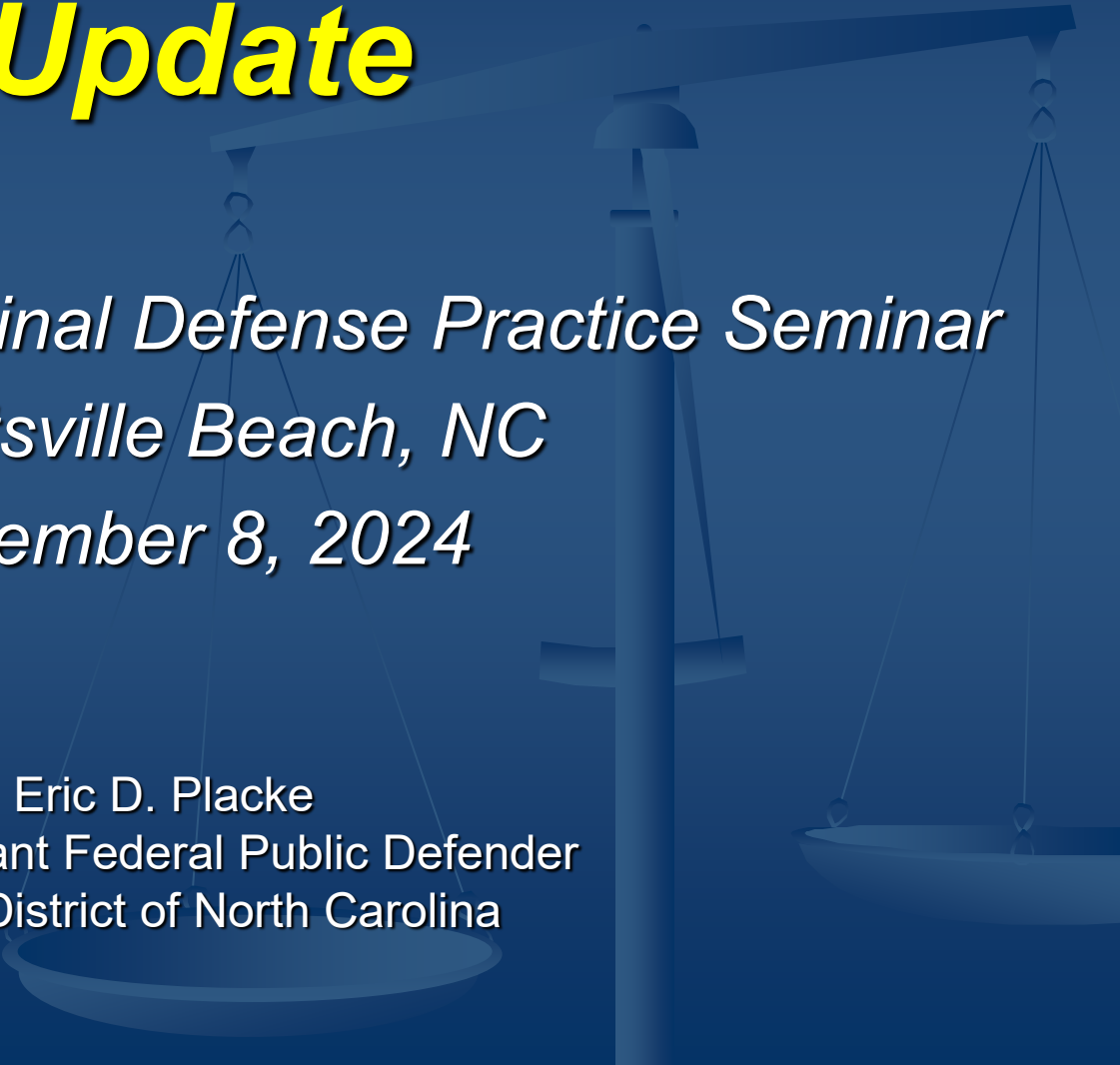


Federal Rules of Evidence Update



*EDNC Federal Criminal Defense Practice Seminar
Wrightsville Beach, NC
November 8, 2024*

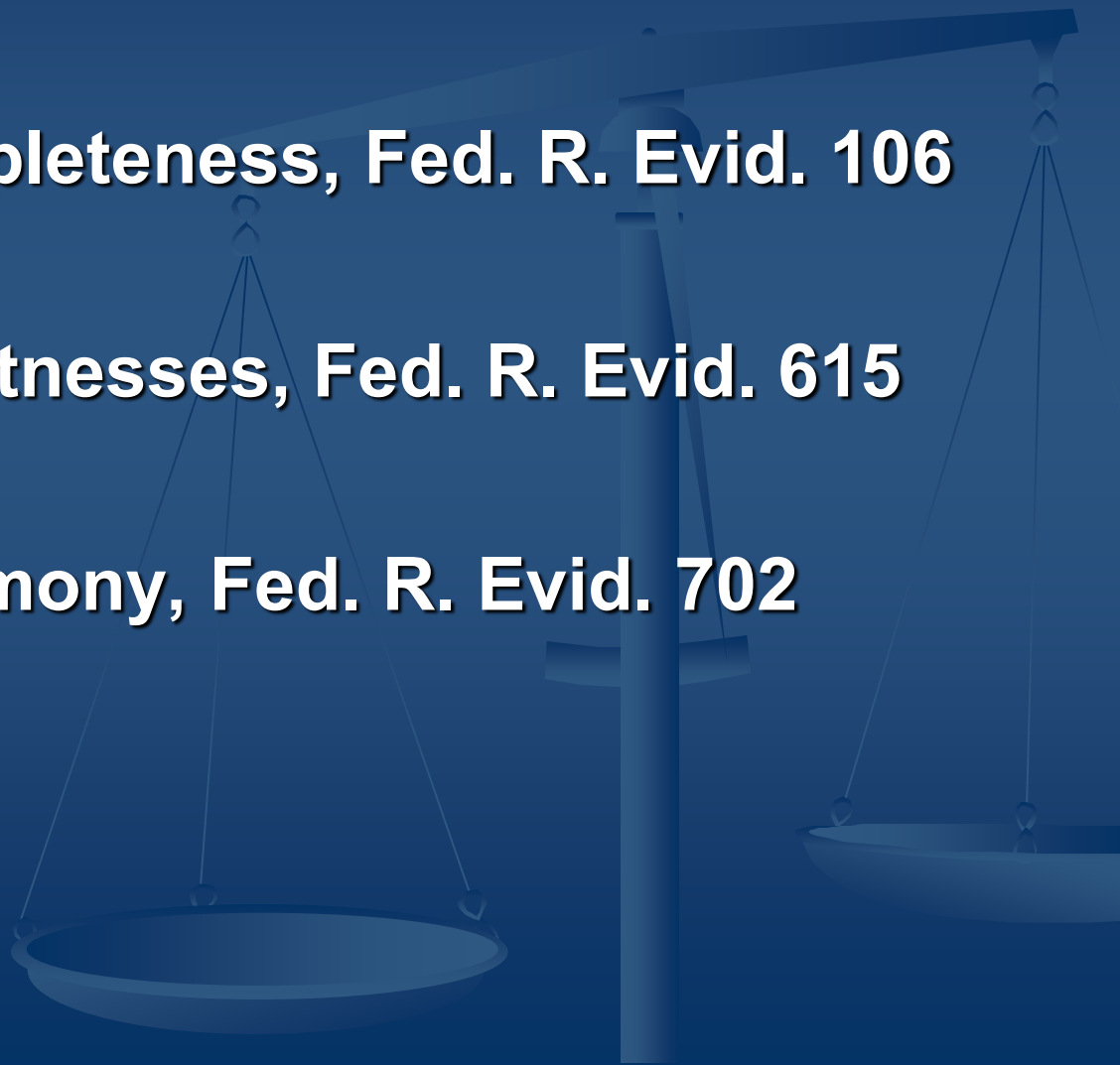
Eric D. Placke
First Assistant Federal Public Defender
Middle District of North Carolina

2023 Amendments

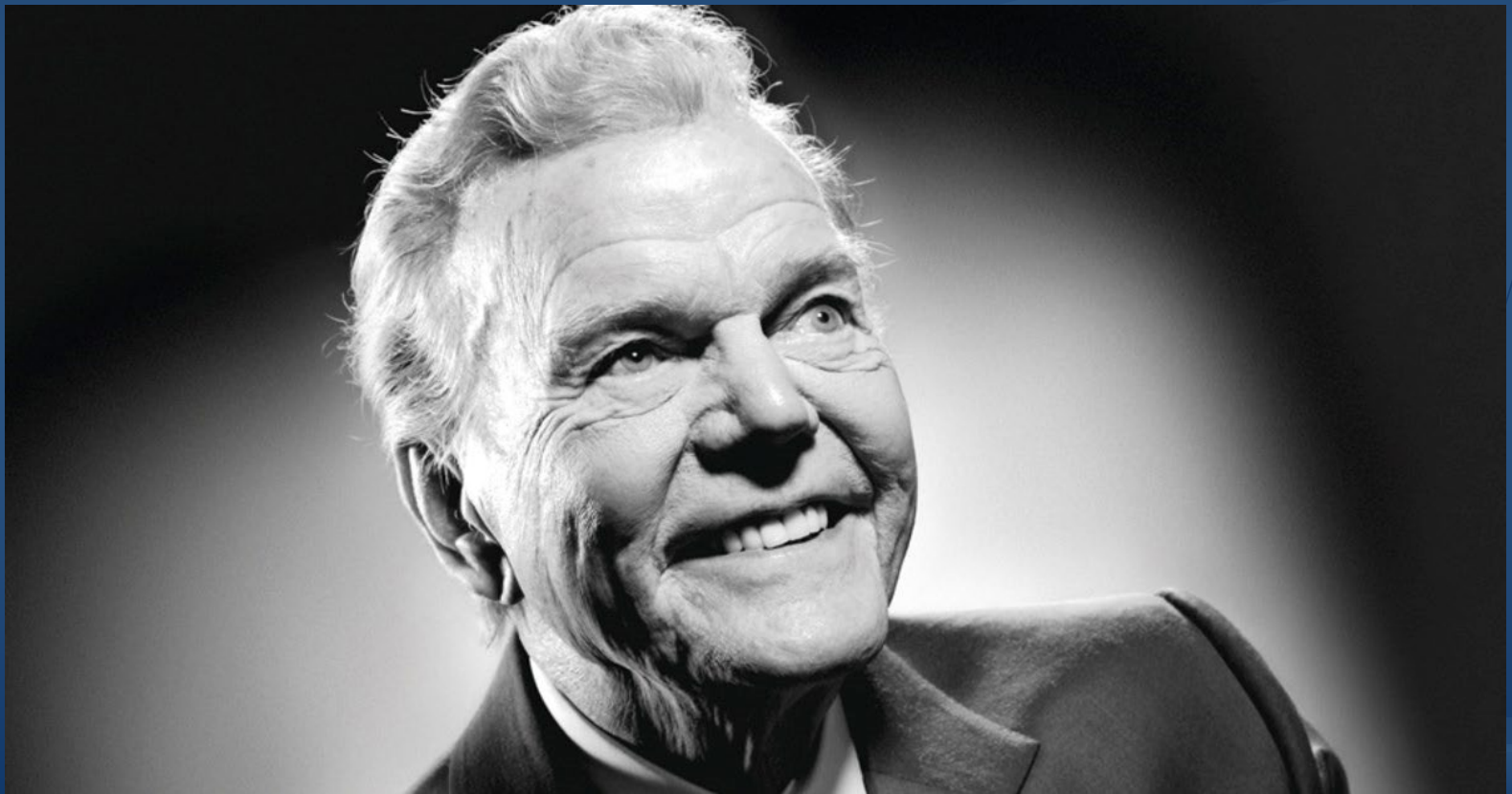
The Rule of Completeness, Fed. R. Evid. 106

Exclusion of Witnesses, Fed. R. Evid. 615

Expert Testimony, Fed. R. Evid. 702



The Rule of Completeness



The Rule of Completeness

“The common-law ‘rule of completeness’ ... was stated succinctly by Wigmore: ‘[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.’ 7 J. Wigmore, *Evidence in Trials at Common Law* § 2113, p. 653 (J. Chadbourn rev. 1978). ***The Federal Rules of Evidence have partially codified the doctrine of completeness in Rule 106.***”

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171–72, 109 S. Ct. 439, 451, 102 L. Ed. 2d 445 (1988) (emphasis added).

The Rule of Completeness

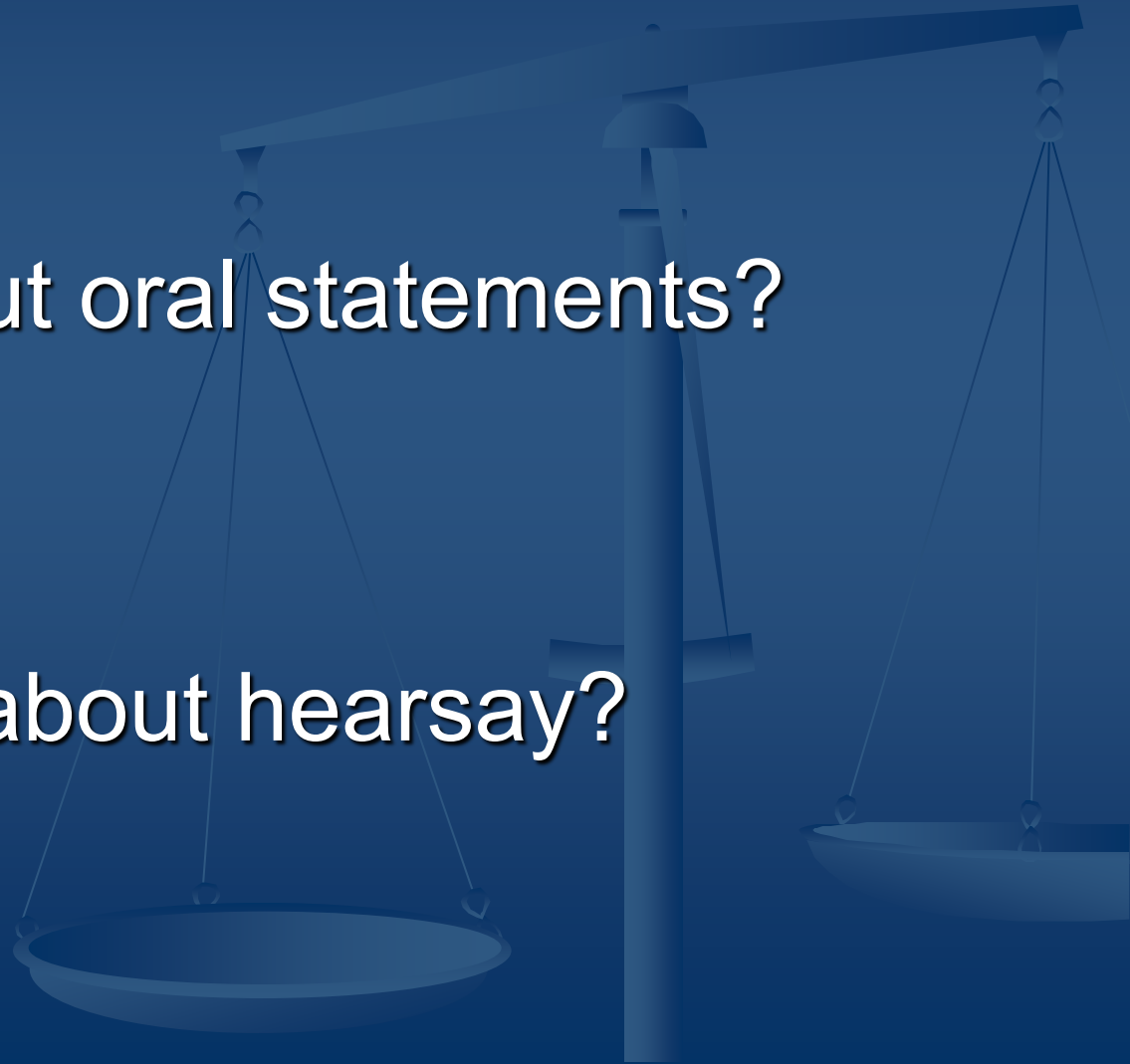
If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

Fed. R. Evid. 106 (Dec. 1, 2011).

The Rule of Completeness

What about oral statements?

What about hearsay?



The Rule of Completeness

U.S. v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) (“The rule applies only to writings or recorded statements, not to conversations.”).

U.S. v. Smith, 43 Fed. Appx 529, 531 (4th Cir. 2002) (“the rule of completeness is inapplicable to [Defendant’s] oral statement”).

U.S. v. Oloyede, 933 F.3d 302, 313-14 (4th Cir. 2019) (“we doubt that a residual common law rule of completeness [for oral statements] survives Rule 106’s codification”).

The Rule of Completeness

U.S. v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) (even if Rule 106 applied, “it would not render admissible ... evidence ... otherwise inadmissible under the hearsay rules”).

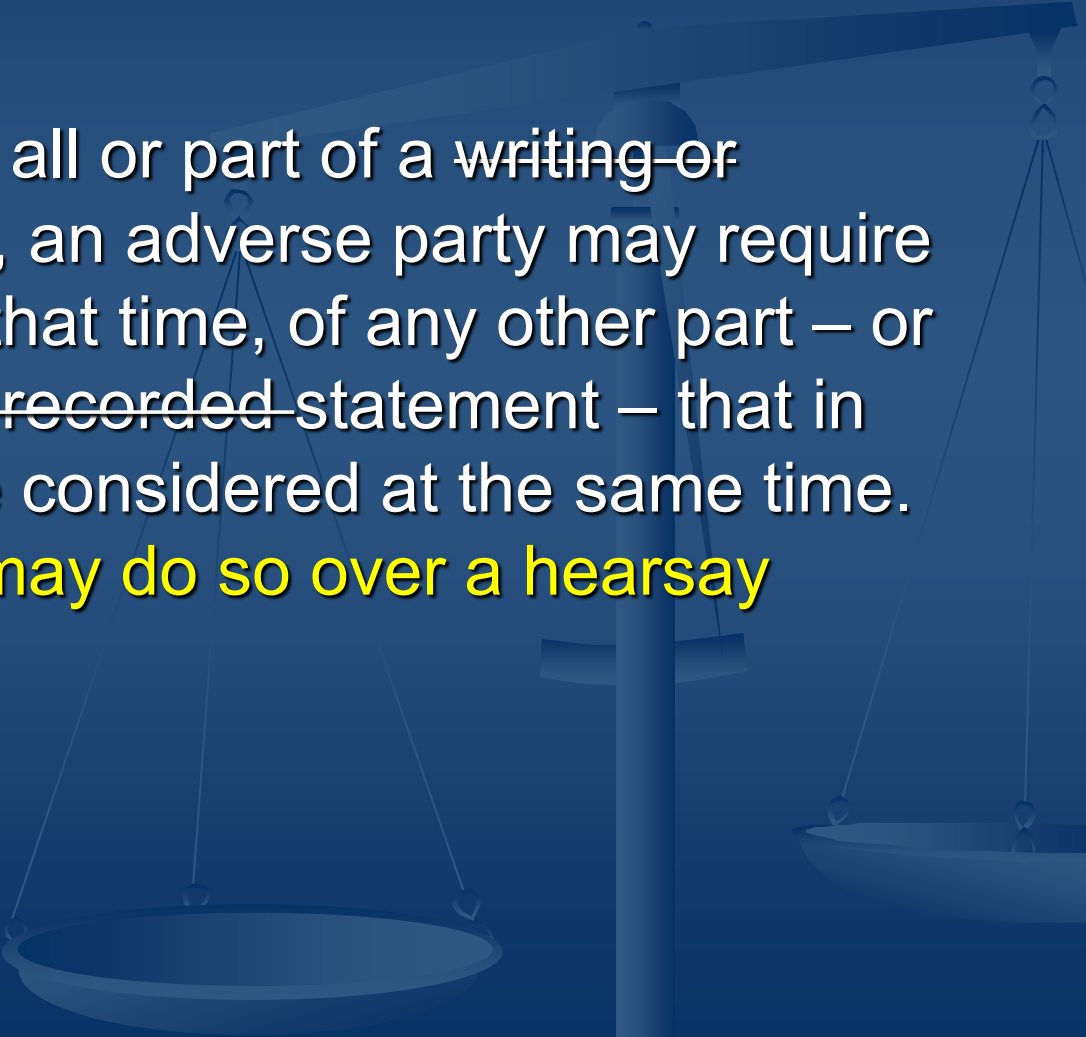
U.S. v. Lentz, 524 F.3d 501, 526 (4th Cir. 2008).

U.S. v. Hassan, 742 F.3d 104, 134 (4th Cir. 2014).

U.S. v. Oloyede, 933 F.3d 302, 313-14 (4th Cir. 2019).

The Rule of Completeness

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part – or any other ~~writing or recorded~~ statement – that in fairness ought to be considered at the same time. **The adverse party may do so over a hearsay objection.**

A faint, stylized image of a balance scale is visible in the background, centered behind the text. The scale has two pans hanging from a horizontal beam, and a vertical post supports the beam. The image is rendered in a light blue color that blends with the dark blue background.

The Rule of Completeness

If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part – or any other statement – that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

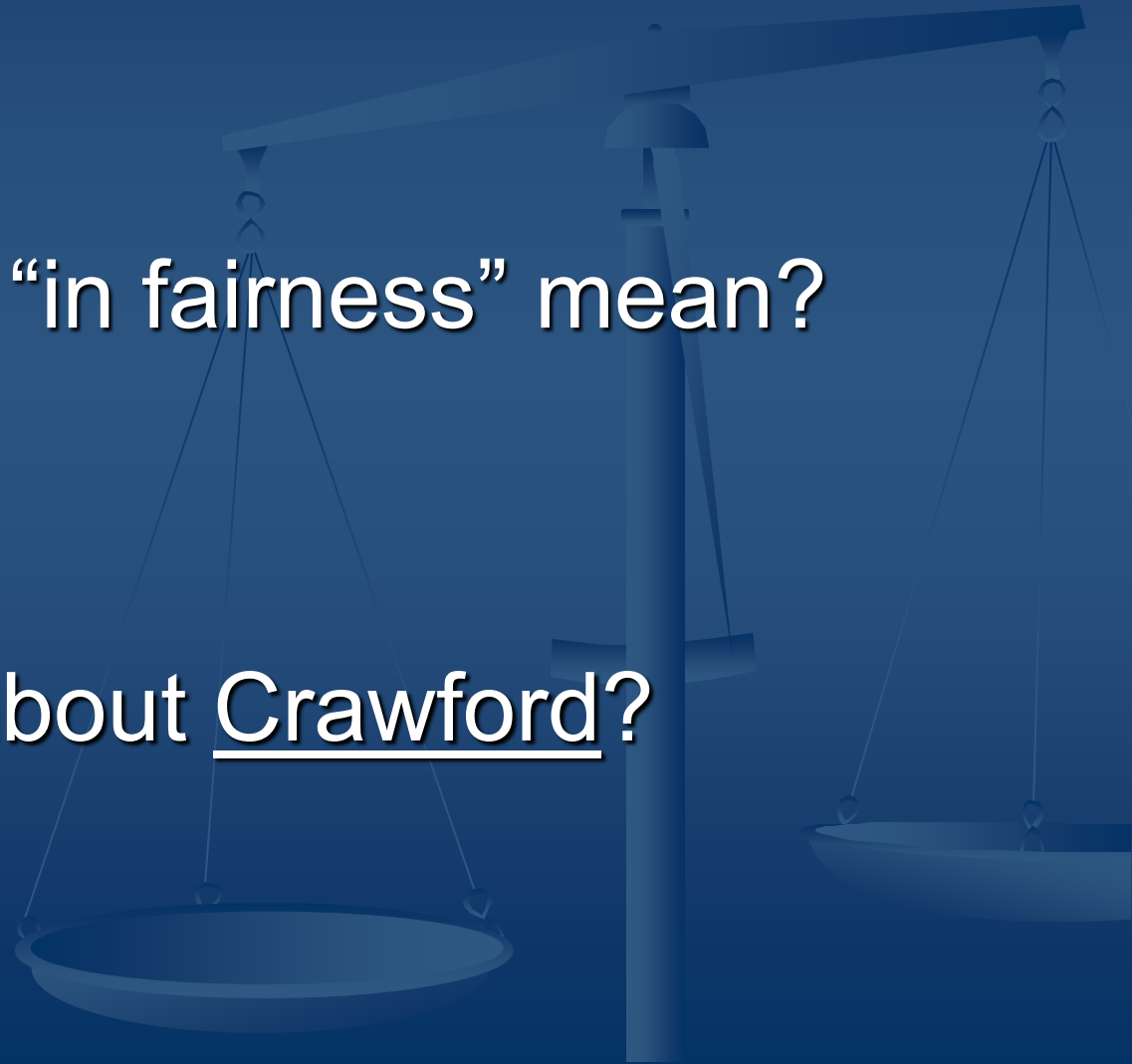
Fed. R. Evid. 106 (Dec. 1, 2023).

“The intent of the amendment is to displace the common law rule of completeness.” Advisory Committee Notes (emphasis added).

The Rule of Completeness

What does “in fairness” mean?

What about Crawford?



The Rule of Completeness

U.S. v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) (“purpose is to prevent a party from misleading the jury by... clarify[ing] or explain[ing] the part already received”).

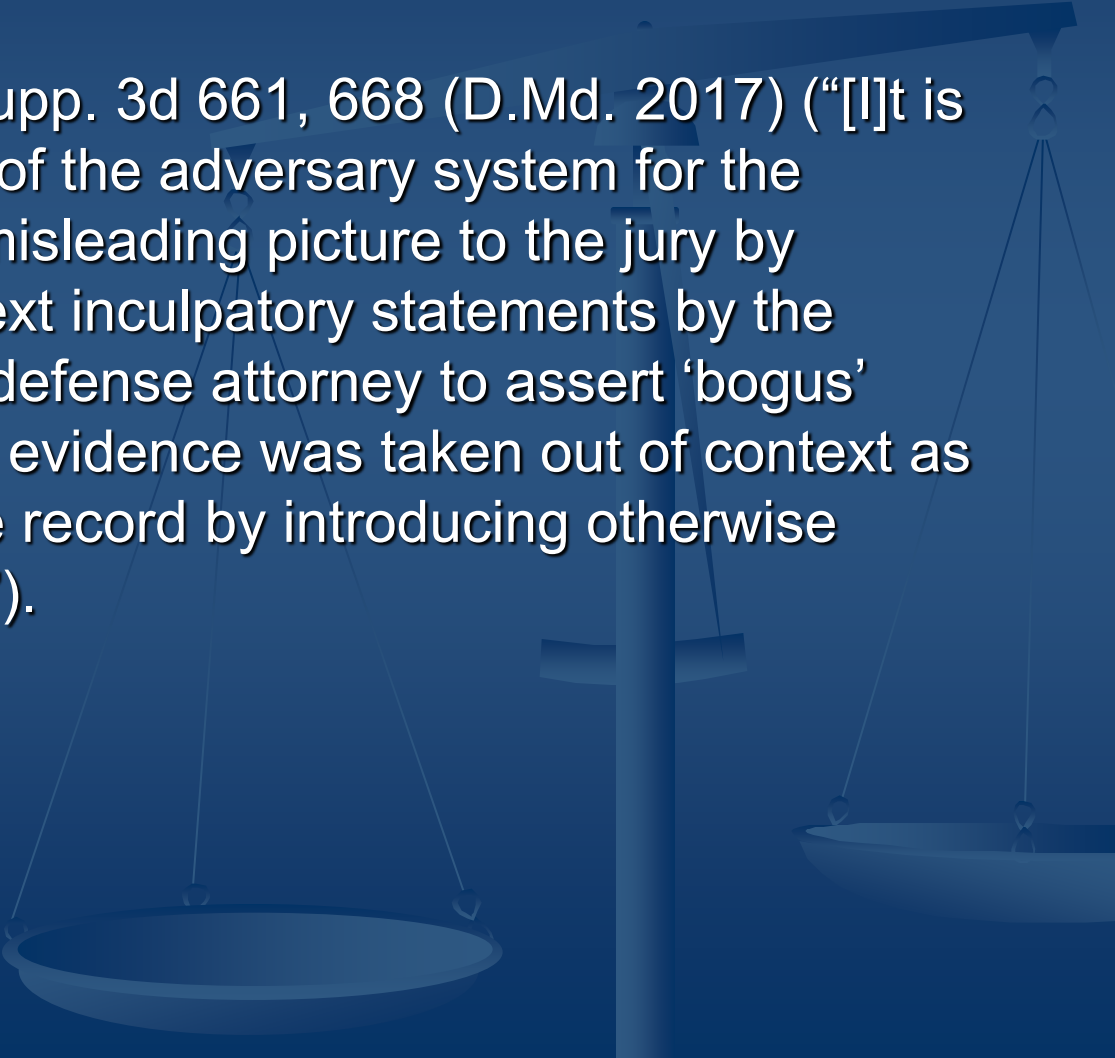
U.S. v. Mohr, 318 F.3d 613, 626 (4th Cir. 2003) (avoid “misunderstanding or distortion”).

U.S. v. Lentz, 524 F.3d 501, 526 (4th Cir. 2008) (“avoid misleading the jury or ... place the portions omitted in proper context”).

U.S. v. Gearheart, __ F. Supp. 3d __, 2023 WL 4106252, *2 (W.D.Va. June 21, 2023) (“qualify, explain, or place into context”).

The Rule of Completeness

U.S. v. Bailey, 322 F. Supp. 3d 661, 668 (D.Md. 2017) (“[I]t is just as much an abuse of the adversary system for the prosecution to paint a misleading picture to the jury by introducing out-of-context inculpatory statements by the defendant as it is for a defense attorney to assert ‘bogus’ claims that prosecution evidence was taken out of context as a pretext to ‘correct’ the record by introducing otherwise inadmissible evidence.”).

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The Rule of Completeness

“Whether and under what circumstances [the rule of completeness] might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court.”

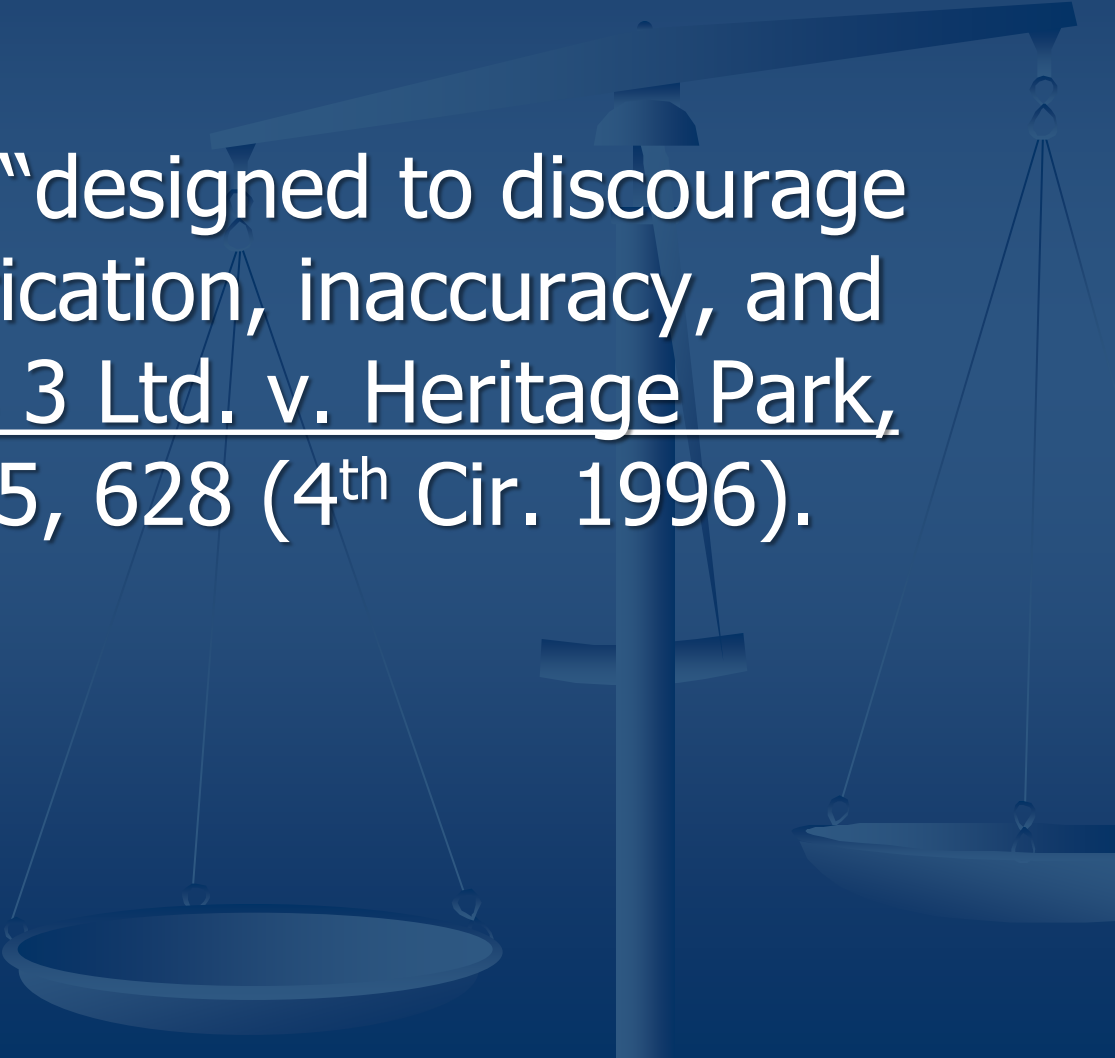
Hemphill v. New York, 595 U.S. 140, 155-56 (2022).

Exclusion of Witnesses



Exclusion of Witnesses

Sequestration is “designed to discourage and expose fabrication, inaccuracy, and collusion.” Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996).

A faint, stylized illustration of a balance scale is visible in the background. The scale is positioned on the right side of the slide, with its pans hanging from a horizontal beam. The entire image has a dark blue background.

Exclusion of Witnesses

At a party's request, the court ***must*** order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding [four listed classes of persons].

Fed. R. Evid. 615 (Dec. 1, 2011) (emphasis added).

Exclusion of Witnesses

What about outside the courtroom?

“[R]eference to ‘the usual sequestration rule’ did nothing more than invoke Federal Rule of Evidence 615.” U.S. v. Rhymes, 218 F.3d 310, 316 (4th Cir. 2000).

“[T]he Rule's text mandates courtroom exclusion of witnesses upon request; it leaves no discretion to the district court. Any further measures, however, imposed by the court are matters of discretion, not of right.” U.S. v. Ali, 991 F.3d 561, 568 (4th Cir. 2021).

Exclusion of Witnesses

What about attorneys?

“It is clear from the plain and unambiguous language of Rule 615 that lawyers simply are not subject to the Rule.” U.S. v. Rhymes, 218 F.3d 310, 316 (4th Cir. 2000).

Exclusion of Witnesses

Rule 615 – Excluding Witnesses
(Dec. 1, 2011)

Rule 615 – Excluding Witnesses from the
Courtroom; Preventing an Excluded
Witness's Access to Trial Testimony
(Dec. 1, 2023)

Exclusion of Witnesses

(a) **Excluding Witnesses.** ... [T]his rule does not authorize excluding:

~~(b)~~ an (2) **one** officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

~~(c)~~ a (3) **any** person whose presence a party shows to be essential to presenting the party's claim or defense;

Fed. R. Evid. 615(a) (Dec. 1, 2023).

Exclusion of Witnesses

(b) **Additional Orders to Prevent Disclosing and Accessing Testimony.** An order under (a) operates only to exclude witnesses from the courtroom. But the court *may* also, by order:

- (1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and
- (2) prohibit excluded witnesses from accessing trial testimony.

Fed. R. Evid. 615(b) (Dec. 1, 2023) (emphasis added).

Exclusion of Witnesses

“Nothing in the language of the Rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. To the extent that an order governing counsel’s disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis.”

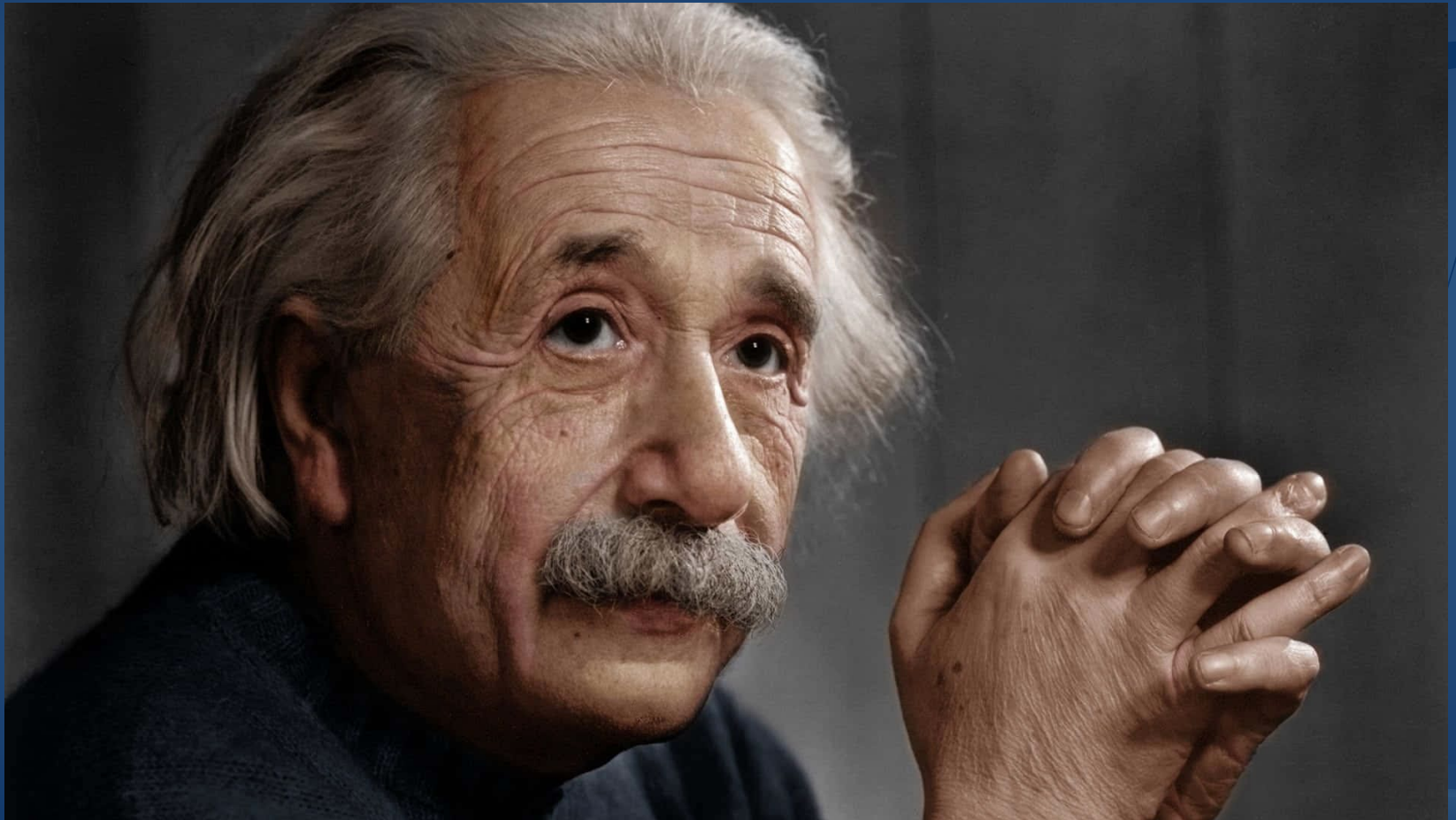
Advisory Committee Notes (Dec. 1, 2023).

Expert Testimony

“That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.... To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The subject of an expert's testimony must be “scientific ... knowledge.” The adjective “scientific” implies a grounding in the methods and procedures of science. ***Similarly, the word “knowledge” connotes more than subjective belief or unsupported speculation.***”

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589–90, 113 S. Ct. 2786, 2794–95, 125 L. Ed. 2d 469 (1993).

Expert Testimony



Expert Testimony



Expert Testimony

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b)** the testimony is based on sufficient facts or data;
- (c)** the testimony is the product of reliable principles and methods; and
- (d)** the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702 (Dec. 1, 2011).

Expert Testimony

U.S. v. Crisp, 324 F.3d 261 (4th Cir. 2003) (fingerprints and handwriting).

U.S. v. Willock, 696 F. Supp.2d 536 (D. Md. 2010) (firearms).

U.S. v. Mouzone, 687 F.3d 207 (4th Cir. 2012) (firearms).

U.S. v. Graham, 2024 WL 688256 (W.D.Va. Feb. 20, 2024) (unpublished) (firearms).

Expert Testimony

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if **the proponent demonstrates to the court that it is more likely than not that:**

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

~~**(d)** the expert has reliably applied the principles and methods to the facts of the case.~~

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702 (Dec. 1, 2023).

Expert Testimony

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. ***Forensic experts should avoid assertions of absolute or one hundred percent certainty--or to a reasonable degree of scientific certainty--if the methodology is subjective and thus potentially subject to error.*** In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods.

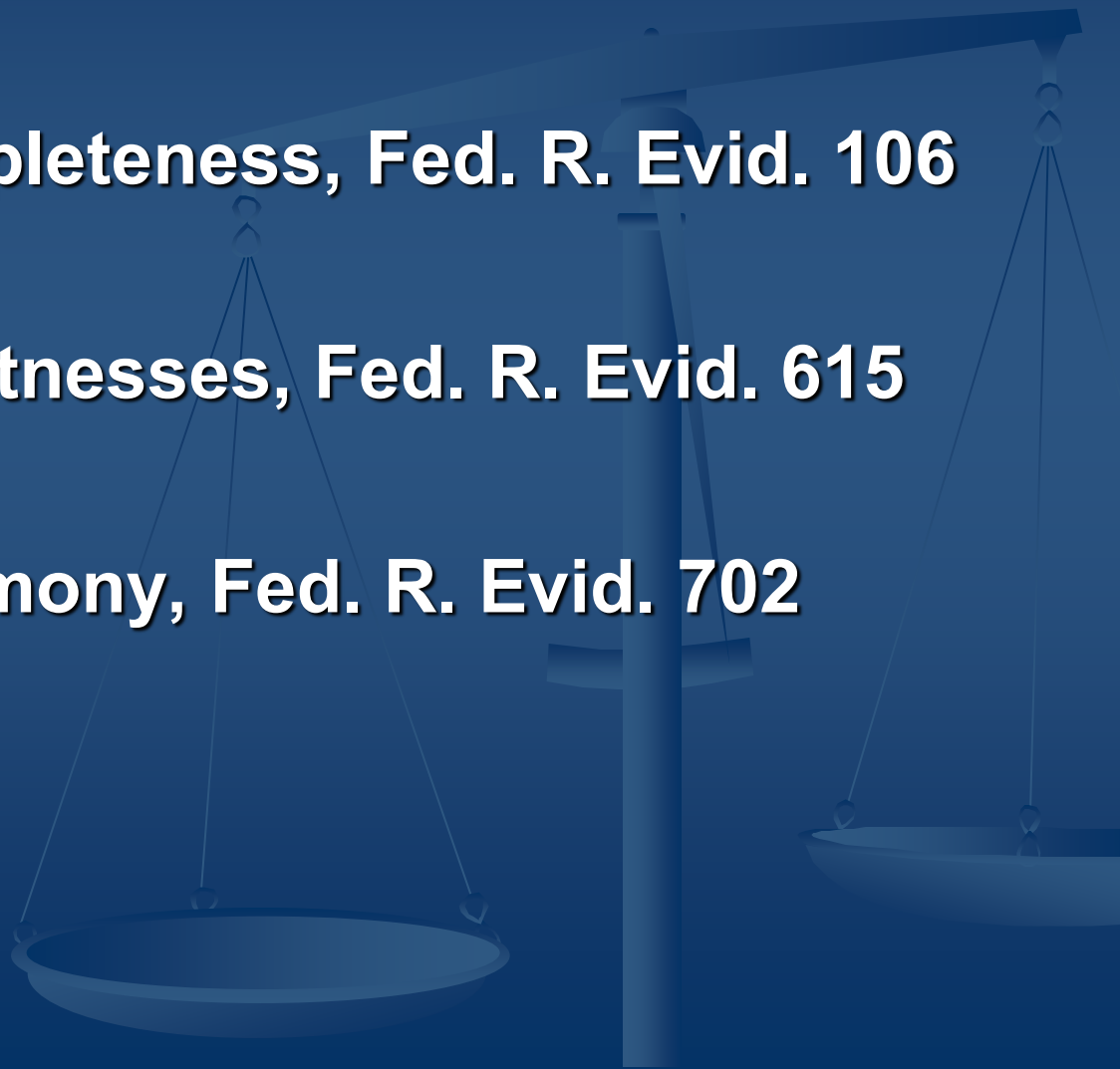
Advisory Committee Notes (Dec. 1, 2023) (emphasis added).

2023 Amendments

The Rule of Completeness, Fed. R. Evid. 106

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2024 Amendments

Illustrative Aids, New Fed. R. Evid. 107

**Extrinsic Evidence of a Prior Inconsistent Statement,
Fed. R. Evid. 613(b)**

Statements That Are Not Hearsay, Fed. R. Evid. 801(d)

Statements Against Interest, Fed. R. Evid. 804(b)(3)

Summaries to Prove Content, Fed. R. Evid. 1006

Illustrative Aids



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 (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.

Fed. R. Evid. 107 (Dec. 1, 2024).

Illustrative Aids

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. ... The term “illustrative aid” is used instead of the term “demonstrative evidence,” as that latter term has been subject to differing interpretation in the courts. 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.

Advisory Committee Notes (Dec. 1, 2024).

Extrinsic Evidence of a Prior Inconsistent Statement

Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Fed. R. Evid. 613(b) (Dec. 1, 2011).

Extrinsic Evidence of a Prior Inconsistent Statement

Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted **until after** the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Fed. R. Evid. 613(b) (Dec. 1, 2024) (emphasis added).

Statements That Are Not Hearsay

New language is added at the end of Fed. R. Evid. 801(d)(2) regarding statements by any opposing party.

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or principal under this rule is also admissible against the party.

Examples in the Advisory Committee Notes include decedent/estate, assignor/assignee and debtor/trustee relationships.

Statements Against Interest

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 claim against someone else or to expose the declarant to civil or criminal liability; and
- (B) 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.

Fed. R. Evid. 804(b)(3) (Dec. 1, 2011).

Statements Against Interest

Statement Against Interest. 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 claim 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 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.**

Fed. R. Evid. 804(b)(3) (Dec. 1, 2024) (emphasis added).

Statements Against Interest

"Rule 804(b)(3) also requires that statements against interest be supported by corroborating circumstances. Our court has enumerated several factors relevant to this particular inquiry, including:

(1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) **the nature and strength of independent evidence relevant to the conduct in question.**

United States v. Dargan, 738 F.3d 643, 650 (4th Cir. 2013) (emphasis added).

Statements Against Interest



Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the 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.

Fed. R. Evid. 1006 (Dec. 1, 2011).

Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence.

The court may admit as evidence 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.

Fed. R. Evid. 1006 (Dec. 1, 2024) (emphasis added).

Summaries to Prove Content

Rule 1006 has been amended to correct misperceptions about the operation of the rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is “not evidence” and that it must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purposes, therefore, Rule 1006 summaries must be admitted as substantive evidence and the rule has been amended to clarify that a party may offer a Rule 1006 summary “as evidence.”

Advisory Committee Notes (Dec. 1, 2024).

Summaries to Prove Content

Although underlying documents or items must be admissible in evidence, they do not have to actually be admitted. United States v. Strissel, 920 F.2d 1162, 1164 (4th Cir. 1990).

“Summary charts are admissible if they aid the jury in ascertaining the truth.” United States v. Johnson, 54 F.3d 1150, 1156 (4th Cir. 1995).

2024 Amendments

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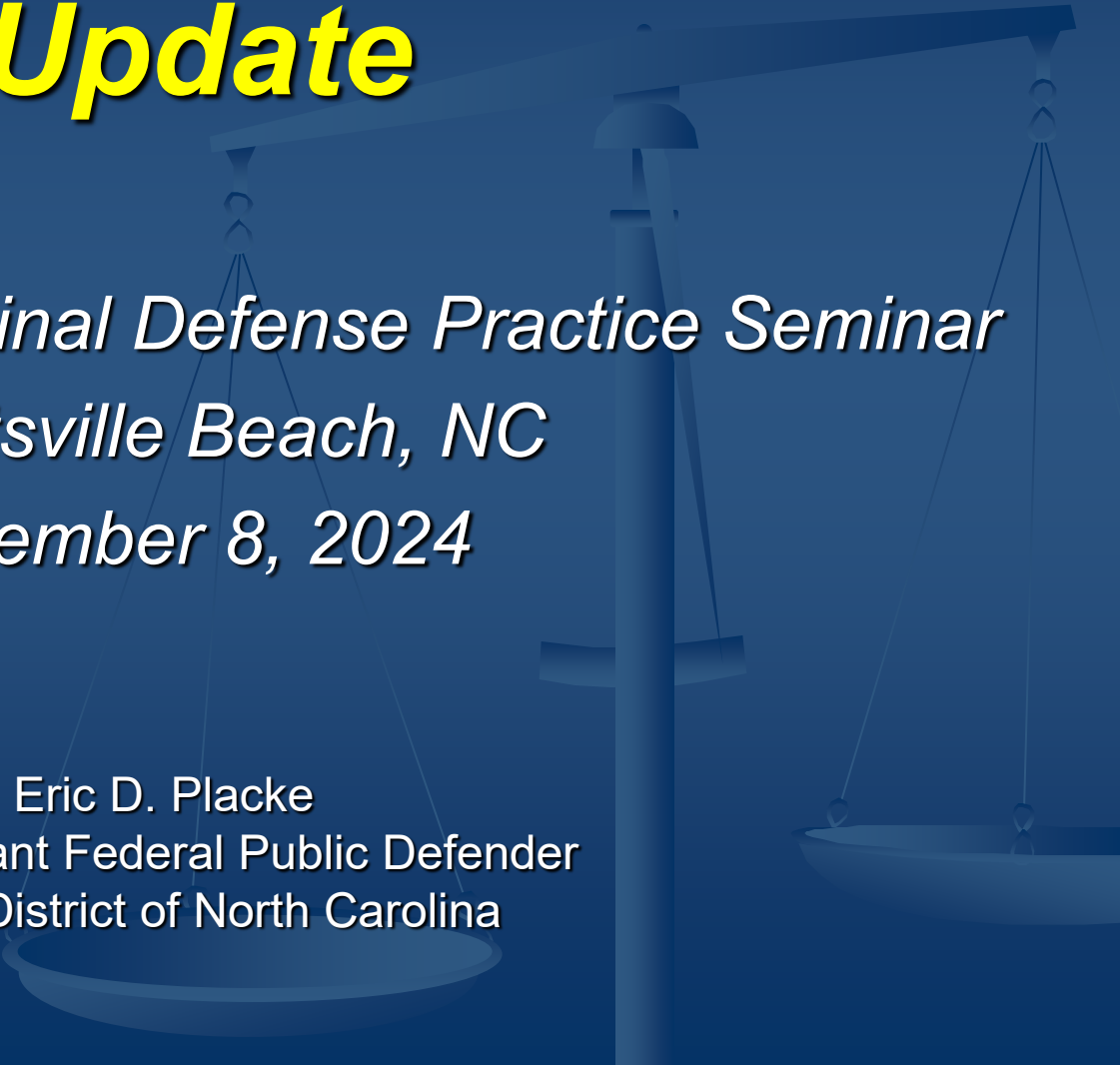
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