AMBIGUITY IN THE PRESENTATION OF EVIDENCE: WHY NORTH DAKOTA SHOULD FOLLOW THE FEDERAL JUDICIARY'S GUIDANCE REGARDING THE PRESENTATION OF EVIDENCE IN STATE COURT MATTERS

ABSTRACT

The Federal Rules of Evidence (the "Rules" or the "FRE") are designed to ensure fairness to litigants and to achieve uniformity in application. Despite this, ambiguity in the text of the Rules can lead to varying applications among the federal judiciary on a discretionary basis. The Judicial Conference is tasked with amending the existing Rules or proposing new rules to remedy any inconsistencies in interpretation or application. The procedural process to amend the FRE is designated to the Advisory Committee on Evidence Rules.

In May 2022, the Committee proposed amendments to Rules 611, 613(b), 801(d)(2), 804(b)(3), and 1006. The initial amendment to Rule 611, Rule 611(d), would later become the newly proposed Rule 107 and aims to provide guidance on the use of illustrative aids in the courtroom. The proposed amendments to Rules 801(d)(2) and 804(b)(3) clearly reflect the Committee's attempt to resolve the remaining uncertainty in the hearsay doctrine. The Committee's proposal of Rule 107 demonstrates the Committee's attempt to provide guidance in an area of emerging research—the use of illustrative aids in the courtroom.

In October 2023, the Judicial Conference advanced a memorandum to the United States Supreme Court recommending adopting the proposed changes. If adopted, the amendments are projected to go into effect in December 2024. North Dakota practitioners should be cognizant of these changes that would impact any practitioners that practice in federal district court. Additionally, this Note will argue that North Dakota follow the federal judiciary's guidance and adopt the proposed amendments or similar changes reflecting the same language to the North Dakota Rules of Evidence for the same reasons the Committee proposed the amendments to the FRE: to resolve ambiguity and to achieve uniformity in application.

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I. INTRODUCTION

Achieving fairness in judicial administration and uniformity in application are the primary purposes of the Federal Rules of Evidence (the "Rules" or the "FRE").[1] Despite these noble purposes, ambiguity in the Rules can lead to varying and unequal application when judicial discretion is

1. FED. R. EVID. 102. These goals are included in the text of the Rules itself in Rule 102, which reads, "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination." *Id.*

involved.[2] The Judicial Conference is tasked with presenting new Federal Rules of Evidence or advancing amendments to the existing Rules in order to resolve any discrepancies in the application and interpretation of the Rules among the federal judicial circuits.[3] Rule amendments are often a reaction to circuit splits or calls to action by legal scholars.[4] However, amendments to the Rules have been somewhat rare since their adoption in 1970.[5] The Advisory Committee on Evidence Rules (the "Advisory Committee") has successfully amended the existing Rules in the past to resolve areas of conflict in the law, but some inconsistencies in the Rules remain.[6]

The Judicial Conference has recently advanced proposed Rule amendments to the United States Supreme Court that are projected to go into effect in all federal district courts in December 2024 if the Court adopts the amendments.[7] These proposed amendments include amending the existing hearsay Rules and the proposal of an entirely new Federal Rule of Evidence to regulate the use of illustrative aids at trial.[8] This Note will discuss the proposed amendments and analyze the emerging legal issues that led the Judicial Conference to propose these amendments. Additionally, this Note will argue for North Dakota to adopt a state rule of evidence regulating the use of illustrative aids at trial to ensure fairness to litigants and achieve uniformity in application across the state judiciary.

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2. Glenn Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1307 (1992) ("[T]he judicial branch designed the Federal Rules of Evidence to operate as guidance for the exercise of discretion within the federal judiciary, and consequently, the Rules' intended function is very much unlike that of most statutes.").

3. *Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/7EVA-NAG6] (last visited Dec. 6, 2023). 28 U.S.C. § 331 grants the Judicial Conference the authority to "recommend amendments and additions to the rules to promote: simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." *Id.*

4. *See generally* 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, 517 (2016).

5. Eileen A. Scallen, *Proceeding with Caution: Making and Amending the Federal Rules of Evidence*, 36 SW. U. L. REV. 601, 610 (2008).

6. Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 BOS. U. L. REV. 1873, 1892 (1992) ("Since its reconstitution in 1992, the Advisory Committee on Evidence Rules has fulfilled its responsibility in amending the Rules to resolve many other conflicts. . . . Still, conflicts in the interpretation of the Federal Rules of Evidence remains, threatening inconsistency and unfairness to litigants.").

7. *Pending Rules and Forms Amendments*, U.S. CTS. at n.1, https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments#a1 [https://perma.cc/UD98-TDEF] (last visited Jan. 17, 2023) ("Although the rules are projected to go into effect on the dates listed, they can be delayed for various reasons or withdrawn entirely.").

8. Memorandum from Hon. Rosylnn R. Mauskopf, Sec. Jud. Conf. U.S., on Transmittal of Proposed Amendments to the Federal Rules of Evidence (Oct. 23, 2023), https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf [https://perma.cc/TK55-Z2S7] [hereinafter *Mauskopf Memo*].

II. AMENDING THE FEDERAL RULES OF EVIDENCE

The process for amending the existing Rules and for the proposal of any new rules is often a drawn-out process that can span several years.[9] The following section of this Note explores the common reasons the Advisory Committee considers amending the existing Rules or proposing a new rule: to resolve an issue with an existing Rule or to fill in a gap in the law that the existing Rules fail to cover. This section will also explain the procedural process followed by the Advisory Committee for adopting amendments to the Rules from start to finish.[10]

A. THE IMPETUS BEHIND RULE AMENDMENTS

Criticism from scholars, negative caselaw, and disagreement among the federal judicial circuits are common reasons the Advisory Committee considers amending the Rules.[11] A dichotomy exists in the legal field regarding amending the FRE, with some proponents of amendments reflecting the changes in the law and society at large and others inherently opposing amendments to the Rules.[12] Former Supreme Court Chief Justice William Rehnquist was one of the most vocal opponents of amending the Rules, believing that "the Federal Rules of Evidence were designed to withstand the test of time."[13] Scholars have critiqued Chief Justice Rehnquist's opposition by noting that Rule amendments may be necessary for fairness in modern litigation techniques.[14] Others have cautioned against amending the Rules only for the sake of modernity and advancements in technology.[15]

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9. U.S. CTS., *supra* note 7. On average, an amendment to an existing federal rule takes about three years from start to finish. *Id.*

10. For the purposes of this Note, discussion of the procedural process will be kept relatively brief. For further discussion of the formal procedural process, see generally Scallen, *supra* note 5, and see also U.S. CTS., *supra* note 3.

11. *See generally* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 976-77 (2022).

12. Capra & Richter, *supra* note 6, at 1889. Opponents of amending the rules "have long warned against alterations to the Federal Rules of Evidence for fear that changes will destroy their brevity and simplicity." *Id.*

13. *Id*. at 1894.

14. *Id.* ("In some instances, however, a rule that operated very well for the era in which it was enacted may be undermined by technological or other societal developments in the trial process. The integrity of the Rules is clearly eroded if they are not adaptable to evolving norms and technology. Thus, rulemakers must always examine existing provisions to ensure that they have kept pace with evolving litigation realities. When the Rules are not serving contemporary trial needs, the costs generally associated with modification of the Rules are eclipsed by the need for change." (footnote omitted)).

15. Liesa L. Richter, *Don't Just Do Something!: E-Hearsay, the Present Sense Impression, and the Case for Caution in the Rulemaking Process*, 61 AM. U. L. REV. 1657, 1660 (2012) ("While amending rules and policies to keep pace with technology undoubtedly can be necessary, legal

B. THE PROCEDURE FOR AMENDING THE FEDERAL RULES OF EVIDENCE

The procedural process for amending the FRE is a lengthy endeavor.[16] The Judicial Conference is tasked with amending the existing Rules or proposing new rules to resolve any uncertainty in the interpretation and application of the Rules.[17] The amendment process is often in response to negative caselaw, circuit splits, or criticism of the Rules from scholars.[18] The process begins with the Advisory Committee on Evidence Rules meeting to discuss any issues in the application or interpretation of the existing Rules and whether any gaps in the Rules would necessitate the proposal of a new rule to fill those gaps. [19] Once the Advisory Committee has met, it may take a vote on the proposed changes and advance any recommended changes that passed to the Standing Committee on Evidence Rules.[20]

The proposed changes advanced to the Standing Committee are then released for public comment.[21] During this time, scholars and practitioners have the opportunity to provide feedback on the Advisory Committee's proposed amendments, make arguments against the changes, or propose further changes to the Rules.[22] A public hearing on the proposed amendments to the FRE is also held during the period designated for public comment.[23] The Advisory Committee then considers the comments provided during the

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reformers should be wary of change for its own sake. Not all legal standards are similarly susceptible to changing cultural and communication media, and some circumspection is in order. Without careful analysis, rapid changes to first legal principles to address ongoing technological progress may usher in unintended negative consequences and serve to undermine long-standing legal standards of continuing significance.").

16. *See* Scallen, *supra* note 5, at 610.

17. 28 U.S.C. § 331 ("The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification, or rejection, in accordance with law.").

18. *See generally* Nunn, *supra*, note 11, at 976-77.

19. U.S. CTS., *supra* note 3 ("The Judicial Conference has authorized the appointment of five advisory committees to assist the Standing Committee, dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules. . . . Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations.").

20. *Id.* ("The Standing Committee reviews and coordinates the recommendations of the five advisory committees, and it recommends the Judicial Conference proposed rule changes 'as may be necessary to maintain consistency and otherwise promote the interests of justice.'" (citation omitted) (quoting 28 U.S.C. § 2073(b))).

21. *Id.*

22. *Id*. Traditionally, the designated commentary period is six months, but "[i]n an emergency, a shorter time period may be authorized by the Standing Committee." *Id.*

23. *Id*.

public hearing and those submitted during the feedback period to determine if further changes to the proposed amendments are necessary.[24] The Advisory Committee then submits the final proposed amendments to the Standing Committee for approval.[25] After the Standing Committee makes a final determination on the amendments it proposes, a memorandum is provided to the chair of the Committee on the Rules of Practice and Procedure.[26]

Then, the Judicial Conference meets to approve the proposed amendments and takes a vote on whether to adopt the changes.[27] If the changes are approved after the vote is taken, the Judicial Conference provides the Chief Justice of the United States Supreme Court a memorandum detailing the proposed changes and a recommendation for the Court to adopt the amendments.[28] If the Supreme Court chooses to adopt the Rule amendments currently pending, the Chief Justice will send a congressional package to the House of Representatives explaining that the Court has chosen to adopt the Rules pursuant to 28 U.S.C. Section 2072.[29] Congress is also provided an opportunity to consider these changes because the FRE was adopted by federal statute.[30] Congress may use its statutory authority to override any changes to the FRE, but it has generally deferred to the Supreme Court and its Advisory Committee on Evidence Rules's interpretation.[31]

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24. *Id*. After the public hearing "[t]he advisory committee then takes a fresh look at the proposed rule changes in light of the written comments and testimony. If the advisory committee decides to make a substantial change in its proposal, it may provide a period for additional public notice and comment." *Id.*

25. *Id*. ("Each proposed amendment must be accompanied by a separate report summarizing the comments received from the public and explaining any changes made by the advisory committee following the original publication.").

26. *Id*.

27. *Id*. Amendments are traditionally considered at the Judicial Conference's September session. *Id.*

28. *Id*.

29. The Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. 28 U.S.C. § 2072. The Court must transmit proposed amendments to Congress by May 1 of the year in which the amendment is to take effect. *Id.* § 2074.

30. U.S. CTS., *supra* note 7 ("The Congress has a statutory period of at least 7 months to act on any rules prescribed by the Supreme Court. If the Congress does not enact legislation to reject, modify, or defer the rules, they take effect as a matter of law on December 1."). *See also* 28 U.S.C. § 2074.

31. Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 154-55 (2008) ("Though Congress has generally left the process of amending the Federal Rules of Evidence to the procedures prescribed in the Rules Enabling Act, lawmakers have directly amended the Rules several times.").

III. THE PROPOSED AMENDMENTS

The Advisory Committee began considering amendments to existing Rules 801(d)(2), 804(b)(3), and 1006 in the Spring of 2022.[32] The Committee's proposed amendments to the existing Rules were published for public comment the following August.[33] What would later become the newly proposed Rule 107 was initially proposed as an amendment to Rule 611 and published for public comment in August 2022.[34] In May 2023, a memorandum outlining the changes and recommended amendments to Rules 801(d)(2), 804(b)(3), 1006, and the newly proposed Rule 107 was provided to the Chair of the Committee on the Rules of Practice and Procedure.[35] In October 2023, the Judicial Conference provided United States Supreme Court Chief Justice John Roberts with a memorandum outlining the Committee's proposed amendments to the existing Rules and proposal of Rule 107 with the recommendation the Court adopt these amendments.[36]

Despite the FRE's goals of fairness to litigants and uniformity in judicial administration, failing to clearly define terms in the Rules can lead to varying applications of the same rule across the federal judicial circuits.[37] The rule against hearsay, including the exclusions from the definition of hearsay and the exceptions to the hearsay doctrine, has been an area of the law continuously explored by legal scholars.[38] An emerging area of research is the differentiation between categories of evidence—specifically, the distinction between demonstrative evidence and the use of illustrative aids.[39] The following section explains how ambiguity in the text and uncertainty in

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32. Memorandum from Hon. John D. Bates, Chair Comm. on R. Prac. & Proc. to Scott S. Harris, Clerk S. Ct. 3 (Oct. 23, 2023), https://www.uscourts.gov/sites/default/files/2023_scotus_package_final_0.pdf [https://perma.cc/TK55-Z2S7] (last visited Mar. 23, 2024) [hereinafter *Oct. Bates Memo*]. The Committee also considered amendments to Rules 611 and 613 at this time. *Id.* The proposed amendments to Rule 611 considered by the Committee would eventually become the newly proposed Federal Rule of Evidence Rule 107. *Id.*

33. *Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence*, Comm. on Rules of Prac. & Proc. Jud. Conf. (2022), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_to_the_federal_rules_2022.pdf [https://perma.cc/PRX8-KX2F].

34. Rule 107 was initially proposed to amend Rule 611 and was referred to as Rule 611(d). *Oct. Bates Memo*, *supra* note 32, at 3.

35. *Id.* at 1.

36. *Mauskopf Memo*, *supra* note 8.

37. Howard & Barnum, *supra* note 4, at 516-17.

38. *See generally* Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367 (1992).

39. *See* Howard & Barnum, *supra* note 4, at 513. *See also* Stephanie Green, *50 Shades of Prejudicial: Reexamining Demonstrative Evidence through State v. Jones*, 45 U. TOL. L. REV. 319 (2014); Sidney T. Marable, *Demonstrative Evidence: Illustrative Versus Real—Laying a Foundation*, ASS'N TRIAL LAW. AM. WINTER CONVENTION MATS. (2006).

the application of the Rules hinders the FRE's goals of fairness and uniformity. Further, this section will analyze the proposed changes and argue that the proposed amendments clearly reflect the Committee's attempt to remedy remaining issues in the areas of hearsay and demonstrative evidence.

A. AMBIGUITY IN THE USE OF DEMONSTRATIVE EVIDENCE

The limits to the presentation of evidence in the courtroom is an area of the law that has remained ambiguous for years.[40] Specifically, the purpose and use of demonstrative evidence has been difficult to contextualize.[41] The term "demonstrative evidence" is not defined in the FRE, so legal scholars are left to fill in the blanks regarding what constitutes demonstrative evidence and the confines of its use.[42] The outer boundaries of what is considered permissible demonstrative evidence has been difficult to characterize for both scholars analyzing the Rules and for the practitioners and judges applying the Rules in the courtroom.[43] The text of the FRE itself does not distinguish "demonstrative evidence" from "real evidence" for admissibility purposes, which leaves room for interpretation.[44] The ambiguity inherent in the term demonstrative evidence "infects the judicial process with uncertainty, hindering advocates when preparing for trial and, in some cases, producing erroneous verdicts."[45] Scholars have attempted to "reconcile and explain these inconsistencies in an effort to decipher an orderly pattern that offered

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40. *See generally* Matthew S. Robertson, Note, *Guilty as Photoshopped: An Examination of Recent Case Law and Scholarship Regarding the Use of Non-Probative Images in the Courtroom*, 55 WASHBURN L.J. 731 (2016); *see also* Francis J. Burke, Jr., *The Lawyer's New Presentation Tools of the Trade – Practical Tips*, AM. LAW INST. 113, 115 (2001).

41. Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 960 (1992) ("[N]o one has yet developed a satisfactory theory explaining the relevance of demonstrative evidence. No one has correctly denoted the characteristics of demonstrative evidence that distinguish it from other forms of trial evidence. No one has proposed a uniform treatment concerning its admissibility or a consistent methodology regarding how such exhibits are to be treated at trial or even whether they should be viewed by jurors during their deliberations. Perhaps most surprisingly, there is not even a settled definition of the term.").

42. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 5 FEDERAL EVIDENCE § 9:22 (4th ed. 2023) ("There is no consensus on the proper definition or scope of demonstrative evidence, and the term itself does not even appear in the Rules.").

43. Timothy W. Cerniglia, *Computer-Generated Exhibits - Demonstrative, Substantive, or Pedagogical - Their Place in Evidence*, 18 AM. J. TRIAL ADOVC. 1, 7 (1994) ("Unfortunately, courts, commentators, and practitioners alike often confuse and blur the distinction between demonstrative evidence, substantive evidence, and exhibits used merely as a display to enlighten, explain, or persuade the trier of fact.").

44. FED. R. EVID. 401. The FRE requires evidence to be relevant for admissibility purposes. *Id.* ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

45. Howard & Barnum, *supra* note 4, at 513.

advocates some degree of predictability of judicial rulings."[46] A further difficulty caused by the ambiguity in the Rules regarding the presentation of evidence at trial has been the inability to concretely distinguish between demonstrative evidence and the use of illustrative aids.[47] The Advisory Committee's advancement of proposed Rule 107 indicates the Committee's attempt to reconcile these inconsistencies.[48]

i. Pattern of Inconsistency

The discretion afforded to judges by the FRE in making rulings on the use of illustrative aids at trial has contributed to varying applications of the Rules and inconsistencies between judicial districts.[49] Before the Committee's proposal of Rule 107, FRE 611 served as the primary guidance for judges regarding the presentation of demonstrative evidence.[50] The language in the text of Rule 611 itself affords federal judges wide latitude regarding the presentation of evidence.[51] Rule 611(a) states, "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures

46. *Id*. at 517.

47. There is no agreed upon definition for illustrative aids and courts have treated these aids differently. Cerniglia, *supra* note 43, at 9 ("Some courts allow [illustrative exhibits] to be admitted into evidence and sent to the jury room during deliberations. Other courts allow the exhibit to be marked for identification for the record and referred to during trial but do not allow the jury to take the exhibit with them into the jury room during deliberations." (footnote omitted)). Even current treatises are unable to distinguish between the use of an illustrative aid versus the concept of demonstrative evidence. GEORGE L. BLUM ET AL., 29A AM. JUR. 2D EVID. § 933 (2024) ("Demonstrative evidence has no probative value in itself; rather, it serves as a visual aid to the jury in comprehending the verbal testimony of a witness. To be admissible, demonstrative evidence must be sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact. A demonstrative or illustrative exhibit is admissible if it clearly depicts the factual situations and will allow the trier of facts to more clearly understand a witness's description." (footnotes omitted)).

48. Memorandum from Hon. John D. Bates, Chair Comm. on R. Prac. & Proc. to Hon. Patrick J. Schiltz, Chair Advisory Comm. Evid. R. 2 (May 10, 2023), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_-_may_2023_0.pdf [https://perma.cc/WG66-8753] [hereinafter *May Bates Memo*]. The Committee distinguishes the concepts by explaining that demonstrative evidence is "admitted into evidence and used substantively to prove disputed issues at trial." *Id.* Comparatively, illustrative aids are "not admitted into evidence but used solely to assist the trier of fact in understanding other evidence." *Id.*

49. Capra & Richter, *supra* note 6, at 1886. ("The principal advantage of a federal code of evidence is that the law is uniform throughout the federal court system. Litigants need not worry that the rule applied in one federal courthouse will differ from the one applicable in another. While that is the ideal, the harsh reality is that no code of evidence—however carefully drafted—can ever be so clear that it is subject to only one interpretation. And that is particularly true of the Federal Rules of Evidence—Rules that began with an Advisory Committee draft that Congress took up and substantially altered.").

50. *May Bates Memo*, *supra* note 48, at 2.

51. FED. R. EVID. 611.

effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."[52] Some legal commentators have argued that the drafters of the original FRE intentionally chose not to define the term demonstrative evidence to afford federal judges broad discretion of the matter.[53] The judicial discretion afforded via Rule 611 currently allows for district court judges to make evidentiary rulings on visual presentations at trial, including the use of illustrative or visual aids.[54] Courts have treated these visual presentations differently; in some districts, illustrative aids have been used substantively and allowed in the jury deliberation room, while in other districts, illustrative aids have been used only during testimony to help the jury understand the evidence being presented to them.[55]

ii. Resolving the Issue of Ambiguity

The Advisory Committee's proposed Rule 107, meant to clarify the use of illustrative aids, clearly demonstrates the Committee's latest attempt to resolve latent ambiguity in the presentation of evidence at trial.[56] This sentiment is expressed by the Committee itself, with the chair of the Committee writing in a memorandum to the Standing Committee, "Illustrative aids are used in almost every trial, and yet nothing in the rules specifically addresses their use. This amendment rectifies that problem."[57] The text of proposed Rule 107 reads as follows:

> (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.

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52. *Id*. at 611(a).

53. *See* Brain & Broderick, *supra* note 41 at 1016-18. *See also* 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FED. PRAC. & PROC. § 5172 (2d ed. 1987). "Wright and Graham's treatise suggests four theories for how the drafters of the Federal Rules of Evidence intended to treat demonstrative evidence." Brain & Broderick, *supra* note 41, at 1016. First, the drafters may not have intended to give demonstrative evidence special treatment under the Federal Rules; second, the drafters may not have viewed demonstrative evidence as evidence at all; third, "the drafters may have intended that the court regulate admission . . . under its broad power to control the mode of presenting evidence provided by Rule 611"; and fourth, a broad reading of the facts of consequence requirement of Rule 401 could permit demonstrative evidence to be treated as relevant evidence. *Id.* at 1016-18.

54. *See* FED. R. EVID. 611.

55. *See* Cerniglia, *supra* note 43, at 8-9.

56. *May Bates Memo*, *supra* note 48, at 2.

57. *Id*. at 3.

> (b) Use in Jury Deliberations. An illustrative is not evidence and must not be provided to the jury during deliberations unless: (1) all parties consent; or (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.[58]

This proposed Rule comes as an answer to the difficulty of distinguishing between the use of demonstrative evidence and illustrative aids and to remedy confusion among the federal circuit courts.[59] Proposed Rule 107 was initially released for public commentary as an amendment to Rule 611(d), which currently governs the presentation of demonstrative evidence at trial.[60] The proposed amendment to Rule 611(d) "allowed illustrative aids to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay."[61] At this early stage, the Committee was unsure of which standard should be used to measure the admission of relevant evidence and sought public commentary on the matter.[62] Eventually, the Committee determined a substantiality test should be used to determine when illustrative aids are appropriate.[63] The Committee also addressed the long-standing issue of whether illustrative aids constitute demonstrative evidence by specifying in the text of the proposed Rule that illustrative aids are not evidence.[64] The text of proposed Rule 107 makes it explicitly clear that illustrative aids are not evidence and should not be treated as such.[65]

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58. *Mauskopf Memo*, *supra* note 8, at Proposed Amendments to the Federal Rules of Evidence Rule 107.

59. *May Bates Memo*, *supra* note 48, at 2 ("[T]he standards for allowing the use of an illustrative aid are not made clear in the case law, in part because there is no specific rule that sets any standards.").

60. *Id*.

61. *Id*.

62. *Id*. ("The pitch of that balance was left open for public comment—whether the negative factors would have to *substantially* outweigh the usefulness of the aid (the same balance as Rule 403), or whether the aid would be prohibited if the negative factors simply outweighed the usefulness of the aid.").

63. *Id*. at 3 ("[I]llustrative aids can be used unless the negative factors *substantially* outweigh the educative value of the aid (reasoning that it would be confusing to have a different balancing test than Rule 403, especially when the line between substantive evidence and illustrative aids may be difficult to draw) . . . .").

64. *Id*.

65. *Id*.

The Committee further explained the distinction between demonstrative evidence and illustrative aids and what considerations guided the text of Rule 107 in the Committee Note to the proposed Rule.[66] The Note to proposed Rule 107 explains that "The term 'illustrative aid' is used instead of the term 'demonstrative evidence' as the latter term has been subject to differing interpretation in the courts."[67] The Committee Note distinguishes the two terms by defining each.[68] Illustrative aids are defined as "any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument."[69] Comparatively, "'Demonstrative evidence' is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact."[70]

The text of the proposed Rule is interesting because it leaves almost no room for interpretation, suggesting a hardline stance taken by the Committee in resolving the issue of whether illustrative aids are considered as evidence. While the proposed Rule 107(b) does include two exceptions, saying "[a]n illustrative aid is not evidence and must not be provided to the jury"[71] makes it explicitly clear that the Committee designed this Rule to resolve the ambiguity in the use of illustrative aids in the courtroom. The text of Rule 107 clarifies many of the critiques echoed by scholars regarding the broad discretion of the trial court to make evidentiary rulings, but the Committee Note following the text further expands on the intent of proposed Rule 107.[72] The Committee explains that "[t]he intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed towards the use of illustrative aids."[73] The inclusion of almost the exact same language as FRE 403's balancing test in the text of proposed Rule 107 further exemplifies this idea.[74]

The Committee's proposal of Rule 107 and the Judicial Conference's transmittal of the Rule to Chief Justice Roberts for final approval of the

66. *Mauskopf Memo*, *supra* note 8, at Rule 107 Committee Note.
67. *Id*.
68. *Id*.
69. *Id*.
70. *Id*.
71. *Id.* at Proposed Amendments to the Federal Rules of Evidence Rule 107(b).
72. *Id*. at Rule 107 Committee Note.
73. *Id*.
74. FED. R. EVID. 403. FRE 403's balancing test allows a court to exclude otherwise relevant evidence if that evidence's "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* Comparatively, the text of proposed Rule 107 eliminates needlessly presenting cumulative evidence from its test. *Mauskopf Memo*, *supra* note 8, at Proposed Amendments to the Federal Rules of Evidence Rule 107.

amendment clearly reflects the federal judiciary's willingness to amend the FRE when necessary to fill gaps in an area of conflict. While there is some benefit to be gained by refraining from amending the FRE any time a Rule is critiqued, sometimes a Rule amendment is necessary to prevent ambiguity and varying application of the Rules among the federal judiciary.[75]

B. UNCERTAINTY IN THE HEARSAY RULES

Hearsay is broadly defined as an out-of-court statement offered to prove the truth of the matter asserted.[76] Despite this seemingly straightforward definition, the rule against hearsay and the exceptions to hearsay cause the most confusion of the FRE among law students, practitioners, and scholars.[77] The exclusions from the definition of hearsay and the exceptions to the hearsay rules developed as a way to introduce certain out-of-court statements in limited circumstances.[78] Most hearsay exceptions are "based on considerations of trustworthiness and necessity."[79]

i. Exclusions from Hearsay

FRE 801(d) excludes certain out-of-court statements from the definition of hearsay if the statement falls under one of two categories: a declarant witness's prior statement or an opposing party statement.[80] The Committee's proposed amendment to Rule 801(d) only impacts the opposing party statement exclusion.[81] The proposed amendment adds the following to Rule 801(d)(2):

> If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would

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75. Capra & Richter, *supra* note 6, at 1901 ("When irreconcilable conflicts in the interpretation and application of the Rule arise among circuits, amendments become necessary to fulfill the promise of uniformity of the Federal Rules of Evidence.").

76. *See* FED. R. EVID. 801(c).

77. *See generally* Lee D. Schinasi, *Teaching the "Portraits, Mosaics and Themes" of the Federal Rules of Evidence*, 29 MISS. COLL. L. REV. 83 (2010).

78. Glen Weissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights from Article VI*, 30 CARDOZO L. REV. 1615, 1629 (2009). ("Early drafts of the Federal Rules of Evidence generally provide the trial judge with broad discretion. As the drafting process evolved, however, the subsequent actions by the Advisory Committee tightened some of the rules regarding admissibility. Article VIII, pertaining to hearsay, originally involved one discretionary rule, and the common law hearsay exceptions were set forth as 'illustrations' in which hearsay might be permissible pursuant to the trial judge's discretion." (footnotes omitted)).

79. Mueller, *supra* note 38, at 370.

80. FED. R. EVID. 801(d).

81. *Id*. at 801(d)(2).

> be admissible against the declarant or the principal under this rule is also admissible against the party.[82]

The Committee Note following the text of the proposed amendments to Rule 801(d)(2) explains the Committee's rationale in recommending adopting the changes.[83] The Note explains that "[t]he rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party."[84] The justification for the amendment is the unfair advantage that parties can potentially gain under the current text of Rule 801(d)(2).[85] The Committee's support of amending the Rule based on potential unfair advantages to litigants echoes the same rationale the Committee expressed in proposing Rule 107.[86]

ii. Exceptions to the Rule Against Hearsay

FRE 804 provides six exceptions to the rule against hearsay when the declarant is unavailable as a witness.[87] One of the exceptions, statements against interest, is found in Rule 804(b)(3).[88] Statements are admissible under this exception to assess the trustworthiness of a witness.[89] The text of Rule 804(b)(3), with the proposed amendment italicized, reads as follows:

> A statement that: (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claims against someone else or to expose the declarant to civil or criminal liability; and (B) *if offered in a criminal case as one that tends to expose the declarant to criminal liability,* is

82. *Mauskopf Memo*, *supra* note 8, at Proposed Amendments to the Federal Rules of Evidence Rule 801(d)(2).

83. *Id*. at Rule 801 Committee Note.

84. *Id*.

85. *Id.* ("The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or principal would have been. A party that derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.").

86. The proposed amendment to Rule 801(d)(2) attempts to remedy any unfair advantage in the admissibility of certain statements. Comparatively, proposed Rule 107 also attempts to remedy any unfair advantage that could be gained by litigants but is based on the visual aspect of presenting evidence.

87. FED. R. EVID. 804.

88. *Id.*

89. *See id.*; *see also* 31A C.J.S. *Evidence* § 402 (2024) ("In assessing the admissibility of a declarant's statement against penal interest under the hearsay exception, the courts will look to whether there are supportive corroborating circumstances indicating trustworthiness.").

> supported by corroborating circumstances that clearly indicate its trustworthiness *after considering the totality of circumstances under which it was made and any evidence that supports or undermines it*.[90]

The current text of Rule 804(b)(3) provides that a statement against interest "is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability."[91] The Committee Note following the text of the proposed amendment to Rule 804(b)(3)(B) explains the Committee's rationale in recommending the amendment.[92] The Note explains that the primary purpose of the Committee's adoption of the amendment is to resolve varying applications of the Rule across the federal judiciary.[93] The Note further explains that the amendment would require courts to assess any evidence supporting or undermining the totality of the circumstances in which the statement was made.[94] The Committee's rationale for approving an amendment to Rule 804(b)(3)(B) is the same as the Committee's rationale in proposing Rule 107: to resolve inconsistencies in the interpretation and application of the Rules.

IV. WHY NORTH DAKOTA SHOULD FOLLOW THE FEDERAL JUDICIARY'S GUIDANCE REGARDING THE PRESENTATION OF EVIDENCE IN STATE COURT MATTERS

The proposed amendments to the existing Rules and the newly proposed Rule 107 are projected to go into effect in December 2024 if the United States Supreme Court adopts the amendments.[95] If adopted, these amendments would be instituted in all federal jurisdictions and impact any attorney practicing in federal district court.[96] These changes could also impact attorneys practicing in state courts if the state where they practice chooses to adopt similar changes to that state's Rules of Evidence. This section will argue that North Dakota should follow the federal judiciary's guidance and adopt the Committee's proposed amendments to the Rules. Alternatively,

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90. *Mauskopf Memo*, *supra* note 8, at Proposed Amendments to the Federal Rules of Evidence Rule 804 (emphasis added).

91. FED. R. EVID. 804(b)(3)(B).

92. *Mauskopf Memo*, *supra* note 8, at Rule 804 Committee Note.

93. *Id*.

94. *Id*.

95. U.S. CTS., *supra* note 7.

96. *See* 28 U.S.C. § 2074(b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

North Dakota should enact rules with similar language to resolve ambiguity and achieve uniformity in applying the North Dakota Rules of Evidence.

North Dakota caselaw is entirely silent on the use of illustrative aids at trial.[97] This is concerning since the distinction between the use of illustrative aids to assist the jury in understanding a fact at issue and the presentation of demonstrative evidence to prove a fact at issue is not solely a federal issue.[98] The lack of a definition for the term "demonstrative evidence" in the North Dakota Rules of Evidence and uncertainty regarding the permissible uses of illustrative aids at trial are issues that impact all courts in this state.[99] The same rationale behind the proposed changes to the FRE applies to North Dakota; as such, North Dakota should adopt the proposed changes or similar changes reflecting the same language to the state specific rules of evidence to resolve ambiguity and to achieve uniformity in application.

A. RESOLVING AMBIGUITY

The North Dakota Rules of Evidence, like its analogous counterpart in the FRE, does not define the term "demonstrative evidence."[100] The term "illustrative aid" is also not defined by the North Dakota Rules of Evidence.[101] Like its federal counterpart, North Dakota looks to Rule 611 to provide guidance regarding the presentation of evidence at trial.[102] Rule 611 is the only North Dakota Rule of Evidence that specifically refers to the *presentation* of evidence.[103] Rule 611 affords the district court broad discretion as to evidentiary determinations and reads, "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for

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97. The exact language of "illustrative aid" does not appear in any North Dakota case decisions. Examples of cases using similar language to refer to the visual representation of evidence will be discussed later in this section.

98. *See* Howard & Barnum, *supra* note 4, at 519. Maine is currently the only state with a state-specific evidence rule governing the use of demonstrative evidence. *Id.* Maine's state-specific rule of evidence regarding the presentation of visual evidence at trial served as a source of inspiration for the Committee's proposal of Rule 107. *Mauskopf Memo*, *supra* note 8, at Rule 107 Committee Note.

99. *See* Howard & Barnum, *supra* note 4, at 519. Litigants in North Dakota state courts are likely experiencing the same issues of inconsistent rulings on the admissibility of illustrative aids and unfairness to litigants that led to the Advisory Committee on Evidence's proposal of Rule 107. *See id.* Other sources that could provide guidance to North Dakota state court judges regarding the use of demonstrative evidence such as "case law, jury instructions, academic writings, and textbooks is limited, piecemeal, and inconsistent, leading to unpredictable judge-specific rules of admission." *See id.*

100. *See* N.D.R.EV. 101.

101. *See id.*

102. *Id*. at 611.

103. *See id*.

determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."[104]

Like the FRE's Rule 611, the judicial discretion afforded to state court judges via North Dakota's Rule 611 allows for state district court judges to make evidentiary rulings on the presentation of evidence at trial, including the use of illustrative or visual aids.[105] In practice, litigators in North Dakota often refer to "illustrative aids" as "demonstrative exhibits" or simply as "demonstratives."[106] Demonstrative exhibits are not substantive evidence and are not intended to be used in the jury deliberation room; rather, demonstrative exhibits are used to help the trier of fact understand testimony.[107] While North Dakota practitioners have used the term "demonstrative exhibits" in practice to refer to what the FRE's Advisory Committee is now calling "illustrative aids," North Dakota's adoption of the FRE's proposed Rule 107 to the state Rules of Evidence or a Rule reflecting similar language would resolve ambiguity in the confines of presenting visual media forms at trial.[108] North Dakota's adoption of a state rule of evidence regarding the use of illustrative aids at trial would be useful to prevent any ambiguity in distinguishing between "demonstrative evidence" that is being offered substantively to prove a fact at issue and the use of a "demonstrative exhibit" used to help the trier of fact understand other evidence.

B. ACHIEVE UNIFORMITY

The broad discretion afforded to district court judges via North Dakota Rule of Evidence Rule 611 to make evidentiary rulings regarding the presentation of evidence in the courtroom likely leads to unequal application across the state judiciary. The true scope of this issue is unknown because only a few North Dakota caselaw opinions discuss the use of demonstrative evidence or visual aids at trial.[109] North Dakota caselaw discussing the use of demonstrative evidence in the courtroom is vague and fails to define the parameters of this type of evidence.[110] Broad discretion is afforded to state

104. *Id*. at 611(a).

105. *Id*.

106. Telephone Interview with Angie Lord, Shareholder, Vogel Law Firm (Feb. 1, 2024) [hereinafter Lord Interview].

107. *Id*.

108. Demonstrative evidence is substantive evidence that has met the admissibility requirements and is offered to prove a fact at issue. However, North Dakota litigators often refer to "demonstrative evidence" simply as "evidence" and do not distinguish between "real" and "demonstrative" evidence. *Id*.

109. *See generally* State v. Ash, 526 N.W.2d 473 (N.D. 1995); Fisher v. Suko, 111 N.W.2d 360 (N.D. 1961); State v. Ohnstad, 359 N.W.2d 827 (N.D. 1984).

110. *See generally* State v. Biby, 366 N.W.2d 460, 464 (N.D. 1985).

trial court judges in making admissibility determinations, and the trial court's ruling is more often than not held up on appeal at the North Dakota Supreme Court.[111]

Further, North Dakota caselaw is silent on the use of illustrative aids at trial.[112] The most analogous example is North Dakota caselaw discussing the use of visual aids at trial.[113] However, the caselaw in this area is extremely limited and fails to clearly define the differences between visual aids used to help the jury understand other evidence or a witness's testimony and demonstrative evidence that would be admitted into evidence and go into the jury deliberation room. In *State v. Ohnstad*, the admission of slides depicting injuries found during an autopsy was upheld by the North Dakota Supreme Court.[114] The court held the trial court did not abuse its discretion in admitting the slides because "[t]he subject matter depicted in the slides was relevant and restricted to what was reasonably necessary to furnish a visual aid to the jury in arriving at a fair understanding of the nature and extent of the skull fracture at the time of the autopsy."[115] In *State v. Ash*, the court concluded it was not obvious error for the trial court to allow "a demonstration interpreting the evidence" that involved a sheriff lying "on the floor of the courtroom, in full view of the jury, while the State's counsel stood over him with the rifled aimed behind the sheriff's right ear and at a distance of less than two inches."[116] The court explained its rationale by noting that "[t]he demonstration was nothing more than a vivid visual summarization of the State's view of a large body of evidence that depicted an execution-style killing."[117] In *Fisher v. Suko*, the court held "the [trial] court did not err in refusing to admit the film in evidence or permit it to be shown on a screen to the jury as a visual demonstration of how the accident could have happened or in explanation or confirmation of the opinion of the expert witness."[118]

The limited caselaw discussing the presentation of visual forms of evidence or the use of illustrative aids in the courtroom in North Dakota is concerning because there is little guidance provided to trial court judges in

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111. *Id.* ("The admissibility of demonstrative evidence is left to the discretion of the trial court, and its decision to admit or exclude the evidence will not be interfered with on appeal unless the court is shown to have abused its discretion." (citing State v. Hartosch, 329 N.W.2d 367 (N.D. 1983))).

112. The exact language of the term "illustrative aid" does not appear in any North Dakota caselaw decisions.

113. *See Ohnstad*, 359 N.W.2d at 827; *see also Ash*, 526 N.W.2d at 473; *Fisher*, 111 N.W.2d at 360.

114. *Ohnstad*, 359 N.W.2d at 840.

115. *Id.*

116. *Ash*, 526 N.W.2d at 483 (quoting Brief for the Appellee, *Ash*, 526 N.W.2d 473).

117. *Id.*

118. *Fisher*, 111 N.W.2d at 365.

making evidentiary rulings. This is compounded by the lack of a definition for demonstrative evidence in the North Dakota Rules of Evidence.[119] North Dakota's adoption of a state specific Rule of Evidence regarding the use of illustrative aids in the courtroom would resolve inconsistencies in the admission of evidence on a discretionary basis and allow for uniformity in application across the state judiciary. The benefit of uniformity in application across the judiciary is a sentiment shared by North Dakota practitioners.[120]

C. IMPLEMENTING THE CHANGES

The North Dakota Rules of Evidence are closely modeled after the Federal Rules of Evidence and share similar goals of ensuring fairness to litigants and achieving uniformity in application.[121] The procedural process for amending the North Dakota Rules of Evidence also resembles the procedure for amending the FRE. In North Dakota, the Joint Procedure Committee (the "N.D. Committee") is tasked with amending or repealing existing rules of evidence and proposing new rules of evidence to fill gaps not covered in the existing rules.[122] The North Dakota Supreme Court vests the N.D. Committee with the power to amend the existing rules of evidence and establishes the N.D. Committee with the objective "to provide continuing study and review of present rules and orders and to propose the adoption of new rules and the amendment or repeal of existing rules and orders for consideration by the Supreme Court."[123] Similar to the federal system's Advisory Committee, the N.D. Committee meets regularly to discuss any

119. *See* N.D.R.EV. 101.

120. Assistant United States Attorney Jonathan O'Konek, who practices in federal district court in the district of North Dakota, believes a rule regarding the use of illustrative aids would be useful at both the federal and state level to promote fairness and efficiency. Telephone Interview with Jonathan O'Konek, Assistant U.S. Att'y (Jan. 23, 2024). Angie Lord, who attended the Eighth Circuit Judicial Conference in the Summer of 2023 where the FRE's proposal of Rule 107 was discussed, believes that a state specific rule of evidence regarding the use of illustrative aids at trial would be beneficial. Lord Interview, *supra* note 106. "Currently there is no state-specific rule. So, a rule would be useful to fill a current void and allow for uniformity." *Id.*

121. *See generally* N.D.R.EV.

122. *Joint Procedure Committee*, N.D. CTS., https://www ndcourts.gov/supreme-court/committees/joint-procedure-committee [https://perma.cc/HJ7Z-HXM5] (last visited Jan. 4, 2024) ("The Joint Procedure Committee is the standing committee of the Supreme Court responsible for proposing adoption, amendment, or repeal of rules of civil procedure, criminal procedure, appellate procedure, evidence, and specialized court procedure. The Committee membership of 10 judges and 10 attorneys is appointed by the Supreme Court, except for one liaison member appointed by the State Bar Association.").

123. *Procedural Rules of the North Dakota Supreme Court*, N.D. CTS. § 8.1, https://www ndcourts.gov/legal-resources/rules/ndrprocr/8 [https://perma.cc/CL6W-G97J] (last visited Jan. 4, 2024).

proposed amendments to existing rules and consider any gaps in the rules.[124] Once the Committee approves an amendment, the N.D. Committee petitions the North Dakota Supreme Court under the Procedural Rules of the N.D. Supreme Court Rule 3 for an order adopting the proposed changes.[125] Notice of a hearing to discuss the proposed changes is then published to provide practitioners with the option to voice their opinions regarding the proposed amendments.[126] The N.D. Committee may submit an amended petition with additional changes based on public comment or other considerations during the amendment process.[127] After any additional amendments are submitted, the North Dakota Supreme Court convenes to consider the changes and submits an order of adoption if the changes are approved.[128] Once the North Dakota Supreme Court adopts the changes, the changes become effective in all North Dakota state courts.[129]

D. THE RATIONALE BEHIND NORTH DAKOTA'S ADOPTION OF THE PROPOSED CHANGES

A decision from the United States Supreme Court regarding the proposed amendments to the FRE, including the newly proposed Rule 107, is expected in May 2024.[130] If adopted, the changes are projected to be implemented in all federal district courts in December 2024.[131] Once the U.S. Supreme Court publishes a final decision regarding the proposed changes, the North Dakota Joint Procedure Committee should convene a meeting to discuss the changes. Regardless of the decision made by the United States Supreme Court regarding the proposed amendments, the Committee should petition the North Dakota Supreme Court for an order to adopt amendments to the North Dakota Rules of Evidence reflecting the same language as the

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124. *Joint Procedure Committee*, *supra* note 122. The Joint Procedure Committee generally seems to convene around three times a year, with meetings typically occurring in January, April, and September, based on the available meeting history. *See id.*

125. *See* Petition for Addition, Amendment, or Repeal of Court Rules (N.D. 2013) (No. 20130261). The most recent amendment to N.D. R. Evid. 611 illustrates the procedure for amending the existing North Dakota Rules of Evidence. *Id.*

126. *See* Notice of Hearing and Comment (N.D. 2013) (No. 20130261), https://www ndcourts.gov/news/north-dakota/north-dakota-supreme-court/notices/20130261/notice-of-hearing [https://perma.cc/HSQ6-YJKJ] (published on web and link sent to required entities under the rules).

127. *See* Letter from Mary M. Maring, Chair, Joint Proc. Comm., to Hon. Gerald W. VandeWalle, C.J., N.D.S.Ct. (Oct. 4, 2013), https://www ndcourts.gov/supreme-court/dockets/20130261/4 [https://perma.cc/ENN8-D36Q].

128. Order of Adoption (N.D. 2013) (No. 20130261), https://www ndcourts.gov/supreme-court/dockets/20130261/10 [https://perma.cc/W5KE-5WNV].

129. *Id*.

130. U.S. CTS., *supra* note 7.

131. *See* 28 U.S.C. § 2074.

proposed FRE amendments to coincide with the purposes of the Rules.[132] Specifically, the Committee should petition the North Dakota Supreme Court for the adoption of a rule regulating the use of demonstrative evidence in the courtroom.

Ensuring fairness to litigants is another benefit that would be obtained by North Dakota's adoption of the proposed changes to the state-specific rules of evidence, in addition to resolving ambiguity and achieving uniformity in application. Research has indicated that "[u]p to 90% of knowledge is obtained through visual impressions . . . making visual evidence a valuable persuasive tool."[133] Further, the persuasive effects of visual representations can be invaluable to a litigator.[134] The true extent of the potential advantage a litigant can gain through visual representations is unknown. North Dakota's adoption of a rule of evidence regarding the use of illustrative aids in the courtroom would prevent any unfair advantage litigants may receive through discretionary evidentiary rulings on the use of visual media forms at trial.

North Dakota should adopt the FRE's proposed amendments to the state Rules of Evidence or Rules reflecting similar language in order to ensure fairness to litigants, resolve ambiguity in the presentation of evidence, and to achieve uniformity in the application of the Rules across the state judiciary. North Dakota's adoption of a Rule making it explicitly clear that illustrative aids are not evidence and should not be treated as such would ensure fairness to litigants while achieving uniformity in application and resolving any latent ambiguity in the Rules. The difficulty in distinguishing between demonstrative evidence that is admitted and used substantively to prove a fact at issue, and the use of an illustrative aid that is not used substantively but to help the trier of fact understand other evidence or testimony necessitates the adoption of a Rule that clarifies these concepts.

V. CONCLUSION

Despite the FRE's goals of fairness in judicial administration and uniformity in application, some ambiguity in the Rules remains. The Advisory Committee on Evidence Rules's transmittal of proposed

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132. Like the FRE, the North Dakota Rules of Evidence include a rule to define the purpose of the rules. N.D.R.Ev. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

133. Green, *supra* note 39, at 327 (footnote omitted).

134. *Id*. at 320 ("Since 'seeing is believing,' and demonstrative evidence appeals directly to the [visual] senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with a particularly persuasive effect." (quoting MCCORMICK ON EVIDENCE 524-25 (Edward Cleary et al. eds., 2d ed. 1972))).

amendments to Rules 801(d)(2), 804(b)(3), and 1006, along with the proposal of Rule 107 regarding the use of illustrative aids in the courtroom demonstrates the Committee's willingness to amend the Rules when necessary to coincide with the goals of the Rules. Although Rule amendments have been relatively rare since the adoption of the FRE in 1970, sometimes Rule amendments are necessary to ensure fairness to litigants, achieve uniformity in the application and interpretation of the Rules across the federal judiciary, and resolve any ambiguity implicit in the Rules. The Committee's advancement of the proposed amendments reflects the Committee's attempt to resolve any inconsistencies in the application and interpretation of the hearsay rules and to provide guidance regarding the presentation of evidence at trial. The difficulty in distinguishing between the use of demonstrative evidence that is used substantively to prove a fact at issue, and the use of illustrative aids that are not used substantively but to help the trier of fact understand other evidence or testimony necessitates the adoption of a Rule that distinguishes these concepts. North Dakota should adopt the FRE's proposed changes or Rules reflecting similar language to achieve the same goals as the federal judiciary: to ensure fairness to litigants, resolve any remaining ambiguity in the interpretation and application of the Rules, and to achieve uniformity in decisions across the state judiciary.

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