra* note 19, at 1064–65; Report of the Judicial Conference Committee on Rules of Practice and Procedure 532 app. D at 1 (Sept. 2023), https://www.uscourts.gov/sites/default/files/september_2023_standing_rules_report.pdf [<https://perma.cc/2DR2-DVZ6>] (containing the language for Rule 107).

223. Underlined text was added by the amendment, and stricken text was deleted from the Rule.

224. Final Proposal, *supra* note 19, at 1093; see also Report of the Advisory Committee on Evidence Rules to Hon. John D. Bates, Chair Committee on Rules of Practice and Procedure 967 app. at 48 (May 10, 2023), https://www.uscourts.gov/sites/default/files/2023-06_standing_committee_agenda_book_final_updated_5-30-23_0.pdf [<https://perma.cc/WD6H-JD94>] (detailing minor changes to proposed amendment to Rule 1006 after publication and comment, including the addition of the word “admissible” to modify the summarized materials described in Rule 1006(a)).

different rules and standards to regulate illustrative aids; some courts prohibit aids in the jury room absent consent by all parties, while others find discretion to send illustrative aids to the jury in some circumstances. Courts may overlook important issues of notice and of preservation of trial aids for the appellate record. And confusion about illustrative aids has undermined the effective use of Rule 1006 summaries of voluminous evidence. As technology has advanced at a lightning pace, the use of sophisticated illustrative aids by trial counsel has only increased. Adding Rule 107 and an amended Rule 1006 to the Federal Rules of Evidence will allow for more efficient and consistent handling of the illustrative aids on which trial lawyers depend.