



**FEDERAL PUBLIC
DEFENDER**

— District of Nevada —

A Defender's Evidence Update

Rene L. Valladares, Federal Public Defender, District of Nevada

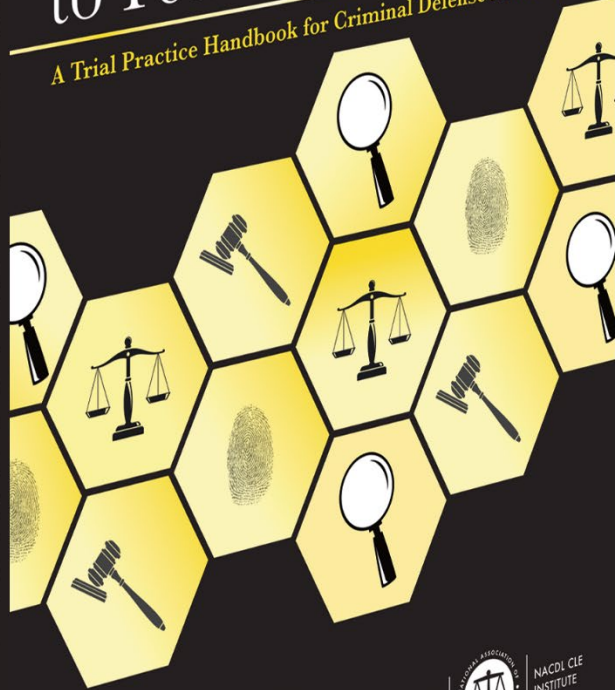
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A Defender's Guide to Federal Evidence

A Trial Practice Handbook for Criminal Defense Attorneys

A Defenders Guide to Federal Evidence: A Trial Practice Handbook for Criminal Defense Attorneys | Rene L. Valladares



Rene L. Valladares

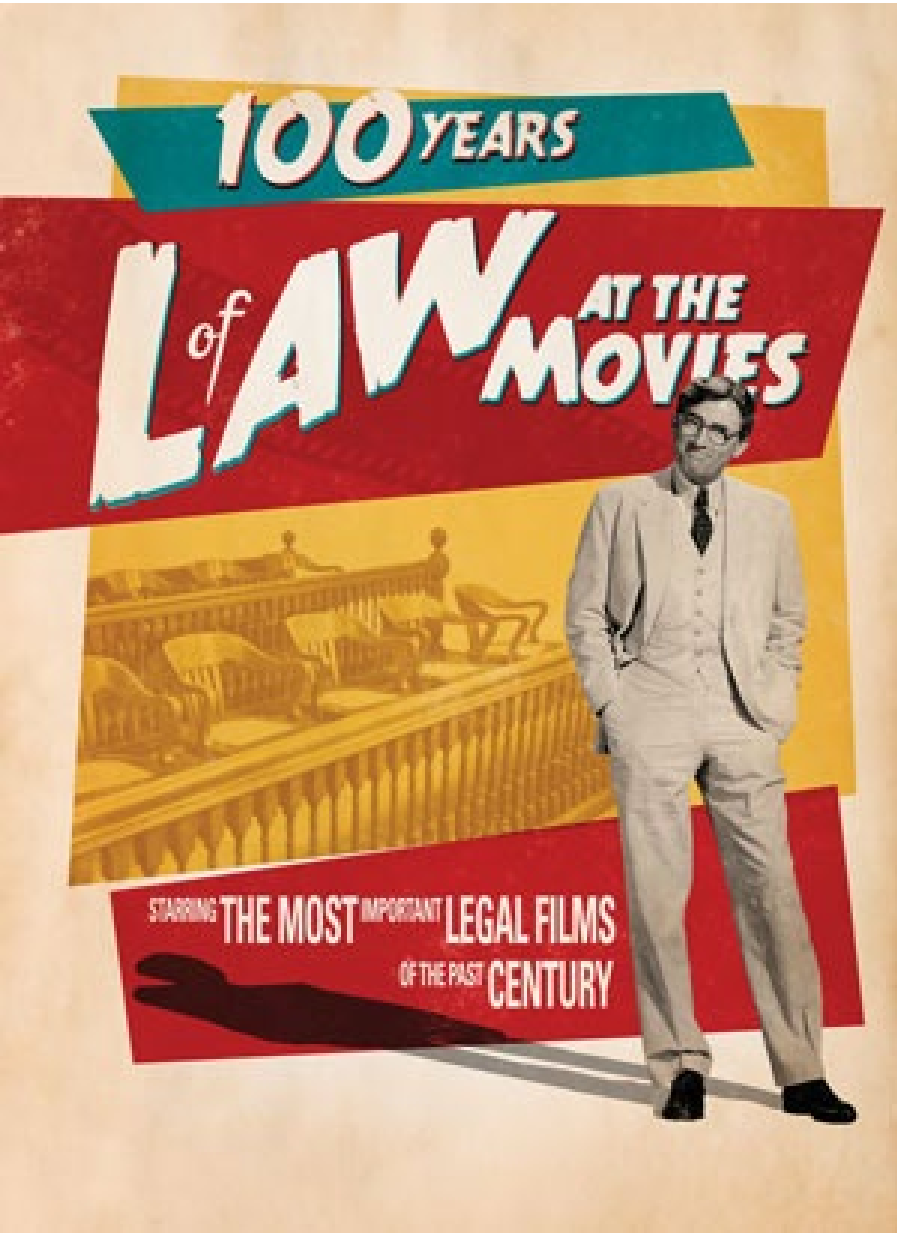
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2023 Amendments

- Rule of Completeness-FRE 106
- Rule of Exclusion-FRE 615
- Testimony by Expert Witnesses-FRE 702



2024 Amendments

- Illustrative Aids-**FRE 107**
- Extrinsic E of Prior Inconsistent Statement-**FRE 613(b)**
- Statements Against Interest-**FRE 804(b)(3)(B)**
- Summaries to Prove Content-**FRE 1006**



Amendment Process

- Takes about three years
 - Advisory Committee on FREs
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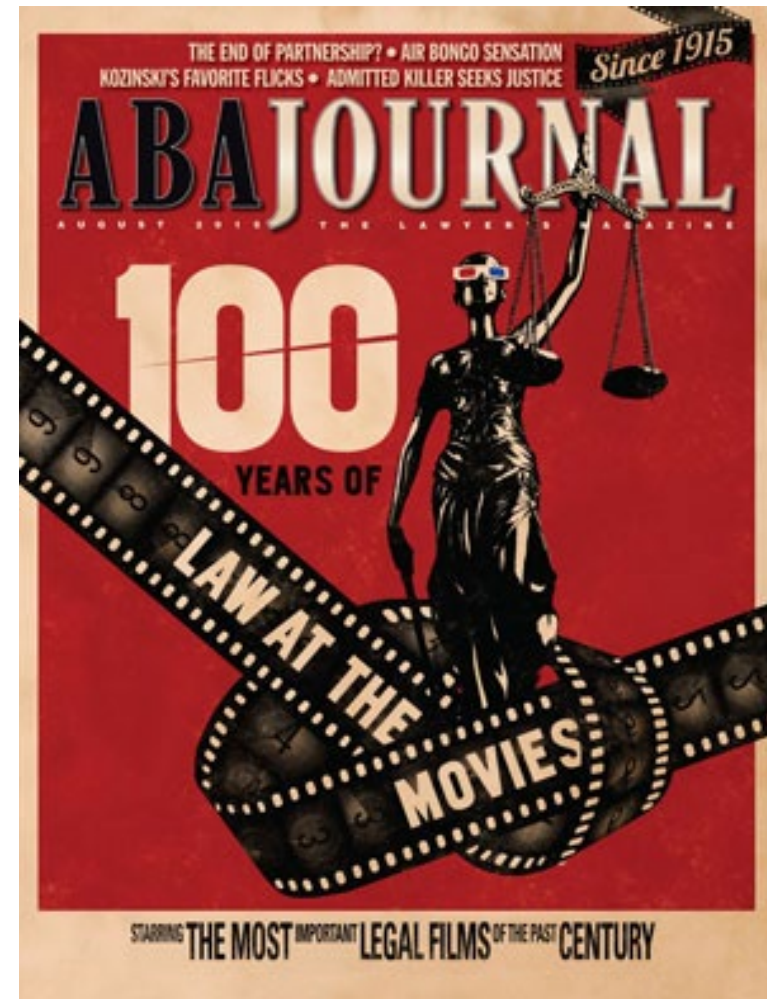


Former FRE 106-Rule of Completeness

- If a party introduces all or part of a **writing or recorded statement**,
- an adverse party may require the introduction of any other part-or any other writing or recorded statement
- that **in fairness ought to be considered at the same time**
- **FRE 106** is a codification of the common law rule of completeness

Problems

- Rule was limited to introduction of writing or recorded statement
- Oral statements were not covered
- Many jurisdictions allowed oral statements
- Hearsay not allowed





Amendment

- Amendment allows completion of **all statements in any form** (not just written or recorded statements)
- Amendment allows completion over a hearsay objection



TO KILL A MOCKINGBIRD | 1962

DIRECTED BY ROBERT MULLIGAN
WRITTEN BY HORTON FOOTE AND HARPER LEE
PRODUCED BY HARPER LEE, GREGORY PECK, ROBERT MULLIGAN AND ALAN J. PAKULA
STARRING GREGORY PECK, MARY BADHAM AND PHILLIP ALFORD
WITH JOHN MEGNA, BROCK PETERS, ROBERT DUVAL, FRANK OVERTON, ROSEMARY MURPHY AND ESTELLE EVANS
RUNNING TIME 129 MINUTES



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Rule of Exclusion-FRE 615

- **FRE 615** states that at a party's request **the court must order witnesses excluded so that they cannot hear other witnesses' testimony**
- The Rule does not allow for the exclusion of:
 - A party who is a natural person
 - An officer of a party that is not a natural person
 - A person whose presence is essential



Problems

- The former rule **did not speak to instances where a witness learns of others' testimony from counsel, a party, or the witness's own inquiries**
- In some circuits, if the court enters a **FRE 615** order without spelling out any additional limits, **the sole effect is to physically exclude the witness from the courtroom**
- But other circuits have held that a **FRE 615** order **automatically forbids recounting others' testimony to the witness, even when the order is silent on this point**
- In those circuits, a person could be held in contempt for behavior not explicitly prohibited by either rule or court order

Amendment

- 1. The amendment adds a new subdivision (b) stating that the court's order **can cover disclosure to a W of or access to testimony by a W, but it must do so explicitly (thus providing fair notice)**
- 2. Amendment allows for **one case agent FRE 615(a)(2)**
- (See, however FRE 615(a)(3))



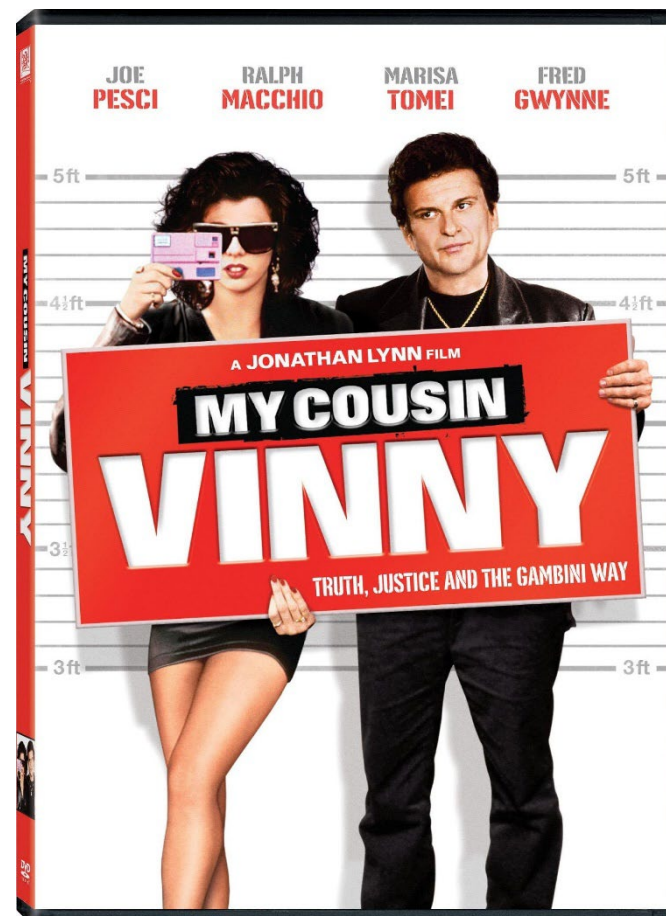
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FRE 702-Expert witness testimony

- The witness must **qualify** as an expert
- The expert knowledge must be **helpful** to the trier of fact. **FRE 702 (a)**
- It must be based on “**sufficient facts or data.**” **FRE 702(b)**
- It must be the product of “**reliable principles and methods.**” **FRE 702(c)**
- The expert must have “**reliably applied the principles and methods** to the facts of the case.” **FRE 702(d)**



FRE 702(c)-Reliable principles and methods

- Reliability is measured by the non-exclusive checklist in Daubert v. Merrell Dow, 509 U.S. 579, 592-593 (1993).
- The factors outlined in Daubert can also apply in cases involving non-scientific evidence. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).



Daubert reliability checklist

- 1. Whether the theory or technique in question can and has been **tested**
- 2. Whether the theory or technique has been subjected to **peer review and publication**
- 3. The theory or technique's known or potential **rate of error**
- 4. The existence and maintenance of **standards** controlling the theory or technique's operation
- 5. Whether the theory or technique has attracted **widespread acceptance** within a relevant scientific community

2009 NAS Report

- 2009 NAS released groundbreaking report on the state of forensic science in courtroom
- With the exception of nuclear DNA analysis, no forensic method has been thoroughly shown to have capacity to connect forensic evidence to specific individuals/sources



Problem areas-”Junk science”

- Problem areas:
- DNA Analysis of complex mixtures
- Bitemark analysis
- Latent fingerprint analysis
- Firearms analysis
- Footwear analysis
- Hair analysis



2016 PCAST Report

- PCAST 2016 Report reemphasized weaknesses continued to plague forensic science.
- Many forensic methods lack validation studies.
- PCAST opposed by DOJ, FBI, and the National Association of District Attorneys.



“Junk” science

- National epidemic of faulty forensic science.
- Judges have largely disregarded Daubert in criminal cases.
- 1. E.G. “Gerry” Morris: *Flawed Science in the Courtroom. Is Excluding it Really that Difficult?*, **THE CHAMPION**, Nov. 2015.
- 2. Janis C. Puracal and Aliza B. Kaplan: *Science in the Courtroom: Challenging Faulty Forensics*, **THE CHAMPION**, Jan.-Feb. 2020.
- 3. Aliza B. Kaplan and Janis C. Puracal, *It’s not a Match: Why the Law Can’t Let Go of Junk Science*. **ALBANY LAW REVIEW**, Vol 81:3, 895.
- 4. Brandon L. Garrett, *Unpacking the Source of Error in Forensic Evidence*, **THE CHAMPION**, June 2021.



- **Courts are not performing “gate-keeping” function**
- Instead, courts are leaving “scientific validity” determinations in hands of the jury and cross-examination by defense counsel
- Expected “sea change” in the admissibility of faulty forensic science did not materialize
- Little change in law to prevent admissibility of faulty forensic science
- **Courts turn blind eye to advances in science insisting on precedent**
- Appellate courts more willing to question admissibility of scientific evidence in civil cases
- Vast majority of reported opinions in crim. cases show courts rarely exclude or restrict expert testimony offered by prosecutors
- Courts more willing to exclude or restrict expert testimony offered by the defense

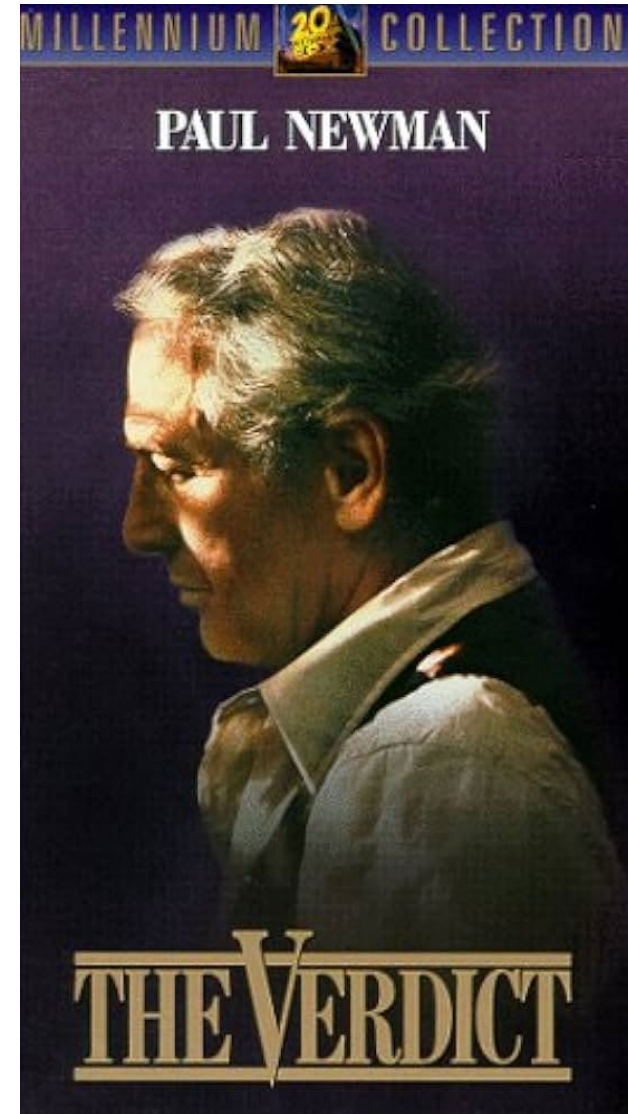
Problem areas-Committee

1. Punting

- Under the caselaw and **FRE 702** a judge should not admit expert testimony until the judge— not the jury—finds by a preponderance of the evidence that the requirements of **FRE 702** are met
- However, many courts ask whether a jury could find by a preponderance of the evidence that the requirements of **FRE 702** are met

2. Overstatement

- Second, the amendment addresses the issue of overstatement, i.e., **where a qualified expert expresses conclusions that go beyond what a reliable application of the methods to the facts would allow**



- Overstatement issues typically arise with respect to forensic testimony in criminal cases
- For example, the expert may say that the bullet came from the defendant's gun, when that level of certainty is not supported by the underlying science



Amendment

- The amendment does not change **FRE 702**; it merely makes clear what the rule already says



- 1. The amendment emphasizes that the proponent of the evidence demonstrate to the court that the admissibility requirements of FRE 702 are satisfied before submitting expert opinion testimony to the jury
- 2. Also that “the expert’s opinion reflects a **reliable application of the principles and methods to the facts of the case.**”



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Demonstrative E v. Illustrative Aids

- **Demonstrative E**

- admitted into evidence and used substantively to prove disputed issues at trial
- **Goes to the jury room**

- **Illustrative Aids**

- not admitted into evidence but used to assist the trier of fact in understanding other evidence
- **Does not go to jury room**

FRE 107-Illustrative Aids

- Despite their pervasiveness, no FRE addresses illustrative aids
- Need for rule governing use of illustrative aids



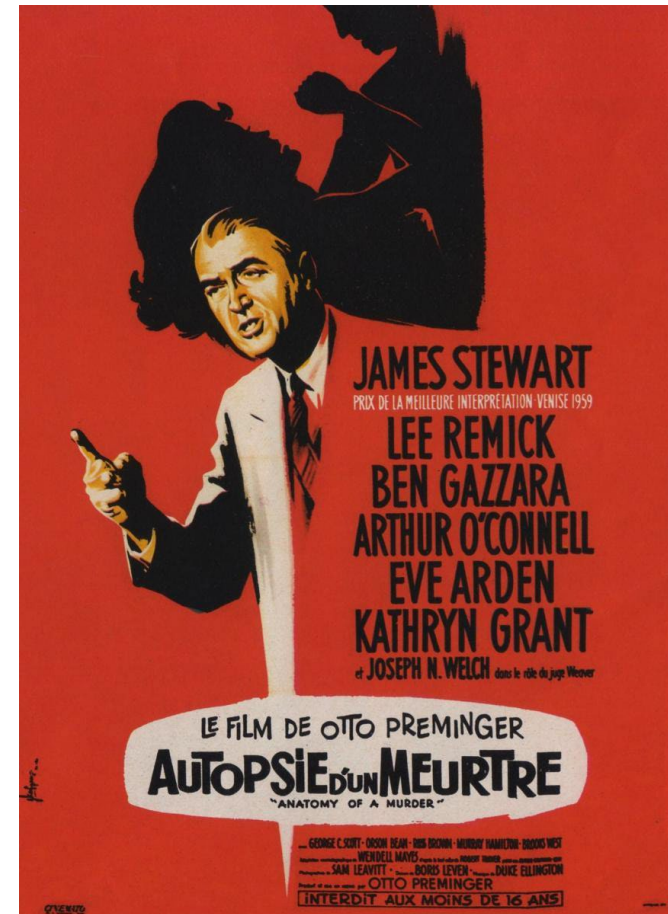
Examples of Illustrative Aids

- Examples include:
 - blackboard drawings,
 - charts,
 - diagrams,
 - graphs,
 - photos,
 - PowerPoint presentations,
 - video depictions



Problems

- Illustrative aids are used routinely, but no rule directly controls them
- There is **court confusion** between demonstrative E and illustrative aids
- Also, standards for use of an illustrative aid are not made clear in the case law



Proposed Amendment

- 1. Must **FRE 403** test (excluded if prejudice substantially outweighs utility)
- 2. An illustrative aid **does not go to the jury room unless:**
 - all parties consent; or
 - the court, for good cause, orders otherwise
- 3. When practicable, an illustrative aid that is used at trial must be entered into the record
- 4. Rule applies to openings/closings
- 5. Notice requirement deleted (instead, reasonable opportunity to object)

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- Proposed amendment approved by Judicial Conference and transmitted to SCOTUS
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Witness's Prior Statement-FRE 613

- The common law provided that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement the adverse party **was required to give the witness an opportunity to explain or deny the statement**
- The existing **FRE 613(b)** rejects “**prior presentation**” requirement
- It provides that extrinsic evidence of the inconsistent statement is admissible so long as the witness is given an opportunity **to explain or deny the statement at some point in the trial**

Witness's Prior Statement-FRE 613

- To qualify as an inconsistency, direct contradiction is not necessary
- Omissions can qualify
- Evasive answers can qualify



Problem

- Judges tend to follow the old common law practice
- The Advisory Committee agreed with that practice as a policy matter
- Prior presentation requirement saves time, because a witness will often concede that she made the inconsistent statement
- The prior presentation requirement also avoids the difficulties inherent in calling a witness back to the stand to give her an opportunity at some later point to explain

Proposed Amendment

- The Proposed amendment would still give the judge discretion in appropriate cases to allow the witness an opportunity to explain or deny the statement after introduction of extrinsic evidence
- Such as when the inconsistent statement is only discovered after the witness finishes testifying and has been excused



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FRE 804(b)(3): Statement Against Interest

- **Statement against interest**
 - 1. Contrary to declarant's pecuniary or proprietary
 - 2. Subjects declarant to civil or criminal liability
 - 3. Requires "unavailability"
- If declarant inculpated but offered to exculpate accused, need corroborating circumstances "**clearly indicative of trustworthiness**"

FRE 804(a): “Unavailable”

- W is absent and proponent of E cannot procure W's attendance
- W invokes privilege
- W refuses to testify **despite a court order**
- Lack of memory

Compare:

Party Admissions

1. Must be made by the party against whom they are being used
2. Do not have to be against interest when made
3. **Declarant can be available**

Statement Against Interest

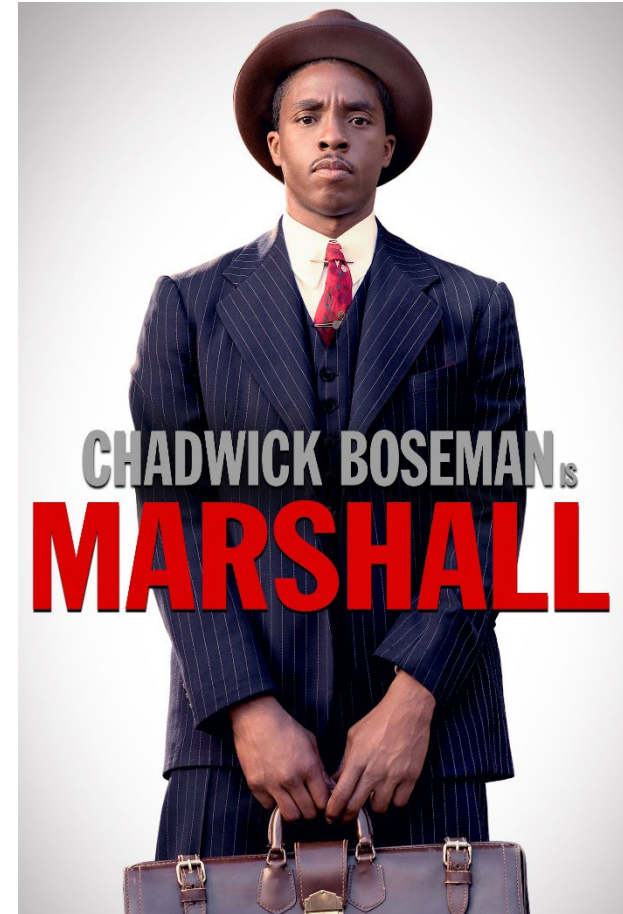
1. Can be made by anyone, party or not
2. Must be against interest when made
3. **Declarant must be unavailable**

Problem

- FRE 804(b)(3)(B) requires “corroborating circumstances that clearly indicate [the] trustworthiness” of the statement if offered in a criminal case as one that exposes declarant to liability
- Courts are split concerning the meaning of “corroborating circumstances”
- Some courts only allow the trial judge to consider guarantees of trustworthiness inherent in the statement itself
- Other circuits allow the judge to consider other evidence of trustworthiness

Proposed Amendment

- The proposed amendment would direct judges to consider:
 1. the totality of circumstances under which the statement was made
 2. and any evidence that supports or contradicts it



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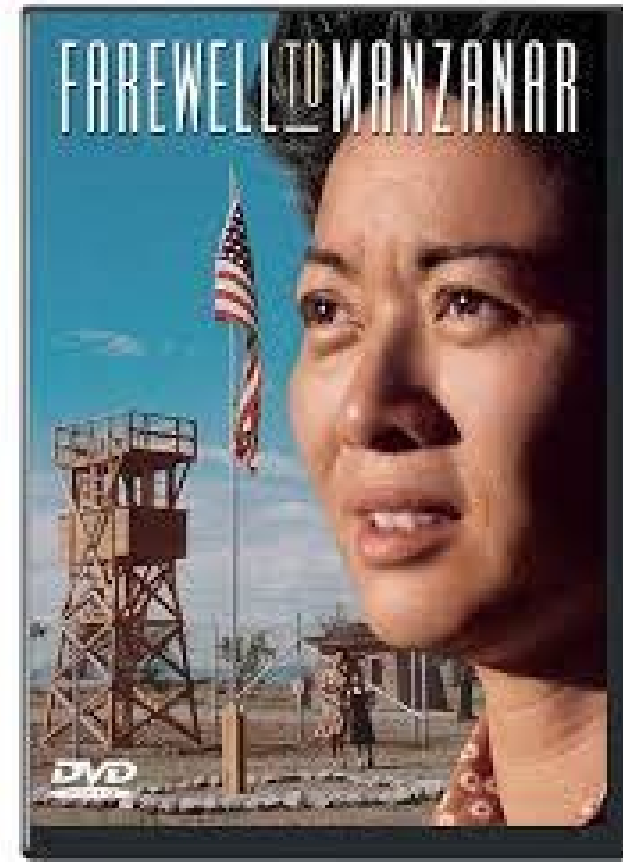


Summaries to Prove Content- FRE 1006

- According to **FRE 1006** a party may use a summary, chart, or calculation to **prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court**
- Proponent must make the originals or duplicates available for examination or copying
- While underlying E does not have to be admitted, **it must be admissible**

Problem

- Some courts have stated that summaries under **FRE 1006 are not evidence**, they treat them as illustrative aids
- Other courts have stated that all the **underlying evidence must be admitted before summary can be admitted**



Proposed Amendment

- The proposed amendment to **FRE 1006** would clarify that a **summary is admissible whether the underlying E has been admitted or not**
- **Opponent must have fair opportunity to meet summary (Advisory Committee Note)**
- Proposed amendment is treated as companion to proposed amendment on illustrative aids **FRE 107**

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Challenging Government Experts

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