
**ADVISORY COMMITTEE
ON
EVIDENCE RULES**

April 30, 2021

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING

April 30, 2021

I. Committee Meeting --- Opening Business

Opening business includes:

- Introduction of new members, Hon. Richard Sullivan and Arun Subramanian, Esq.
- Approval of the minutes of the Fall, 2020 meeting.
- Report on the January, 2021 meeting of the Standing Committee.

II. Rule 702

The Committee has been considering two possible changes to Rule 702: 1) an amendment regulating overstatement of expert conclusions --- or instead a compromise that focuses the court on the expert's opinion in considering whether the expert's method was reliably applied and sufficiently based on facts or data; and 2) an amendment providing that the admissibility requirements set forth in the rule --- most especially sufficiency of basis and reliability of application --- are matters that must be decided by the court by a preponderance of the evidence under Rule 104(a). The memorandum prepared by the Reporter and Professor Richter on these possible changes is behind Tab 2.

Immediately behind the memorandum are two attachments:

1. A case digest prepared by the Reporter on forensic expert testimony; and
2. Letters and Reports to the Committee from members of the public regarding an amendment to Rule 702.

III. Rule 106

The Committee has been considering a proposal to amend Rule 106, the rule of completeness, for two purposes: 1. to specify that completing evidence is admissible over a hearsay objection; and 2. to extend its coverage to oral statements. The Reporter's memorandum on the subject is behind Tab 3.

IV. Rule 615

The Committee is considering whether the Rule should be amended to provide that a Rule 615 order extends to prohibiting excluded witnesses from obtaining or from being provided trial testimony while they are excluded from the courtroom. The Reporter's memorandum on Rule 615 is behind Tab 4.

V. Circuit Splits

The Reporter has prepared a memorandum on circuit splits over the meaning of certain Federal Rules of Evidence. This memorandum is submitted to assess the interest of the Committee in considering amendments to rectify some of these circuit splits. The memorandum is behind Tab 5.

VI. Best Evidence Rule and Transcripts of Foreign Conversations

There is considerable confusion and disagreement in the courts on how the Best Evidence Rule applies when a conversation in a foreign language is recorded, and the conversation is proven through a translation. Questions include whether the foreign language recording must be admitted into evidence. Professor Richter, the Academic Consultant to the Committee, has prepared a memorandum, as well as possible language for an amendment, for the Committee's consideration. The memorandum is behind Tab 6.

VII. Possible Amendments to Rule 611

The Reporter has prepared a memorandum to assist the Committee in considering two amendments to Rule 611: 1) an expansion of the language of Rule 611(a) that would cover actions taken by courts under the Rule that are not actually within the terms of the discretion granted in the text of Rule 611(a); and 2) providing textual safeguards for juror questioning of witnesses.

A separate memorandum prepared by the Reporter discusses whether Rule 611 should be amended to provide specific regulations for using illustrative aids. Such an amendment would promote and articulate a distinction between illustrative aids and demonstrative evidence.

Both these memoranda are behind Tab VII. In addition, a law review article on the distinction between illustrative aids and demonstrative evidence is included after the memoranda.

VIII. Possible Amendments to Rule 1006

Professor Richter has prepared a memo on several problems in the application of Rule 1006 by some courts. Some courts have held that Rule 1006 summaries are not evidence; others have held that all the summarized evidence must have actually been admitted in order for the summary to be admitted. Professor Richter analyzes these mistaken applications, as well as other disputes in the courts on the proper use of summaries. She also sets forth a draft amendment to assist the Committee in determining whether to give further consideration to amendments to Rule 1006.

IX. Admissibility of Statements Made by an Individual When Offered Against a Successor-in-Interest

If a person makes a hearsay statement that would be admissible against them as a party-opponent statement, what happens when the party-opponent turns out to be that person's successor-in-interest (e.g., the declarant's estate)? The courts are in dispute on this question. The Reporter has prepared a memorandum on the subject, as well as a draft amendment, to assist the Committee in considering whether to pursue a possible amendment to Rule 801(d)(2).

Attached to the Reporter's memo is a law review note discussing the subject and the split in the courts.

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| Members | Position | District/Circuit | Start Date | End Date |
|-----------------------------|-----------------|--------------------------------|-------------------|-----------------|
| | | | Member: 2020 | ---- |
| Patrick J. Schiltz | D | Minnesota | Chair: 2020 | 2023 |
| James P. Bassett | JUST | New Hampshire | 2016 | 2022 |
| Shelly Dick | D | Louisiana (Middle) | 2017 | 2023 |
| Traci L. Lovitt | ESQ | Massachusetts | 2016 | 2022 |
| Kathryn Nester | FPD | California (Southern) (CDO) | 2018 | 2021 |
| Thomas D. Schroeder | D | North Carolina (Middle) | 2017 | 2023 |
| Arun Subramanian | ESQ | New York | 2021 | 2023 |
| Richard J. Sullivan | C | Second Circuit | 2021 | 2023 |
| TBD* | DOJ | Washington, DC | ---- | Open |
| Daniel J. Capra Reporter | ACAD | New York | 1996 | Open |

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| | |
|--|---|
| Liaisons for the Advisory Committee on Appellate Rules | <p>Hon. Frank M. Hull <i>(Standing)</i></p> <p>Hon. Bernice B. Donald <i>(Bankruptcy)</i></p> |
| Liaison for the Advisory Committee on Bankruptcy Rules | <p>Hon. William J. Kayatta, Jr. <i>(Standing)</i></p> |
| Liaisons for the Advisory Committee on Civil Rules | <p>Peter D. Keisler, Esq. <i>(Standing)</i></p> <p>Hon. Catherine P. McEwen <i>(Bankruptcy)</i></p> |
| Liaison for the Advisory Committee on Criminal Rules | <p>Hon. Jesse M. Furman <i>(Standing)</i></p> |
| Liaisons for the Advisory Committee on Evidence Rules | <p>Hon. James C. Dever III <i>(Criminal)</i></p> <p>Hon. Carolyn B. Kuhl <i>(Standing)</i></p> <p>Hon. Sara Lioi <i>(Civil)</i></p> |

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TAB 1

TAB 1A

Advisory Committee on Evidence Rules
Minutes of the Meeting of November 13, 2020
Via Microsoft Teams

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on November 13, 2020 via Microsoft Teams.

The following members of the Committee were present:

Hon. Patrick J. Schiltz, Chair
Hon. James P. Bassett
Hon. J. Thomas Marten
Hon. Shelly Dick
Hon. Thomas D. Schroeder
Traci L. Lovitt, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Hon. Richard Donoghue, Esq., Principal Associate Deputy Attorney General, Department of Justice
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. John D. Bates, Chair of the Committee on Rules of Practice and Procedure
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. Sara Lioi, Liaison from the Civil Rules Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Elizabeth Shapiro, Department of Justice
Ted Hunt, Esq., Department of Justice
Timothy Lau, Esq., Federal Judicial Center
Andrew Goldsmith, Esq., Department of Justice
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Brittany Bunting, Rules Committee Staff

Members of the public attending were:

Brian J. Kargus, OTJAG Criminal Law Division
Sri Kuehnlenz, Esq., American College of Trial Lawyers
Mark S. Cohen, Esq., American College of Trial Lawyers
Amy Brogioli, American Association for Justice
Abigail Dodd, Shell Oil Company
Alex Dahl, Lawyers for Civil Justice
Caitlin Gullickson, CLS Strategies
Sam Taylor, CLS Strategies
Julia Sutherland, CLS Strategies

John G. McCarthy, Federal Bar Association
Susan Steinman, American Association for Justice
Alex Biedermann, Associate Professor University of Lausanne
Lee Mickus, Esq., Evans Fears & Schuttert LLP
John Hawkinson, Freelance Journalist
Jakub Madej
Leah Lorber, GSK
Aaron Wolf, FJC AAAS Fellow
Kathleen Foley, FJC Fellow
Habib Nasrullah, Esq., Wheeler Trigg O'Donnell LLP
Gabby Gannon, Student, University at Buffalo
Heather Abraham, Student, University at Buffalo

I. Opening Business

The new Chair of the Evidence Advisory Committee, the Honorable Patrick J. Schiltz, opened the meeting by welcoming everyone and introducing himself. All Committee members and liaisons introduced themselves as well. The Chair then acknowledged and thanked the previous Committee Chair, the Honorable Debra A. Livingston, for her service on the Committee, noting that her new role as Chief Judge of the Second Circuit Court of Appeals had prevented her from continuing as Chair. The Chair then read a letter to the Committee from Judge Livingston in which she thanked committee members for their thorough, thoughtful, and collegial exchange. She gave special thanks to Judge Schroeder for chairing a subcommittee on FRE 702 and to Dan Capra for his excellent stewardship as Reporter. She closed by noting her pride in the important rulemaking work accomplished during her tenure as a committee member and as Chair.

Professor Capra then gave a special thanks and farewell to Judge Tom Marten, who is concluding his service as a member of the Committee. Professor Capra noted Judge Marten's profound contributions to the work of the Committee and the wealth of information and effort he provided during his tenure. Judge Marten thanked the Reporter for his kind words, and stated that he was grateful to have worked with a group of such brilliant people. Judge Marten noted the extraordinary thought and effort that goes into the rulemaking process, with attention given to every single word considered.

The Chair advised the Committee that two new members would be joining the Committee for the next meeting: Judge Richard J. Sullivan of the Second Circuit Court of Appeals and Arun Subramanian, Esq. of Susman Godfrey L.L.P.

II. Approval of Minutes

Due to the covid-19 pandemic during the spring of 2020, the Advisory Committee on Evidence Rules did not hold a spring meeting. Therefore, the Chair moved approval of the Minutes of the Advisory Committee meeting from the Fall of 2019. The Minutes of the Fall 2019 meeting were approved by acclamation.

III. Report on June 2020 Standing Committee Meeting

The Reporter gave a report on the June 2020 meeting of the Standing Committee. He reminded the Committee that the Evidence Advisory Committee presented no action items at the June meeting. The Reporter and Judge Livingston informed the Standing Committee on the Committee's continuing work on Rules 106, 615, and 702. They also reported on the potential need for an "emergency" evidence rule pursuant to the CARES Act that would enable the suspension of certain evidence rules during an emergency (such as the covid-19 pandemic). Based upon their careful research and review, they reported that there was no need for an emergency evidence rule. The Reporter noted that he had included a memorandum regarding the emergency rule issue in the Agenda materials and that the Committee would be given an opportunity to provide input on the issue later in the meeting.

IV. Potential Amendment to FRE 702

The Chair opened the substantive agenda with a discussion of FRE 702. He noted that the Committee had been considering two potential amendments to FRE 702 for the past few years: 1) an amendment that would clarify the application of the FRE 104(a) preponderance standard of admissibility to FRE 702 inquiries and 2) an amendment that would prevent an expert from "overstating" her conclusions. The Chair proposed to discuss each potential amendment in turn, noting that no votes would be taken at the meeting. He explained that the goal of the discussion would be to narrow amendment alternatives and to have a proposal that could be voted upon at the Spring 2021 meeting.

A. Amending FRE 702 to Clarify the Application of FRE 104(a)

The Reporter reminded the Committee that the FRE 104(a) issue came to the Committee's attention through a law review article by David Bernstein & Eric Lasker. The Reporter's research --- as well as research provided by a number of parties who had submitted comments to the Committee --- reveals a number of federal cases in which judges did not apply the preponderance standard of admissibility to the requirements of sufficiency of basis and reliable application of principles and methods, instead holding that such issues were ones of weight for the jury. In other cases, the Reporter noted wayward language by federal courts suggesting that FRE 702 inquiries were ones of weight, even where the judge appeared to apply the appropriate FRE 104(a) standard. The Reporter noted that based on the discussion at previous meetings, all Committee members were in agreement that the FRE 104(a) preponderance standard applies to a trial judge's admissibility findings under FRE 702, and that courts should state that they are applying that standard.

The Committee has been considering an amendment to FRE 702 to expressly provide that the trial judge must find the requirements of the Rule satisfied by a preponderance of the evidence. The Reporter noted that one concern about such an amendment might be that FRE 104(a) already applies to FRE 702 under existing rules. Indeed, he noted that express preponderance language likely would have been rejected in 2000 when Rule 702 was amended to reflect the *Daubert* opinion *because* the preponderance standard was already baked into the existing Rule. Twenty

years later -- when it is clear that federal judges are not uniformly finding and following the preponderance standard -- the justification for a clarifying amendment exists. He emphasized that the FRE 104(a) standard is not expressly stated in FRE 702. Litigants and judges need to look to a footnote in *Daubert* providing that FRE 104(a) governs Rule 702 determinations and then to FRE 104(a) (which does not actually explicitly set out a preponderance of the evidence standard) and then to the Supreme Court's decision in *Bourjaily* (which interprets Rule 104(a) as requiring a preponderance) to learn that such findings are to be made by the trial judge by a preponderance of the evidence. The Reporter explained that this circuitous route to the preponderance standard is a subtle one that has been missed by many courts and that an amendment to Rule 702 could improve decision making by expressly stating the applicable standard of proof. He further noted that the *Daubert* opinion included some language about "shaky" expert testimony being a question for the jury, further exacerbating confusion.

Should the Committee favor an amendment, the Reporter noted that the next issue to be discussed is the placement of the preponderance requirement. There are two possibilities. First, it could be added to the opening paragraph of the Rule, and the expert qualification requirement could be moved out of the opening paragraph to the end of the Rule in a new subsection (e). The Reporter explained that a draft of this potential amendment could be found on page 154 of the Agenda materials. The principal benefit of this approach is that the preponderance standard would expressly cover *all* Rule 702 requirements, including the expert's qualifications. The downside of that approach is that it would significantly disrupt the structure of the existing Rule and would place an expert's qualifications (typically the first question) as the last requirement. The second approach would add preponderance of the evidence language to the Rule 702 introductory paragraph after the existing and well-known language regarding an expert's qualifications. This would clarify its application to the Rule 702(b)-(d) requirements, which many courts are currently missing. Although the new language would not specifically apply to the finding of an expert's qualification, Rule 104(a) still governs that determination and courts uniformly understand that the issue of an expert's qualifications is for the judge and not the jury. Any potential negative inference that might be drawn could be addressed in a Committee note. The Reporter alerted the Committee that this second drafting option appeared on page 152 of the Agenda. He explained that it would be helpful to get the Committee's thoughts on whether to propose a 104(a) amendment and, if so, which draft is preferred.

Committee members expressed substantial support for a preponderance amendment. All agreed that the existing circuitous path through *Daubert*, Rule 104(a), and *Bourjaily* to get to the preponderance standard for Rule 702 was challenging for lawyers and judges. Committee members opined that a trial judge ought to be able to open the Federal Rules of Evidence and understand the rule to be applied from the text. One Committee member observed that the federal cases and comments from members of the public had revealed a pervasive problem with courts discussing expert admissibility requirements as matters of weight. Another Committee member agreed that trial courts can be tempted to kick difficult Rule 702 questions to the jury. Committee members noted that courts routinely conduct a preponderance of the evidence inquiry with respect to admissibility requirements in other evidence rules, but that such a methodical analysis is rare in applying Rule 702. Committee members expressed confidence that adding an express preponderance requirement to the language of Rule 702 would provide a clear signal to judges that would improve consideration of expert opinion testimony. Another Committee member noted that

more methodical consideration of Rule 702 by trial judges would aid courts reviewing the admissibility of expert testimony on appeal.

With respect to the form of a potential amendment to Rule 702, Committee members were in agreement that the draft amendment on page 152 of the Agenda that would add the preponderance requirement after the existing language regarding an expert's qualifications would be superior, because it would address the problem found in the cases and yet would retain the existing structure of Rule 702. The Department of Justice agreed that a preponderance amendment would be a helpful clarification to the Rule and expressed support for the draft amendment on page 152. The Department suggested that it may favor some modifications to the proposed Advisory Committee note and reiterated its strong opposition to any amendment to Rule 702 to regulate overstatement of expert testimony. The Federal Public Defender also expressed support for an amendment to add a preponderance standard as reflected in the draft on page 152 of the Agenda, noting that such an amendment would make it clear that the trial judge is supposed to act as the gatekeeper with respect to expert opinion testimony.

One Committee member inquired whether adding a preponderance standard would impose an obligation upon a trial judge to police Rule 702 requirements *sua sponte*. The Reporter explained that the amendment would not impose such an obligation – as with other rules, a trial judge operating under an amended Rule 702 could act *sua sponte* if she so chose, but would not need to act without objection. The Chair agreed with the Reporter's interpretation of the potential amended language. The Federal Defender inquired about whether a preponderance amendment would affect a litigant's ability to attempt to elicit a new expert opinion during cross examination and whether the court would have to pause the trial to conduct a preponderance inquiry anew. The Reporter explained that the amendment would not affect the procedure trial judges already follow when this happens at trial. The Chair noted that this issue is unlikely to arise in civil cases due to pretrial discovery obligations and the exclusion of undisclosed opinions. If it comes up in the criminal arena where there are currently fewer discovery obligations, the trial judge has to have a recess or hearing to resolve *Daubert* questions. An amendment to add a preponderance requirement would not alter that process.

The Chair rounded out the discussion, thanking the Committee for its thoughtful comments and noting his desire to have the Committee focus on the preponderance issue closely, because prior discussions had focused largely on the issue of overstatement. He described his initial disinclination to amend Rule 702 to add an express preponderance requirement. He confessed trepidation about sending an unusual amendment clarifying an existing rule to the Supreme Court and expressed sympathy for complaints about constant amendments to the Federal Rules. But the Chair explained that despite initial reservations, he had come to favor the proposal. The Chair stated that Circuit court language at odds with the language of Rule 702 presents a serious concern. He further noted being struck by Judge Campbell's comment at a prior meeting that attorneys and trial judges often do not discuss Rule 702 issues in Rule 104(a) preponderance terms. Because the Rule lacks an express reference to the preponderance standard, the Chair observed that the Rule may indeed be a part of the problem. He further stated that unintended consequences seemed unlikely for an amendment adding an express preponderance standard to the Rule.

Hearing unanimous approval from the Committee to move forward with a preponderance amendment akin to the one on page 152 of the Agenda materials, the Chair asked the Reporter to prepare that draft for the spring meeting, along with a draft Advisory Committee note. The Chair explained that the Committee could discuss the details of the note at the spring meeting, but emphasized that an Advisory Committee note would need to state that a preponderance amendment in the text of Rule 702 was not intended to create a negative inference about applying the standard to other rules.

Judge Bates commented that the Standing Committee shared the Chair's reluctance to advance unnecessary amendments, but opined that a preponderance amendment sounded like a needed clarification that would aid practice. Accordingly, Judge Bates anticipated no resistance from the Standing Committee to such a proposal.

The Reporter notified the Committee that some federal courts have also added an intensifier to the Rule 702(a) requirement that an expert's opinion "will help" the trier of fact. These courts have required that an expert's opinion will "appreciably help." The Reporter explained that this misstatement of the Rule 702 standard by some courts did not by itself justify an amendment to the Rule, but noted that he had included language in brackets in the draft Advisory Committee note to the proposed preponderance amendment to emphasize that expert opinion testimony need only "help" and need not "appreciably help" under Rule 702. The Chair asked the Reporter to leave that bracketed language in the draft note to be taken up and considered by the Advisory Committee at its spring meeting.

B. Regulating Overstatement of Expert Opinions

The Chair then turned the Committee's discussion to a potential amendment to Rule 702 that would prevent an expert from "overstating" the conclusions that may reasonably be drawn from a reliable application of the expert's principles and methods. The Chair noted that the overstatement proposal originated from concerns regarding forensic testimony in criminal cases. Because the Department of Justice had filed a letter with the Committee opposing an overstatement amendment, the Chair first recognized the Department of Justice to describe its opposition.

Elizabeth Shapiro summarized the Department's objections to an overstatement amendment. She argued that the PCAST Report, which launched the Committee's review of Rule 702, was obsolete already due to the rapidly evolving nature of forensic examination. She highlighted the Department of Justice's work developing uniform language governing the testimony of forensic experts in numerous disciplines to control the risk of overstatement. She opined that the DOJ's uniform language was a healthier and more nimble response to concerns about forensic testimony than a rule change. She also noted that national organizations with expertise in forensics have been examining and adopting the Department's uniform language. She described recent opinions by district courts in the District of Columbia and the Western District of Oklahoma referencing the Department's uniform language in ruling on *Daubert* motions. Finally, she opined that the Committee should not propose an amendment to Rule 702 to regulate expert overstatement because the existing requirements of the Rule already permit such regulation, and that such an amendment could be thought to be an excuse for a lengthy Advisory Committee note on forensic evidence --- that would be obsolete before it could take effect.

Ted Hunt, the Department's expert on forensic testimony, next argued that existing Rule 702 is being applied effectively by federal courts to police forensic testimony, and that no rule change should be made. He described tremendous change in the forensics community since 2009. In particular, he noted studies completed since the PCAST Report revealing false positive error rates of less than 1% in forensic disciplines such as fingerprint identification and ballistics. He noted that even these low rates of error failed to account for the fact that a second reviewing examiner required by protocols in forensic laboratories would catch even these few errors (though he did not mention whether those second reviewers knew the results of the original test). He emphasized that pattern comparison testimony is a skill-based, experience-based method and that courts are appropriately treating it as such. He acknowledged the difficulty in extrapolating error rates to all forensic examiners in all disciplines, making the identification of general error rates challenging. Still, he highlighted the Department's work in developing and publishing uniform language for 16 forensic disciplines. This language prohibits overstatement by experts and eliminates problematic legacy language (such as "zero error rate" or "infallible"). He emphasized that concessions of fallibility are now routinely made by forensic experts. He suggested that the federal caselaw may not have entirely caught up with this rapid progress, but that courts were starting to reference and utilize the uniform language appropriately. In sum, he opined that existing Rule 702 is working optimally with respect to forensic testimony and should not be amended.

One Committee member asked whether the uniform language adopted by the Department applies to forensic examiners from state laboratories who testify in federal cases. The Department acknowledged that the uniform language is not binding on state witnesses, but described movement in national organizations to adopt the Department's uniform language, leading to the hope that state and local labs will not make claims at odds with that uniform language going forward.

Next, the Federal Defender voiced her strong support for an overstatement amendment to Rule 702. She reminded the Committee that erroneous forensic testimony could lead and has led to false convictions. She called attention to the voluminous digest of federal cases collected by the Reporter in the Agenda materials, illustrating the many times that forensic (and other) experts had been permitted to make clear overstatements about the conclusions that may reliably be drawn from their methods. She acknowledged the Department's frustration with the PCAST Report but pointed out that the Department may make the same arguments it is making about the reliability of its forensic testimony in court before a trial judge to overcome an objection based upon overstatement. She further noted that forensic testimony in state courts is particularly problematic and that even perfect adherence by the Department to its uniform language would be inadequate to fix the problem in state courts --- a problem that might be solved by the promulgation of a federal model. She noted the importance of adding a specific prohibition on overstatement to Rule 702 to alert courts to focus on that point. An amendment to Rule 702 would prevent the issue of overstatement from being ignored or overlooked and would signal to courts that they have a gatekeeping responsibility with respect to an expert's ultimate conclusions on the stand. In sum, she opined that an amendment would not prevent the government from presenting and defending reliable forensic testimony, but would prevent egregious overstatements by testifying experts.

The Chair asked the Federal Defender whether the problem with overstated expert testimony was really a “Rules” problem or whether it represents more of a lawyering problem. He expressed skepticism that trial judges don’t realize they have power to regulate expert conclusions and suggested that an amendment to Rule 702 will not solve the problem if defense lawyers fail to challenge expert testimony and bring concerns to the attention of the trial judge. The Federal Defender responded that a Rule change would put everyone – trial judges and defense attorneys alike – on notice that expert testimony overpromising on conclusions that can be drawn from a forensic examination should be challenged and regulated. She stated that nothing in the current Rule signals the need for an inquiry into the form or extent of the expert’s conclusions and urged the need for an amendment to make such an inquiry express and mandatory.

Rich Donoghue, Principal Associate Attorney General for the Department of Justice, argued that the problem with forensic expert testimony, if any, was more of a lawyering issue and not so widespread as to warrant an amendment. Elizabeth Shapiro argued that an amendment to the Federal Rules of Evidence would not fix a problem largely existing in state courts, and that national forensic organizations were working to resolve issues at both the federal and state level. Judge Kuhl noted that California courts do not use *Daubert* but that it has nonetheless had a significant effect on state court handling of expert testimony. She suggested that an amendment to Federal Rule of Evidence 702 would be looked to in the state courts. The Reporter agreed, explaining that the Federal Rules are a model for state evidence rules and are even adopted automatically in some states.

The Federal Defender suggested that the issue was a simple and clear cost/benefit analysis. She urged that the benefit of an amendment would be to protect people from going to prison unnecessarily by signaling an important inquiry into forensic testimony, and that the only cost associated with the amendment might be to require prosecutors to do the work of defending their forensic experts in the face of an objection armed with the arguments and information that the Department has presented to the Committee. She suggested that human liberty balanced against additional work for prosecutors was a clear “no-brainer.”

Judge Schroeder, Chair of the Subcommittee on Rule 702, agreed that the problems with forensic testimony are greatest in state courts, but emphasized that state courts aren’t the exclusive source of problematic testimony. He commended the Department for its work on uniform language, but opined that such language ought to apply to a state forensic examiner presented as a witness by a federal prosecutor. Lastly, he noted that the problem of “overstatement” is a multifaceted one that can mean different things. An expert’s conclusion of a “match” might be an overstatement of her conclusion, whereas a statement about her degree of confidence in a conclusion might be a slightly different problem. The overarching concern is to prevent a witness, once qualified as an expert, from having free reign to testify to anything. He inquired as to how the Committee could draft an amendment to Rule 702 to capture the multifaceted issue of overstatement without exceeding the problem and causing unintended consequences.

Ted Hunt responded that forensic experts do not testify to a “match” in court. The modern approach is to admit fallibility as is done in the Department’s uniform language. He opined that dated cases are problematic and that there has been a paradigm shift to more tempered and qualified forensic testimony. He challenged the assumption that a forensic expert’s “identification” is an

overstatement. According to Mr. Hunt, “source identifications” can be done with a high degree of reliability, according to the forensic literature. He further opined that jurors largely *undervalue* forensic evidence due to high profile exonerations and advocacy, and that good lawyering can and does address any issues that exist.

The Chair asked the Reporter about his case digest, inquiring how often courts allow overstatement because courts think they lack authority to regulate it and how often they allow overstatement due to lawyering oversights. The Reporter responded that the federal cases overwhelmingly rely upon precedent to admit forensic testimony in a particular discipline. For example, federal courts admit ballistics opinions because ballistics opinions have always been allowed in prior cases. The Chair suggested that federal courts do not state that they lack authority to regulate a conclusion per Rule 702. The Reporter replied that the issue of regulating an expert’s conclusions is much like the preponderance issue discussed earlier – even if Rule 702 already authorizes it, that authority is embedded and hidden in the Rule and it is overlooked by courts.

The Chair then turned to the many drafting alternatives of an overstatement amendment presented for the Committee’s review and suggested that the draft on page 142 of the Agenda book --- modifying existing subsection (d) slightly to provide that an expert’s opinion should be “limited to” or should “reflect” a reliable application of the principles and methods to the facts of the case-- could resolve any issues without adding a new subsection (e) regulating “overstatement” per se. The Chair asked the Department of Justice what harm could be done by adopting such a minimalist change to subsection (d) (assuming an accompanying Advisory Committee note that would not seek to provide guidelines on forensic testimony). Elizabeth Shapiro responded that the draft change to subsection (d) would rearrange words as a “Trojan horse” to justify an expansive Committee note on forensic evidence, which would be inappropriate. The Chair reiterated that any concerns about the language of the Committee note could be addressed later, and that the question was whether the minor, clarifying changes to subsection (d) in keeping with the proposal on page 142 of the Agenda would cause particular harms or unintended consequences. The Reporter noted that the slight change to subsection (d) would not be simply rearranging words as a “Trojan horse” – instead, the modification would be one of emphasis designed to focus the judge on the expert’s conclusions --- in keeping with the Supreme Court’s decision in *Joiner*.

Elizabeth Shapiro expressed concern that a slight change in emphasis in the text would signal some change to courts, but not exactly what degree of change is intended. The Federal Defender disagreed, arguing that there could be no negative consequence to alerting the trial judge to focus on the expert’s reported conclusions to ensure that they are not exaggerated. She emphasized that overstated expert opinions can be devastating to a criminal defendant and disagreed with the Department’s earlier suggestion that jurors undervalue forensic testimony. Instead, she noted longstanding studies from the Innocence Project and others showing that jurors assume the trial judge approves of things an expert is permitted to testify to.

Judge Kuhl, who originally suggested a change to subsection (d) (instead of the addition of a new subsection (e) on overstatement) explained that she proposed a minimalist change to the requirements already in the Rule to shift the emphasis slightly without creating the unintended consequences that might exist with an entirely new subsection. The Reporter noted that the cases reveal a lack of focus on whether an expert’s particular trial testimony is allowable once the

decision is made that the expert's methodology is reliable, and that the amendment to subsection (d) could help to rectify that problem.

The Chair once again asked the Department of Justice what harm there could be in a focus-clarifying amendment to subsection (d) if it were accompanied by a scaled-down Advisory Committee note. Rich Donaghue suggested that the Department was concerned about any amendment and the signal that would send. Nonetheless, he stated that the Department did not object to the proposal to amend the language of subsection (d) to clarify that courts must regulate the expert's conclusion as well as the methodology. He concluded that the proposed language in (d) could be useful to courts and litigants. He explained that the content of any Advisory Committee note would be of much greater concern to the Department. The Chair then asked the Reporter to prepare a working draft amendment to Rule 702 for the spring meeting that combines the addition of a preponderance standard with an amendment to subsection (d) akin to the draft on page 142 of the Agenda, with a scaled down draft Committee note explaining the emphasis on an expert's testimonial conclusions, with a reference to concerns about conclusions by forensic experts.

Another Committee member asked the Reporter about the effect of prior amendments designed to clarify existing requirements. In particular, he queried whether such modest amendments were effective in combatting prior inaccurate precedent. The Reporter acknowledged that some federal courts getting Rule 702 wrong were relying on pre-*Daubert* precedent that should be superseded. He noted that clarifying amendments are often important in toning up a provision that is operating sub-optimally, and that they have usually worked. He listed as an example the 2003 amendment to Rule 404(a) emphasizing the pre-existing rule that circumstantial evidence of character was inadmissible in civil cases.

Another Committee member opined that a modest amendment to subsection (d) of Rule 702 would not go far enough in correcting the problem with existing federal precedent. She suggested that such a minimalist approach would not get to the heart of the issue -- that trial judges may not know they have the authority to police an expert's expressed conclusions. She opined that trial judges should be able to open the Federal Rules of Evidence on the bench during trial and have the Rules expressly direct them where to focus. She suggested that an amendment adding a new subsection (e) to Rule 702 that tells a trial judge to regulate "overstatement" would be far more effective. The Reporter noted his agreement that a subsection (e) amendment would be more effective. Still he acknowledged that optimal amendments, like recent proposals to amend Rule 404(b) significantly, may not garner enough support to get passed. In the case of Rule 404(b), an amended notice provision was a fallback compromise. The question with respect to Rule 702 is whether there is support for a new subsection (e) and, if not, whether a modified subsection (d) is a helpful fallback alternative.

The Chair then took a non-binding, informal straw poll to see which approach to amending Rule 702 to address the issue of overstatement Committee members would favor. The Chair noted three options: 1) no amendment directed to overstatement; 2) the modest modification to the language of subsection (d); or 3) the more substantial addition of a new subsection (e). One Committee member expressed a desire to hear from the Department of Justice with respect to the addition of a new subsection (e). The Chair stated that the Department clearly prefers no

amendment to Rule 702 to address overstatement, draws a red line at an amendment that would add express “overstatement” regulation in a new subsection (e), and could live with the modest modification to subsection (d) depending on the content of the accompanying Committee note. The Department agreed with the Chair’s characterization of its views.

One Committee member stated definite support for an amendment to subsection (d) and confessed to being “on the fence” about the addition of a subsection (e). That Committee member expressed an inclination to support (e) as well due to the problems in the existing Rule 702 precedent, but expressed concerns about adding a subsection (e) on overstatement to civil cases.

Another Committee member expressed clear support for a new subsection (e), but stated support for a modification to (d) as a compromise, if necessary. Another Committee member agreed with those preferences and priorities. The Federal Defender agreed with the position that a new (e) is critical to address the testimony that comes out of an expert’s mouth on the stand, but noted that modifications to subsection (d) would be better than nothing.

Another Committee member stated a preference for the modification to subsection (d) only, expressing doubt that a new subsection (e) would fix the problems that do exist in the precedent and concerns about drafting in a manner that would avoid unintended consequences. That Committee member noted pending amendments to criminal discovery requirements in Fed. R. Crim Proc. 16 that will give more notice to criminal defendants about expert testimony and will allow them to challenge and exclude undisclosed testimony. Another Committee member stated opposition to the addition of a new subsection (e), arguing that it would represent too dramatic a change and that it was not needed to address what is essentially a lawyering issue in light of evolving forensic standards. This Committee member was also concerned about adding complexity to already extensive *Daubert* proceedings in civil cases, but had no objection to the language proposed to alter existing subsection (d). The Committee member confessed to being somewhere between “doing nothing” and modifying subsection (d) depending on the content of an accompanying Committee note.

The Chair rounded out the straw poll by expressing agreement with those Committee members who opposed a new subsection (e), articulating concerns that it was too substantial a change that could have unintended collateral effects. He suggested that the real problem in the expert testimony arena is not caused by Rule 702 and may not be solved by an amendment to Rule 702. He opined that the new criminal discovery rules would help fix problems with expert testimony, as would the Department of Justice’s efforts to craft uniform testimonial language. In closing, the Chair said he would not vote for (e), could support (d), but could live with doing nothing with respect to overstatement.

Judge Bates commended the Reporter and the Committee for a very thoughtful dialogue and encouraged them to present all sides of the issue and the conflicting opinions of Committee members to the Standing Committee to obtain useful input. Judge Bates also inquired about the effect of a modification to subsection (d) to focus on the expert’s actual “opinion” on expert testimony *not* in the form of opinion. The Reporter explained that Rule 702 allows an expert to testify in the form of an opinion “or otherwise” to allow for expert testimony on background information, such as the operation of a human heart. He explained that Rule 702(d) was always

focused on opinion testimony more than such background testimony. Still, he noted that an amendment to subsection (d) might focus on an expert's "testimony" rather than an expert's "opinion" to clearly accommodate expert testimony not in the form of an opinion.

In closing, the Chair asked the Reporter to prepare two draft alternatives of Rule 702 for the Committee's consideration at its spring meeting:

- 1) A draft including preponderance language in the opening paragraph of Rule 702 and a slightly modified subsection (d). This draft should be accompanied by a "skinny" Advisory Committee note that includes some brief reference to forensic evidence and the PCAST Report in brackets.
- 2) A draft including preponderance language in the opening paragraph of Rule 702 and a new subsection (e) regulating overstatement. This draft should be accompanied by a more comprehensive Advisory Committee note.

The Chair asked whether the incoming Committee members could listen to the discussion of Rule 702 from today's meeting before the Spring meeting. Both the Administrative Office and the Reporter promised to have new Committee members apprised of preceding discussions.

V. Proposed Amendment to Federal Rule of Evidence 106

The Reporter reminded the Committee that a potential amendment to Rule 106, the rule of completeness, had been before the Committee for several years. He noted that the Rule permits a party to insist upon the presentation of a remainder of a written or recorded statement if its opponent has presented a part of that statement in a fashion that has unfairly distorted its true meaning. The Reporter emphasized that the narrowly applied fairness trigger for the Rule was not being changed by any of the amendment proposals before the Committee. Instead, two potential amendments were being considered.

First, the Committee has been exploring an amendment that would permit a completing remainder to be admitted "over a hearsay objection." The Reporter noted that the Committee had wrestled with the purpose for which such a remainder might be admitted over a hearsay objection – either for its truth or for the limited non-hearsay purpose of providing context. The Reporter noted problems with an amendment limiting the use of a completing remainder to non-hearsay context alone, due to the need for confusing limiting instructions, and suggested the possibility of allowing the trial judge to decide on a case-by-case basis the purpose for which the remainder may be used once it is admitted to complete. Second, the Reporter reminded the Committee that it has been exploring an amendment that would extend completion rights in Rule 106 to oral unrecorded statements, which are not currently covered by the text of Rule 106. He explained that many circuits currently admit oral statements when necessary to prevent unfair distortion, but that they do so under a confusing combination of residual common law evidence principles and the broad power of the trial court to control the mode and order of interrogation under Rule 611(a). He further noted that a few circuits appear to reject completion of oral statements altogether, simply because they are omitted from Rule 106's coverage. He explained that it could be helpful to bring oral statements under the Rule 106 umbrella, so that all aspects of completeness are covered in one

place. And it would also be very useful to provide in a Committee note that there is no more common law of completion, once a comprehensive Rule 106 has been adopted. The Reporter noted that the Agenda materials contained several draft proposals for amending Rule 106 and solicited Committee input as to its Rule 106 preferences, explaining that the goal of the discussion was to narrow the drafting alternatives for consideration at the spring meeting.

One Committee member expressed support for an amendment that would allow a completing remainder over a hearsay objection and that would add oral statements akin to the one on page 588 of the Agenda materials. The Committee member opined that the trial judge should decide on a case-by-case basis whether to admit the remainder for its truth or for context only and that an amendment should not limit the use to non-hearsay context. The Chair also expressed support for the amendment proposal on page 588 of the Agenda Book. He reasoned that some evidence rules are *in limine* rules, while some are “on the fly” rules that come up in the heat of trial. He noted that Rule 106 is an “on the fly” rule that often comes up in the heat of trial action, and that trial judges do not have time to research the common law or Rule 611(a). He stated that it is very unusual for a Federal Rule of Evidence not to supersede the common law and that he would favor a Committee note expressly providing that the common law is superseded by the amendment. The Chair expressed support for the inclusion of oral statements, seeing no conceptual distinction between oral and recorded statements and the need for completion. He acknowledged disagreement that a remainder would have to be admitted for its truth to repair distortion but thinks the draft amendment elegantly elides the purpose for which a remainder is admitted by providing only that it is admissible “over a hearsay objection.” Such an amendment would take no position on the use to which a completing remainder could be put.

Justice Bassett agreed that the amendment covering both oral statements and allowing remainders over a hearsay objection would be optimal. He noted that New Hampshire had long allowed oral statements to be completed and had recently amended its evidence rule to reflect that practice. He reported no problems with the amendment of the New Hampshire rule to replace the common law and supported a similar amendment for Federal Rule 106. Judge Kuhl noted that California does not distinguish between recorded and oral statements for purposes of completion, and similarly has experienced no difficulties with oral statements. She also opined that the fairness concerns addressed by Rule 106 overcome any hearsay concerns about the remainder, and that the trial judge should have discretion to admit the remainder with or without a limiting instruction.

The Department of Justice expressed opposition to the draft proposal on page 588 of the Agenda materials, arguing that completion was not as rarely applied as suggested in the appellate opinions. The Department suggested that prosecutors are routinely interrupted at trial with requests to complete, particularly when playing a recording. The Department suggested that trial judges do not apply the Rule 106 standard narrowly and are inclined to allow completion liberally to avoid an appellate issue. The Department expressed a preference for an amendment to Rule 106 that would allow remainders only for their non-hearsay value in providing context and that would continue to omit oral statements. The Department emphasized that the Advisory Committee that originally drafted Rule 106 in 1973 omitted oral statements purposely and that including them now would make Rule 106 more susceptible to abuse by criminal defendants trying to admit unreliable exculpatory statements. The Chair noted that the Department’s criticisms of Rule 106 were of the “fairness” trigger for applying it, and no change to that standard is under consideration. He further

noted that opposition to oral statements is misplaced, because most federal courts *already allow* completion with oral statements -- they just do it under a confusing combination of common law and Rule 611(a). Another Committee member similarly inquired of the Department how adding oral statements to Rule 106 would “open Pandora’s box” if most courts already admit them. The Reporter noted that a few federal courts end their analysis with Rule 106 and do *not* admit oral statements, probably because counsel does not think of Rule 611(a) or common law. So the current state of affairs regarding oral statements creates a conflict in the courts and results in a trap for the unwary.

Another Committee member disagreed with the draft Committee note suggesting that a completing remainder should be admitted for its truth and suggested that an amendment would undermine the hearsay rule if unreliable oral statements could be admitted for their truth. The Chair agreed that a completing remainder need not necessarily be true to complete, but expressed concern about a context-only amendment, because that would require a limiting instruction impossible for jurors to follow. Another Department of Justice representative contended if Rule 106 is amended, criminal defendants would be limited only by their imagination in crafting exculpatory oral statements, and that a recording requirement would at least limit defendants to requesting additional portions of an authenticated recording to be played in court. The Reporter noted that there is no difference between oral statements admitted to complete and all the other oral, unrecorded statements found admissible under the evidence rules. He queried why a government witness is permitted in the first place to testify about an unrecorded oral statement allegedly made by a defendant given the concern expressed about manufactured oral statements. He reiterated that most circuits already permit completion with oral statements, so an amendment confirming that existing practice would not open the floodgates to new evidence. Another Committee member opined that anxiety about adding oral statements to Rule 106 was overblown and larger in anticipation than in reality. That Committee member suggested that oral statements were very rare in criminal cases and that most statements were recorded, and that an amended Rule 106 should cover both recorded and unrecorded statements.

Rich Donaghue expressed concern that including oral statements in the Rule would create a “wild west” approach to completion and that trial judges would be even more inclined to allow completion with unreliable oral statements by defendants after seeing an expansive amendment to Rule 106. The Chair again expressed confusion about the Department’s opposition to adding oral statements given that most circuits already allow completion of unfairly presented oral statements. He queried why the Department would oppose a uniform rule on point. Mr. Donaghue responded that adding oral statements to Rule 106 would suggest an expansive approach to the Rule. The Reporter commented that leaving oral statements out of the Rule would simply take advantage of litigants who don’t know about the common law and Rule 611(a), and would treat litigants differently depending on the quality and experience of counsel. He further reiterated that most courts already allow completion with oral statements and that there is no “wild west” culture in completion practice. The Reporter also addressed expressed concerns about the reliability of a completing remainder allowed in for its truth. He explained that completion is allowed to level the playing field after an unfair partial presentation of a statement, so reliability is a red herring. He observed that party opponent statements of defendants, which are the most common targets of completion, are not admitted because they are reliable --- so why should the completion have to be reliable?

The Chair closed the discussion of Rule 106 by asking for an informal, non-binding straw vote about an amendment to Rule 106 to help narrow alternatives to be discussed at the spring meeting. The Chair noted four alternatives: 1) no amendment to Rule 106; 2) an amendment to allow completion over a hearsay objection only (leaving out oral statements); 3) an amendment to add oral statements only (leaving out the hearsay fix); and (4) an amendment that adds oral statements and allows completion over a hearsay objection.

Five Committee members and the Chair expressed a preference for the fourth option that would add oral statements and allow completion over a hearsay objection. One Committee member expressed a preference for an amendment that would add oral statements and admit completing statements for their non-hearsay context only. The Department of Justice voiced opposition to any amendment.

The Chair asked the Reporter to prepare a draft amendment that would add oral statements and allow completion over a hearsay objection for the spring meeting.

VI. Federal Rule of Evidence 615 and Witness Sequestration

The Reporter reminded the Committee that it had been discussing potential amendments to Rule 615 governing witness sequestration to clarify the scope of a district court's Rule 615 order. He explained that it is very clear that a district court may extend sequestration protections beyond the courtroom, but that the circuits are split on the manner in which a trial judge must extend protection. Some circuits hold that a trial judge's order of sequestration per Rule 615 *automatically* extends beyond the courtroom and prevents sequestered witnesses from obtaining or being provided trial testimony. These courts find that Rule 615 orders must extend outside the courtroom to provide the protection against testimonial tailoring the Rule is designed to provide --- if witnesses can simply step outside the courtroom doors and share their testimony with prospective witnesses, Rule 615 provides little meaningful protection. Other circuits hold that a Rule 615 order operates only to physically exclude testifying witnesses from the courtroom, and that a trial judge must enter a further order if there is an intent to prevent access by excluded witnesses to trial testimony. According to these circuits, a Rule 615 order can do no more than exclude witnesses physically because that is all the plain language of the Rule provides. Further, these circuits highlight problems of notice if a terse Rule 615 order is automatically extended beyond the courtroom doors, leaving witnesses and litigants subject to sanction for extra-tribunal conduct not expressly prohibited by the court's sequestration order. The question for the Committee is how to amend Rule 615 to reconcile this conflict and reach the best result for the trial process.

The Reporter explained that the Committee had previously discussed a purely discretionary approach to protection beyond the courtroom, with an amended Rule 615 continuing to mandate physical exclusion from the courtroom only, but expressly authorizing the trial judge to extend or not extend protection further at the judge's discretion. A draft of such a discretionary amendment was included in the Agenda materials at page 660. The Reporter noted that another amendment alternative requiring extension beyond the courtroom at a party's request had been included in the Agenda materials at page 662, at Liesa Richter's suggestion. The Reporter explained that physical sequestration currently in Rule 615 was made *mandatory* upon request both because sequestration

is crucial to accurate testimony and because the trial judge lacks information about potential tailoring risks upon which to exercise discretion. As noted by the many circuits that already extend sequestration protection beyond the courtroom automatically, the right to sequestration is meaningless without some extra-tribunal protection. Therefore, it can be argued that a party should have a right to demand some protection beyond the courtroom doors upon request (as they do with physical sequestration currently). Under this version of an amended Rule 615, the trial judge would not have discretion to deny completely protections outside the courtroom if a party asked for them. Importantly, such an amendment would leave the details and extent of protections afforded outside the courtroom to the trial judge's discretion based upon the needs of the particular case.

The Reporter noted additional issues raised by sequestration that the Committee should consider in its review of Rule 615. First, he noted the question of whether sequestration prohibitions on conveying testimony to witnesses should be binding on counsel --- a question that has been discussed previously by the Committee. He reminded the Committee that this issue of counsel regulation raised complicated constitutional issues concerning the right to counsel, as well as issues of professional responsibility, beyond the typical ken of evidence rules. For that reason, the Committee had previously discussed potential amendments to Rule 615 that would not seek to control counsel, leaving any such issues that arise to trial judges in individual cases. Finally, the Reporter noted a possible dispute in the courts about the exception to sequestration in Rule 615(b) for representatives of entity parties. The Reporter explained that the purpose of the entity representative exception was to place entity parties on equal footing with individual parties who are permitted to remain in the courtroom. Accordingly, it would seem that an entity party would be entitled to a single representative in the courtroom to create parity with individual parties. Some courts, however, have suggested that trial judges have discretion to permit *more than one* agent or representative of an entity to remain in the courtroom under Rule 615(b) – particularly in criminal cases where the government seeks to have more than one agent remain in the courtroom. The Reporter noted that Judge Weinstein has suggested that trial courts have discretion to allow more than one entity representative under Rule 615(b); but the Reporter questioned what basis exists for exercising such discretion when the exception in (b) is as of right. He suggested that the superior approach would be to allow a single entity representative to remain in the courtroom under Rule 615(b) as of right, and for the trial judge to exercise discretion under Rule 615(c) to allow additional representatives to remain if a party bears the burden of demonstrating that they are “essential to presenting the party’s claim or defense.” The Reporter noted that such a result could easily be accomplished with a minor amendment to Rule 615(b). He emphasized that the Rule 615(b) issue was not important enough to justify an amendment to the Rule in its own right, but that it could be a useful clarification if the Committee were to propose other amendments to the Rule.

One Committee member suggested that counsel do not always invoke Rule 615 and may not want sequestration protection at all or at least none beyond the courtroom. For that reason, the Committee member expressed a preference for the purely discretionary amendment proposal on page 660 of the Agenda book, as it would not require protections beyond the courtroom. He agreed that the issue of regulating counsel was a “can of worms” beyond the scope of evidentiary considerations, so the Committee should not address it. As to the entity representative issue, he noted that entity parties often have only one representative remain in the courtroom under Rule 615(b) at any one time, but sometimes swap out representatives throughout the trial, particularly

in long trials. He suggested that such swapping out of representatives should be sanctioned in an Advisory Committee note should the Committee clarify that Rule 615(b) is limited to a single representative.

The Chair also noted that parties may not want sequestration orders to extend beyond the courtroom and that the Rule should not require something the parties do not want. The Reporter noted that sequestration protection is essentially pointless without some extended protection and that a mandatory amendment would extend protection beyond the courtroom only “at a party’s request.” Still, the Chair expressed a preference for a discretionary amendment such as the one on page 660 of the Agenda book, that would permit “additional orders” adding extra-tribunal protection but would not require a court to issue such protections upon request. To clarify the scope of a succinct order that simply invokes “Rule 615”, the Chair suggested adding language to subsection (a) of the draft discretionary amendment on page 660 of the Agenda materials stating that an order affirmatively *does not* extend any protection beyond the courtroom unless it expressly states otherwise. He noted that this would be important to avoid punishing parties for extra-tribunal sequestration violations without adequate notice.

The Department of Justice expressed support for a discretionary approach to Rule 615, but questioned the proposal to limit entity representatives to just one under Rule 615(b). The Department queried why it should not be permitted to have two case agents sit in the courtroom notwithstanding sequestration. The Reporter again noted the purpose of Rule 615(b) was to put entity parties on par with individuals --- not to give entities an advantage. Therefore, the government should get a single representative under Rule 615(b) as of right without showing any justification, and could qualify additional agents under Rule 615(c) if they can show them to be “essential.” The Department asked whether there would be a limit on the number of agents it could qualify as “essential” under Rule 615(c), expressing concern that an amendment could be read to limit the judge’s discretion with respect to subsection (c). The Reporter replied in the negative, affirming that subsection (c) would permit as many persons to remain in the courtroom as were shown to be “essential.” He suggested that an Advisory Committee note could clarify that point should the Committee advance an amendment limiting the number of representatives permitted under subsection (b), as well as acknowledging the propriety of swapping out representatives under subsection (b).

The Chair noted that the Rules are amended very infrequently and that there are limited opportunities to clarify issues. He asked that the Reporter retain a proposed amendment to Rule 615(b) in the draft for the spring meeting to afford the Committee more time to consider it.

The Federal Public Defender noted the expanding opportunities for witness-tailoring outside the courtroom in light of technological advances and the covid-19 pandemic. She noted that trials are being conducted on Zoom or streamed from one courtroom into another to allow for social distancing. Because such measures increase concerns about witness access to testimony, she suggested that an amended rule should be proactive about regulating access to trial testimony by witnesses who have been sequestered. Another Committee member suggested that a draft allowing, but not requiring, protections beyond the courtroom would suffice and noted the counsel issue potentially raised by protections beyond the courtroom. That Committee member also thought a clarification to Rule 615(b) would be helpful.

The Chair closed the discussion of Rule 615 by requesting that the Reporter prepare the discretionary draft of an amendment to the Rule akin to the one on page 660 of the Agenda materials, with an express addition to subsection (a) providing that a Rule 615 order does not extend beyond the courtroom doors unless it says so expressly. He also asked the Reporter to include a clarification of Rule 615(b) allowing only one entity representative at a time, with a Committee note explaining that swapping of representatives under (b) is permissible and that subsection (c) allowing exceptions for “essential” persons is not changed by the amendment and is not numerically limited.

VII. CARES Act and an Emergency Evidence Rule

Pursuant to the CARES Act, all of the federal rulemaking committees have been considering the need for the addition of an “emergency rule” that would allow the suspension of federal rules to account for emergency situations such as the covid-19 pandemic. The Judicial Conference asked the Reporter and the former Chair, Judge Livingston, to evaluate the need for an emergency rule of evidence to suspend the regular rules in times of crisis. After careful consideration, the Reporter and Judge Livingston agreed that there is no need for an emergency rule of evidence because the existing Evidence Rules are sufficiently flexible to accommodate emergency circumstances.

First, the Reporter documented his exhaustive examination of the Rules of Evidence to ascertain whether any of them demand that “testimony” occur in court (as opposed to virtually as has been done during the pandemic). He reported that none of the Rules require that testimony be given in a courtroom. He further explained that Rule 611(a) gives trial judges broad discretion to control the “mode of examination” and that many federal judges have utilized that authority during the pandemic to authorize virtual testimony. He acknowledged that remote testimony raised important issues of confrontation in the criminal context, but observed that it is the Sixth Amendment – and not the Evidence Rules – that control confrontation. Accordingly, an emergency evidence rule would not resolve confrontation concerns. In sum, the Reporter and Judge Livingston concluded that there was no need for an emergency evidence rule. The Reporter solicited thoughts and comments from Committee members as to the need for an emergency evidence rule. Committee members thanked the Reporter for his exhaustive work on the topic and concurred with the conclusion that there is no need for an emergency rule of evidence.

VIII. Future Agenda Items

The Reporter reminded Committee members that he had included a memorandum on a number of existing circuit splits with respect to the application of the Federal Rules of Evidence in the Agenda materials. He explained that his goal was to acquaint the Committee with potential problems that may lend themselves to rulemaking solutions and to solicit the Committee’s feedback as to whether it would like to see any of the identified splits prepared for consideration at a future meeting. The Chair suggested that Committee members could email the Reporter or the Chair if they wished to discuss any of the circuit splits further. One Committee member commended the Reporter for his thorough work in identifying so many circuit splits.

The Chair then explained that there were a number of evidentiary issues he had asked the Reporter to place on the Agenda for the Committee's consideration, noting that two of them had been considered by the Committee within the last 5-7 years.

First, the Chair suggested that it is not clear why a witness's prior statement should be considered hearsay when the witness testifies at trial subject to cross-examination. He noted that some states do not include a testifying witness's prior statements in their definitions of hearsay. The Chair explained that he would like the Committee to consider whether to amend FRE 801 to permit witness statements to be admissible for their truth when the witness testifies at trial subject to cross-examination. He suggested that there was no justification for the existing rule and that a change would save much needless inquiry and analysis. The Chair acknowledged the Committee's past consideration of the issue, and that such a project could wind up allowing only prior *inconsistent* witness statements to be admissible for truth, but expressed his desire for the Committee to consider the issue anew.

The Chair next discussed the potential for a rule of evidence governing the admissibility of illustrative and demonstrative evidence. He noted that such evidence is presented in virtually every case tried in federal court and yet there is no rule of evidence that even mentions the subject. Courts and litigants must look to the common law with cases all over the map in their regulation of demonstrative evidence and illustrative aids. The Chair noted that the cases do not agree about: 1) the nomenclature used to describe such evidence; 2) when it may be used; 3) whether it may go to the jury room during deliberations; or 4) how to create a record of it for appeal. The Chair noted that he had asked the Reporter to prepare materials on the topic for the Committee's consideration.

The Chair next noted an issue regarding the use of English language transcripts of foreign language recordings in federal court. Here again, he noted that the Rules are silent, and that case law appears divided. The Chair noted a recent drug prosecution in which there were relevant Spanish language recordings. Both the government and the defense agreed that English transcripts of the recordings were accurate, and the government admitted only the transcripts without admitting the underlying Spanish language recordings (presumably because the jury could not have understood them in any event). The Chair explained that the Tenth Circuit – over a dissent – had reversed the conviction, finding that the Best Evidence rule required the admission of the Spanish recordings. He noted that both the majority and dissent had cited conflicting cases in support of their respective positions and suggested that a clear rule regarding English transcripts of foreign language recordings could be helpful.

The Chair also noted that trial judges utilize their broad discretion in Rule 611(a) to support many different interventions. For example, a trial judge might order all parties to ask their questions of an out-of-town witness on a single day. As the Reporter noted earlier, trial judges have used Rule 611(a) during the pandemic to justify remote trials. The Chair explained that he had asked the Reporter to examine the federal cases to see what types of specific actions trial judges are using Rule 611(a) to support, with the idea being to consider an amendment to Rule 611(a) to list more specific measures that cover what trial judges actually do with the Rule.

The Chair finally suggested that the Committee might consider resolving a circuit split on the use of a decedent's statements against her estate at trial. He noted that some courts allowed such

use, essentially equating the decedent and her estate for hearsay purposes. Other courts have declined to allow such statements against an estate, however, essentially giving the estate a better litigating position than the decedent would have had at trial. The Chair noted that there was a useful law review note on the topic in the *N.Y.U. Law Review* and suggested that this issue might be a useful component of a package amendments should others be considered.

The Chair closed by emphasizing that Committee members should feel no pressure to agree on any of these matters but expressed his view that they are worthy of discussion and consideration.

IX. Closing Matters

The Chair thanked everyone for their contributions and noted that the spring meeting of the Committee will be held on April 30, 2021 – hopefully in person at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., depending upon the public health situation, with a Committee dinner to be held the night before. The meeting was adjourned.

Respectfully Submitted,

Liesa L. Richter, Academic Consultant

TAB 1B

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on January 5, 2021. The following members participated in the meeting:

Judge John D. Bates, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.

Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia A. Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); Dr. Emery G. Lee and Dr. Tim Reagan, Senior Research Associates at the FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue. Andrew Goldsmith and Jonathan Wroblewski were also present on behalf of the DOJ.

OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He began by reviewing the technical procedures by which this virtual meeting would operate. He next acknowledged recent changes in the leadership of the Rules Committees. Judge Bates introduced himself, acknowledging that this was his first Standing Committee meeting as Chair, and thanked Judge David Campbell for his wonderful leadership and insight. Judge Bates next recognized new Advisory Committee Chairs: Judge Robert Dow is the new Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee is the new Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz is the new Chair of the Advisory Committee on Evidence Rules. Judge Bates noted next that Rebecca Womeldorf, Secretary to the Standing Committee, would be leaving the Rules Committee Staff to work as the Reporter of Decisions to the Supreme Court. Judge Bates thanked Ms. Womeldorf for her friendship and years of work with the Rules Committees.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the June 23, 2020 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2020. Also included are the rules approved by the Judicial Conference in September 2020 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2021, provided the Supreme Court approves them and Congress takes no action to the contrary. Other rules included in the chart are currently out for public comment. Julie Wilson of the Rules Committee Staff explained that a hearing on the proposed Supplemental Rules for Social Security Review Actions currently out for comment is scheduled for January 22, 2021.

JOINT COMMITTEE BUSINESS

Emergency Rules Project Pursuant to the CARES Act

Judge Bates introduced this agenda item, included in the agenda book beginning at page 91, which has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He began by highlighting the fact that Chief Justice Roberts had recognized the role of the Rules Committees in his end of the year address on the state of the federal courts. The Chief Justice complimented their efforts thus far, particularly those members who had worked on the videoconferencing provisions included in the CARES Act. Judge Bates also thanked everyone who has worked on this project for their superb efforts. He noted the particular efforts of Professor Capra in coordinating the project across committees and of both him and Professor Struve in preparing the presentation of the advisory committees' suggestions for today's meeting.

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the

Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In the intervening months, each advisory committee – except for the Evidence Rules Committee – developed draft rules for discussion at this Standing Committee meeting. The goal at this meeting was to present the draft rules and to seek initial feedback from the Standing Committee. Comments on details are welcomed, but the focus would primarily be on broader issues. Overarching questions for the members to keep in mind included what degree of uniformity across rules would be desirable and who should have authority to declare an emergency or enact emergency rules. At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

Professor Struve began the presentation of the emergency rules proposals. She echoed Judge Bates’s thanks to all those who have brought the project to this stage, especially the advisory committee chairs, reporters, relevant subcommittee members, and Professor Capra. She explained the structure by which the day’s discussion would proceed. The discussion would be segmented by topic. Professors Struve and Capra would introduce each topic and then advisory committees’ reporters would be invited to summarize their committees’ views on that topic. The topic would then be opened for general discussion among the Standing Committee members.

Professor Capra thanked the advisory committee members and reporters and described the history of the project. He explained that the Evidence Rules Committee would not be presenting a proposal. Its members determined early in the process that there was no need for an emergency rule because the Evidence Rules are already sufficiently flexible to accommodate emergencies.

“Who Decides” Issue. This first topic concerns what actor or actors decide whether an emergency is declared. The advisory committees’ subcommittees decided early in the process that a rules emergency should not be tied to a declaration of a presidential emergency. Although the CARES Act relies on a presidential declaration of emergency, and instructed the Rules Committees to consider emergency rules in that context, the advisory committees all agreed that the judiciary would benefit from being able to respond to a broader set of emergencies, and that limiting the emergency rules to only a presidentially declared emergency would not make sense. The advisory committees agreed that the Judicial Conference should have the authority to declare a rules emergency, but they were not in agreement on whether other actors should share this authority. The draft amendment to Appellate Rule 2 grants such authority to “the court” as well, and provides that the chief circuit judge can exercise the same authority unless the court orders otherwise. Draft Bankruptcy Rule 9038 grants the authority first to the Judicial Conference either for all federal courts or for one or more courts, second to the chief circuit judge for one or more courts within the circuit, and third to the chief bankruptcy judge for one or more locations in the district.

Professor Gibson and Judge Dennis Dow summarized the position of the Bankruptcy Rules Committee. Professor Gibson explained that the Advisory Committee thought there could be emergencies of different scope – some might be on a national scale like the COVID-19 pandemic, others might be confined to a circuit, a state, or to one district or part of a district within a state. The Advisory Committee thought it was more efficient for local actors to be able to declare an emergency and to act more quickly to respond to a localized emergency. She noted that the Advisory Committee was not concerned that overeager judges would be too quick to declare an emergency, and pointed out that paragraph (b)(4) of draft Bankruptcy Rule 9038 would allow the Judicial Conference to review and revise any declaration. A majority of the Advisory Committee favored giving actors at all three levels the authority to declare an emergency. Judge Dow explained that his committee thought that in the case of a localized emergency, decisionmaking should be at the local level, where the effects of the situation would be felt. He thought this was similar to the proposal put forward by the Appellate Rules Committee. He emphasized the stakes of the issue – draft Rule 9038 only deals with procedural issues, not substantive rights. Finally, he noted that the bankruptcy draft rule balances the need for rapid response with the opportunity for modification after the fact by the Judicial Conference. Professor Capra added that because the draft rule allows a number of actors to declare an emergency, it had to be drafted differently from the other advisory committees' proposals, which introduced some additional lack of conformity.

Judge Bybee and Professor Hartnett explained the Appellate Rules Committee's proposal. Judge Bybee began by noting that Appellate Rule 2 already allows a court of appeals to "suspend any provision of" the appellate rules "in a particular case." The proposed appellate emergency rule would amend Appellate Rule 2 to allow the courts of appeals to make these kinds of changes across all cases. The Appellate Rules Committee thought it was important to allow the chief judge of a circuit or a court to make these changes. Most of the appellate rules, like the bankruptcy rules, are procedural, limiting any impact on substantive rights when the rules are suspended. Jurisdiction, for example, would never be affected. Further, Judge Bybee explained the Advisory Committee's view that courts of appeals are accustomed to having to deal collegially. This would provide a check on the judgment of a chief judge. He added that the Advisory Committee preserved the backup option of allowing the Judicial Conference authority to exercise the same rule-suspending powers. Professor Hartnett noted the long history of flexibility in the appellate rules. Rule 2 has existed since the Appellate Rules were first promulgated and the circuit courts' authority to suspend their rules predates the Appellate Rules. The nature of a court of appeals is that it speaks with one voice and its procedures are designed to that end. Finally, Professor Hartnett addressed the dignity of the courts of appeals, explaining that there is no right of appeal from these courts. They are courts of last resort and courts with that authority ought to be able to suspend the rules.

Judge Kethledge and Professors Beale and King spoke on behalf of the Criminal Rules Committee. That committee determined that the Judicial Conference was the ideal body to make emergency declarations because it has input from around the country and authority to act. The Criminal Rules Committee has long been the recipient of suggestions that the Criminal Rules be amended to allow for greater use of remote proceedings. The Criminal Rules Committee has historically resisted allowing virtual proceedings. Professor Beale noted the critical differences between the kinds of emergency rules being considered by each advisory committee. The need for gatekeeping is much greater when it comes to criminal proceedings because constitutional issues are implicated most directly by changes to the Criminal Rules. This makes it more important to

exercise restraint when suspending any rules. The Judicial Conference is better positioned to act in this manner. The Criminal Rules Committee believed there was no reason to think the Judicial Conference would suffer from a lack of information or that the Judicial Conference and its Executive Committee could not act with appropriate speed. Given the nature of the emergency rules and the values they protect, the Advisory Committee believed it was preferable to have a single gatekeeper deciding when to declare an emergency. Professor King added that the Advisory Committee had considered the concerns – expressed by other committees – that an emergency might be localized, but that their proposal accounted for this possibility. It requires the Judicial Conference to consider moving proceedings to another district or another courthouse before emergency rules can be enacted. Because there is always an obligation to move proceedings and to remain under the normal rules, there is less reason to think that a local decisionmaker is needed or that the Judicial Conference is not well situated to make the necessary decisions.

Judge Robert Dow and Professors Cooper and Marcus spoke on behalf of the Civil Rules Committee. Professor Cooper explained that their committee arrived at the same conclusion as the Criminal Rules Committee. The Civil Rules already allow broad discretion to the trial courts and they seem to be functioning well during the pandemic. Professor Marcus added that confusion could result if two courts or districts located near one another were both affected by the same emergency but chose to respond in different ways. The Judicial Conference would be able to coordinate efforts across districts and could better achieve consistency.

The discussion was then opened to the members of the Standing Committee. Judge Bates spoke first. Moving away from the particular proposals, he reminded the members of the overall goal of uniformity. To the extent that decisionmaking is dispersed, there would be a potential for undermining this uniformity in a way that is undesirable even in an emergency context. The CARES Act had envisioned emergency rules relating to a presidential emergency and some committees were now looking at very localized actors like a small district. The scale of the departure from what Congress originally suggested was worth keeping in mind. Judge Bates's understanding was that the Judicial Conference, and particularly its Executive Committee, was able to act quickly when necessary. He also suggested that he saw little reason to think that the speed of the emergency declaration would matter more for any one set of rules than for another. Speed is equally important for each type of rules and court proceedings. In response to the Appellate Rules Committee's suggestion that the courts of appeals can and should "speak with one voice," Judge Bates thought this could be an argument for keeping the authority at that level rather than at the district level, but did not think it was an argument against giving the authority to the Judicial Conference.

An attorney member spoke in favor of uniformity with respect to 'who decides.' This member thought that in creating emergency rules for the first time, it was preferable to be cautious and incremental and to create a single gatekeeper rather than a complex multitiered system. This member also thought that the challenges created during the current emergency were greatest in the criminal context and thought that there was something to be said for choosing the gatekeeper that makes the most sense for that set of rules.

Another attorney member agreed that uniformity in 'who decides' makes sense. If the reasons for decentralization are increased nimbleness and ability to accommodate geographical

differences, and the reasons for centralization are the substantive issues raised by the Criminal Rules Committee, then substantive issues should win out. This is particularly so if the Judicial Conference can act with sufficient nimbleness and precision.

One judge member noted that, by definition, an emergency creates an atmosphere of unease. Having the authority to declare an emergency reside in one place – with the Judicial Conference – suggests authority and promotes trust. It makes sense to focus on a single identifiable body that is designed to be sensitive to lots of issues. A member agreed that substantive protections are most important. This member thought that the authority to declare an emergency should be tailored to the kind of nationwide issue – like the pandemic – that Congress had in mind when it suggested emergency rules. Local issues, like floods, hurricanes, or power outages, have been dealt with in the past without an emergency rule and have not prompted Congressional action.

Another judge member also spoke in favor of uniformity and argued that the benefits of uniformity outweigh those of localization.

Another judge member noted that the consideration of emergency rules happens infrequently and that we should consider the types of emergencies that are possible. This member suggested that a situation where the country's communications infrastructure is damaged might make it infeasible to communicate nationally and might make local control desirable.

One judge member expressed that she was impressed with the drafts and had originally been comfortable with different decisionmakers for different sets of rules, but was now thinking that uniformity was more desirable in light of the scope of the proposed changes. As an alternative means of balancing the values at stake, this member suggested that perhaps the Judicial Conference could be the default decisionmaker but that others could be permitted to determine that the Judicial Conference is unreachable and – in those situations – to act on their own.

Professor Coquillette echoed Judge Bates's view that the Executive Committee of the Judicial Conference can act very quickly and has done so in the past.

A judge member asked about the extent to which the bankruptcy rules are already sufficiently flexible to allow judges to toll and extend deadlines in particular cases. Professor Gibson responded that there is already a rule that allows flexibility with regard to some deadlines (Bankruptcy Rule 9006(b)), but that, because there are limits on the authority granted and some deadlines are exempt, the subcommittee thought an emergency rule would be helpful. This same committee member then explained his view that although the Bankruptcy Rules Committee's reasons for allowing emergency declarations at the bankruptcy court level made sense, the other committees' arguments to the contrary were also compelling. This member also suggested that there was an appearance benefit favoring an Article III over an Article I decisionmaker that might tilt the balance in favor of giving the Judicial Conference sole authority.

Another judge member supported having a different decisionmaker for the appellate rules, but found today's arguments in favor of uniformity compelling. This member thought that the courts of appeals were very different from trial courts – there are fewer substantive rights at stake and they are sufficiently nimble. Circuit-wide orders have been used in the past in order to

immediately protect rights when, for example, major weather events necessitate the extension of filing deadlines.

An attorney member thought that perceptions of what constitutes an emergency may vary throughout the country and was initially inclined to favor some devolution of power to regional courts. However, he was persuaded by the flexibility of the existing rules and the need for uniformity and now favored keeping the decisionmaking power in the Judicial Conference, and thought it was important that a uniform federal authority be identifiable in emergencies.

Definition of a Rules Emergency. Professor Capra introduced questions concerning what ought to qualify as a “rules emergency.” There was at least some uniformity across advisory committees on this issue. The advisory committees agreed there must be “extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court” which “substantially impair[s] the court’s ability to perform its functions in compliance with the[] rules.” One early issue was whether there should be a requirement that the parties, as well as the courts, are unable to operate under the normal rules. This possibility was rejected because the courts, and particularly the Judicial Conference, would be unlikely to have information about the parties’ access. Further, a problem for the parties is necessarily a problem for the courts so – to the extent the information is available – it makes no difference. The remaining point of inconsistency across committees is that the Criminal Rules Committee, and no other committee, included a requirement (in draft Criminal Rule 62(a)(2)) that before the Judicial Conference declares a Criminal Rules emergency it must determine that “no feasible alternative measures would eliminate the impairment within a reasonable time.”

Judge Kethledge explained this additional requirement. First, he explained that the “extraordinary circumstances” finding under paragraph (a)(1) of the proposed criminal rule – the finding the other committees also require – is a substantive impairment requirement. The additional requirement in paragraph (a)(2) is an exhaustion requirement. These are not redundant. Judge Kethledge emphasized that the committees have thought about different kinds of proceedings and have focused on different things. Procedurally, the Criminal Rules are the only rules the CARES Act directly amended. The Criminal Rules Committee gave intensive consideration to how the rules ought to be abrogated in light of this kind of emergency. They thought it was important that the rules not be abrogated unless doing so proves absolutely necessary. The Criminal Rules protect core substantive interests with a long history in the law. Given how carefully these rules have been crafted in the first place, all feasible alternatives should be explored before any rules are suspended. There might be ways of adapting that cannot be foreseen right now but which the Judicial Conference might be able to learn about in the moment from local actors on the ground. Judge Kethledge thought any remaining disuniformity was worth allowing. Professor Beale added that uniformity on this point was not essential – the Criminal Rules Committee was not asking the other advisory committees to adopt the additional exhaustion requirement. She suggested that it might be fine for a Bankruptcy Rules emergency to be declared at the local level while extra protections are afforded the substantive rights at issue in the criminal context. Professor King agreed that the Criminal Rules Committee feels very strongly about including the exhaustion requirement.

Professor Cooper spoke on behalf of the Civil Rules Committee. That committee was comfortable with the “no feasible alternative” requirement being included in a criminal emergency rule but not in the civil rule. It did not think it was necessary for the Civil Rules and, in light of the different rights being protected in the criminal context, was not concerned with the disuniformity. Professor Marcus agreed that Civil and Criminal Rules are very different so having a difference on this point made sense.

Professor Gibson said the Bankruptcy Rules Committee felt similarly to the Civil Rules Committee and had decided against including the “no feasible alternative” language. They were not concerned with the disuniformity.

Judge Bybee observed that the only “friction points” for the courts of appeals in an emergency were the filing of briefs and the holding of oral arguments. Neither of these implicated the kinds of values at stake in the Criminal Rules, and the Appellate Rules Committee was therefore also not concerned by the possibility of allowing the additional requirement in the proposed criminal rule to remain in place.

Judge Bates thought the Criminal Rules Committee made a strong argument but he had two points to add. First, he wanted to be sure that the exhaustion requirement was not redundant. He asked whether it might be said that before it could find a “substantial impairment” the Judicial Conference would necessarily have to have considered alternatives? Second, if the Judicial Conference were put in the position of declaring a rules emergency across all the rules sets, was there anything to be said for having the same standard for all the rules? If the rule were to state that declaring a Criminal Rules emergency required consideration of feasible alternatives, might this imply that there was no obligation to consider alternatives outside of the criminal context? What would be the implications of leaving the requirement out for the other sets of rules?

A judge member reminded the Committee of the existing authority of the courts of appeal under Appellate Rule 2 to suspend the Appellate Rules in particular cases and asked whether the proposed amendment to Appellate Rule 2 could be seen as constraining this existing authority to a narrower set of circumstances. This member noted that courts of appeal have been able to respond to emergencies in the past and would not want to see their existing power limited.

An attorney member suggested adding “or set of cases” to Appellate Rule 2(a) in order to avoid constraining the current authority of the courts of appeals. This would make it clear that the courts of appeal could issue suspensions of rules across cases without declaring an emergency. Professor Hartnett thought the Appellate Rules Committee would be receptive to such a change because they did not want the existing authority of the courts of appeals to be constrained. Professor Capra asked whether the issuance of orders under such an authority might start to look like local rulemaking. Professor Hartnett responded that the language “a set of cases” would imply that orders suspending rules cannot be applied to all cases. Professor Struve asked for clarification on the suggestion that subdivision (a) be modified in a way that would apply even outside of emergency situations.

A judge member thought the higher standard for declaring a Criminal Rules emergency was appropriate. Although the inclusion of the higher standard in only one of four emergency rules

would imply that alternatives did not need to be considered in other contexts, this member did not think the drawbacks of this implication outweighed the benefits of the heightened standard for a Criminal Rules emergency.

Another judge member asked whether this language was added in response to any particular situation that had come to the Criminal Rules Committee's attention. Professor King explained that the Criminal Rules' Emergency Rules Subcommittee had held a miniconference and consulted with a broad group of actors. The input received through these avenues influenced the Criminal Rules Committee's thinking. One circumstance that distinguished its approach was the possibility of a hurricane or other major catastrophe rendering all the courthouses in a district not useable. Other advisory committees would consider this a substantial impairment but history had shown – in Puerto Rico and Louisiana – that criminal proceedings could be moved to a different courthouse in another area. Judge Kethledge added that the Emergency Rules Subcommittee had canvassed chief judges around the country. In response to Judge Bates's questions, Judge Kethledge thought that the required determinations were not redundant because paragraph (a)(1) of draft Criminal Rule 62 only looked for an impairment and did not imply any evaluation of alternatives. In a situation like the aftermath of Hurricane Katrina, court proceedings were moved pursuant to 28 U.S.C. § 141. If an option like this is available, courts would be obligated to use it to hold criminal proceedings under the existing rules while an emergency might be declared under the Appellate, Bankruptcy, and Civil rules.

An attorney member said that he had been somewhat confused by the language because it seemed that the “substantial impairment” finding would take into account the possibility of moving court functions. However, this member now thought that a court moving its functions would be “substantially impaired” because relocated proceedings do not constitute normal court operations. The member suggested that it might be worth adding an adverb to modify “eliminate” in paragraph (a)(2) – possibly “sufficiently.” This would indicate that the alternative must be sufficiently effective to mitigate the disruption of court operations.

Ms. Shapiro expressed the DOJ's support for Judge Kethledge's reasoning and for including the additional requirement for the Criminal Rules.

Judge Bates suggested that while the Criminal Rules Committee's reasoning was compelling, it might be worth reevaluating the value of uniformity. He also wanted to be sure that, just as the Criminal Rules Committee had considered dropping the requirement, the other advisory committees had considered adopting it.

Open-ended Appellate Rule Structure. Professor Capra explained that the proposed appellate emergency rule sets almost no limit on the range of Appellate Rules that are subject to suspension in a rules emergency. Nor does it state what the substitute rule (if any) must be when a rule is suspended. The appellate emergency rule proposal does not specify what provisions need to be included in an emergency rules declaration. It imposes no particular time limits on a rules emergency declaration. These and other limitations are found in the other three emergency rules.

Judge Bybee reiterated that the two “friction points” for the courts of appeal operating under emergency situations are filing deadlines and oral argument scheduling. Given the flexibility

already available under the current Appellate Rules, the Appellate Rules Committee did not think it made sense to have a more detailed rule for adjusting the timing of these events during emergencies. The Advisory Committee would prefer having no emergency rule to adding more constraints to their proposal because without an emergency rule the courts of appeal can just rely on the flexibility they already have.

Professor Hartnett added that the current Appellate Rule 2 can be thought of as the Appellate Rules' equivalent to Civil Rule 1, which states that the Civil Rules should be interpreted to preserve justice and efficiency. Professor Hartnett understood that the proposed amendment to Appellate Rule 2 was particularly open-ended and did not identify alternative rules but noted that rule-suspension provisions during the pandemic have often not provided alternatives. For example, an order waiving a paper-filing requirement does not have to include all the details of online filing. Professor Hartnett also suggested that subdivision (a) – the current Appellate Rule 2 – would carry over into an appellate rules emergency and would then authorize courts to create whatever alternatives they might need to operate. In addition, the Appellate Rules Committee did not set timing deadlines for emergency declarations, opting instead for the open-ended instruction that the emergency-declarer “must end the suspension” of rules “when the rules emergency no longer exists.” Finally, he noted that he was not aware of anyone having suggested that Rule 2 had been abused historically.

Judge Bates suggested that the courts of appeals' normal modification of deadlines and oral argument timing was not quite comparable to the suspension of rules during an emergency. The ability to alter deadlines and scheduling is not unique to the courts of appeal. The distinguishing feature of the courts of appeals might be that there is not much at stake when deadlines and schedules are changed. He said it did not seem to him that this was what the committees were concerned with here. Judge Bates also asked whether there is a downside to not setting out replacement rules. If nothing is set out, it will be left to someone – the chief circuit judge, a panel, the circuit as a whole – to describe specifics.

Judge Bates then pointed out that subdivision (a) says the court “may suspend and order proceedings as it directs” while subdivision (b), the emergency rule, only says the court “may suspend” and does not mention ordering proceedings. He asked whether paragraph (b) needs something about the authority to order proceedings, or whether the omission was intentional. Professor Hartnett explained that the Appellate Rules Committee had assumed that the authority in paragraph (a) was implicit in (b), but he agreed that it should probably be made explicit.

A judge member made a similar drafting note. In paragraph (b)(2) the suspension of rules within a circuit is allowed, but sometimes the rule only needs to be suspended in part of a circuit. The member suggested that perhaps the rule should refer to “all or part of that circuit.”

Another judge member did not think it was a problem for the courts of appeals to have a different structure to their emergency rules, but this member thought that a sunset provision – maybe ninety days – would be an appropriate and important safeguard. Professor Capra added that if the Judicial Conference was, ultimately, the only authority declaring emergencies across all the rule sets, it would be particularly odd for there to be a time limit on the other three types of rules emergencies but not on an appellate rules emergency.

An attorney member had a question about language in paragraph (b)(2) that identifies “time limits imposed by statute and described in Rule 26(b)(1)-(2)” as those that cannot be set aside in an emergency and whether this referred to time limits both “imposed by statute” *and* “described in Rule 26” and about the extent to which these categories overlapped. Professors Hartnett and Struve indicated that they were not aware of any time limits in the Appellate Rules imposed by statute but not covered in Rule 26(b), but recommended keeping the references to both because some requirements covered in Rule 26(b) are not set by statute.

Judge Bybee thought it made sense to add “and order proceedings” to subdivision (b) for consistency with subdivision (a), and he did not have any objection to a ninety-day time limit for an emergency declaration. He agreed with Professor Capra’s point that this would be a particularly good idea if the Judicial Conference were in the position of declaring rules emergencies across rules sets. He also agreed with the proposal to add “or set of cases” and expressed his view that the Appellate Rules Committee would likely be amenable to these suggestions.

Some relatively brief comments rounded out this discussion. One judge member noted that if a ninety-day sunset provision is introduced there should be an option to extend the emergency past the ninety days. Another judge member thought it would be helpful for paragraph (b)(2) to reference both deadlines imposed by statute and Rule 26(b) because it was helpful to the reader to include both, noting that, in this judge’s court, there exists a practice of including sunset provisions when issuing emergency-type orders. Another judge member suggested that paragraph (b)(3) be amended to limit the Judicial Conference’s review authority to review of decisions under subdivision (b) as opposed to all of Rule 2, which would include subdivision (a). Judge Bybee pointed out that the draft committee note addressed some issues that had been raised and that he expected the Advisory Committee would be open to including additional clarifications.

Authority. Professor Struve introduced an issue raised in the Appellate Rules Committee meeting, regarding whether rules allowing the Judicial Conference or other actors to declare an emergency might run afoul of the Rules Enabling Act. She framed the issue in this way: a judge presiding over individual cases is generally understood to have authority over her own docket. In the draft emergency rules, the advisory committees give authority to the Judicial Conference. That authority would not be limited to cases on its members’ own dockets. Nor does 28 U.S.C. § 331 – which establishes and lays out the powers of the Judicial Conference – give the Judicial Conference the authority to declare emergencies or suspend rules of procedure. Would there be a problem if rules of procedure enacted through the Rules Enabling Act process gave the Judicial Conference such authority?

Professor Struve reported that the general consensus after discussion among the reporters was that there was not an issue under the Rules Enabling Act. One way of thinking about it was that there are a variety of decisionmakers that exist outside of the courts that make determinations that are incorporated by reference to the ways the courts function. For example, a state can declare a legal holiday and have that decision incorporated into a time-counting provision, giving that holiday declaration a legal effect in the rules. In the draft criminal, civil, and bankruptcy rules, the Judicial Conference would choose from a menu of options and could choose to implement some or all of them. There is less structure to the proposed appellate emergency provisions but as

discussed, they already have more flexibility to suspend their rules, and the stakes are somewhat lower.

Professor Capra thought the issue was simple. He pointed out that making a declaration that an existing rule comes into effect is different from making a rule. The rule is preexisting, and triggering it is not rulemaking. Professor Hartnett looked at the question differently. He thought the concern was not that the federal rules cannot incorporate other law by reference, but rather the source of the authority for another body to act in the first place: Where does the Judicial Conference get the authority to declare the emergency? The other way to think about it is that perhaps the rule promulgated under the Rules Enabling Act can itself be the source of the Judicial Conference's authority, but this requires thinking through the implications. Can a rule promulgated under the Rules Enabling Act create authority for a body that did not have such authority already?

Professor Coquillette did not think this presented a practical problem. He added that Congress instructed the Rules Committees to make rules that solve this problem, and he did not think it was likely that anyone would challenge it.

A judge member asked whether paragraph (b)(3) of the draft amendment should refer to a "declaration" under paragraph (b)(1) rather than a "determination," because the word "determination" would seem to suggest that the Judicial Conference can review and revise the rules modifications put in place as well as the emergency declaration. It did not seem to this member that the Judicial Conference should necessarily be reviewing the modifications.

Professor Marcus thought it was very peculiar to suggest that there was an authority problem when Congress had instructed the Rules Committees to do something like this and when Congress would be reviewing the rule before it went into effect.

Professor Cooper thought that it was a very good idea for the Judicial Conference to be the actor empowered to act and that there was therefore likely a way to find authority under either the Rules Enabling Act or 28 U.S.C. § 331.

Professor Beale thought that the Rules Enabling Act provides the necessary authority if such authority did not exist otherwise. If there is a statutory gap – and, in her opinion, one does not appear to exist – she thought that the Rules Enabling Act's supersession could bridge that gap. If the Judicial Conference is the logical place to lodge the power to declare an emergency and if the Rules Committees, the Judicial Conference, the Supreme Court, and Congress affirm that by approving the emergency rules – that ought to be enough to alleviate any lingering concerns.

Professor Gibson noted that although the section of the Rules Enabling Act that applies specifically to Bankruptcy Rules, 28 U.S.C. § 2075, does not include a supersession clause, she nevertheless agreed that it provided sufficient authority.

Professor Cooper said that the Civil Rules had embraced things prescribed by the Judicial Conference in the past. For example, electronic filing was originally permitted according to standards developed by the Judicial Conference. Local rules numbering and the maintenance of district court records were similar examples.

An attorney member asked if there was a gap between the current rule proposals and the CARES Act's focus on presidentially declared emergencies. Is there anything to be pointed to other than the later ratification process? Professor Capra thought that this was only a problem if the CARES Act were relied on for authority to promulgate the emergency rules. Instead the Rules Enabling Act could be relied on as the statutory authority. Judge Bates clarified that the authority question here is different from the statutory authorization.

Criminal Rules Provisions. The next topic for discussion was some of the substantive provisions of draft Criminal Rule 62, particularly subdivisions (c) and (d). Subdivision (c) lays out specific substantive changes for emergency circumstances that were developed based on feedback the committee received from participants in the miniconference. Judge Kethledge and Professors Beale and King invited any thoughts from the Standing Committee on these proposals.

Judge Bates had a question concerning paragraph (c)(3), which would allow the court to conduct a bench trial without the government's consent when it finds that doing so "is necessary to avoid violating the defendant's constitutional rights." He asked why the Criminal Rules Committee had limited this to constitutional rights instead of allowing the same procedure when a statutory right was at stake. Judge Kethledge thought the main reason was to avoid any questions under *Singer v. United States*, 380 U.S. 24 (1965), in which the Supreme Court held that a defendant has no constitutional right to waive trial by jury. Professor Beale noted also that the DOJ was opposed to too much of a deviation from the norm and that the subcommittee had taken these views into account. Originally, the rule would have allowed a bench trial without the government's consent whenever doing so would be "in the interest of justice." The Advisory Committee ultimately determined that this provision should be a narrow one. Judge Kethledge noted that there was division over this provision among advisory committee members and that it had not been put forward with unanimous support.

A judge member questioned the extent to which the situation envisioned by paragraph (c)(3) could ever actually arise. Presumably the constitutional right at issue would be a speedy trial right, and evaluating whether an additional delay would violate that right requires a fairly complicated multi-factor decision. If, under the rule as drafted, a judge has to go through all of that analysis and get it right, subject to an interlocutory appeal by the government, in practice it could be very difficult to ever actually order a bench trial over a government objection. The member was not opposed to the provision though because criminal defendants sitting in jail while proceedings are delayed has been a major problem during the current pandemic. Professor Beale thought that as a practical matter the provision could be used. The member asked whether looking at the statutory speedy trial test rather than the constitutional one might make the provision more likely to actually come into play. Professor King noted that *Singer* concerned the method of trial; it did not involve speedy trial rights. The consensus of the Advisory Committee was to not limit the provision to speedy trial rights because we cannot predict all future emergency circumstances and what constitutional rights they might somehow implicate.

Another judge member expressed the view that this would likely be a null set provision if the government's veto can only be overridden based on constitutional concerns, and that it was not worth writing a rule for a circumstance that would not happen.

A member asked for clarification on whether the rules and statutes normally allow a bench trial without the government's consent. Professor Capra and others confirmed that they do not. This member then asked whether this was a substantive change. Judge Kethledge thought there might be a question there.

An attorney member thought the emergency setting could pit the defendant and government against one another in a new way. In an emergency, the choice between a jury and a bench trial also might implicate a very long incarceration. Judge Kethledge agreed these are serious concerns. Professor King said there had been mixed reports regarding whether the government had been withholding consent to bench trials in situations like these.

Professor Coquillette noted that the Supreme Court routinely approves the Standing Committee's recommendations but that the bench trial provision was the kind of thing that had historically attracted more attention from the Court. Judge Bates agreed. On the other hand, Judge Bates thought members of Congress might want statutory speedy trial rights protected as well as constitutional rights. Accordingly, he thought it important to be very careful.

A judge member appreciated that the proposed rule addressed the issue of extended detention while trials are delayed. This member was not aware of this issue arising but thought there might be a need to think about defendants who want to have a jury trial but are not able to get one for an extended period of time.

Mr. Wroblewski said that the DOJ shared the concerns with delayed trials, especially for detained defendants. It had urged U.S. Attorneys to offer bench trials, and some offices had made blanket offers. Many defendants have not taken this offer. There have been some situations where the government has not consented to a bench trial, but those have been few. While the DOJ does not anticipate that paragraph (c)(3) will have much impact in the end, it is sensitive to concerns about what the Supreme Court will think. It supports the current proposal as a compromise rule.

As a final point on the bench trial issue, a member wondered why this rule was necessary. If constitutional rights are at stake, this member asked, isn't the government always obligated to agree or to drop the case? Frequently the government must choose to prosecute a case in a manner it would not prefer in order to avoid violating a defendant's constitutional rights.

A judge member offered a view on paragraph (c)(1) which, as currently drafted, would establish that "[i]f emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding." This member felt that the word "preclude" was too strong. At times in the past year, public attendance was severely limited but not totally unavailable. It would be better to encourage or require allowing alternative public access when in-person access is seriously limited but not precluded.

Discussion then proceeded to subdivision (d), which addresses remote proceedings. In general, subdivision (d) is more restrictive than the CARES Act's remote proceedings provisions. It carries over some aspects but has additional prerequisites that must be met before proceedings may be held remotely.

Judge Bates asked whether subparagraph (d)(2)(A) should refer to “in-person proceedings” rather than “*an* in-person proceeding.” The latter formulation, which is in the current draft, would seem to suggest a case-specific finding, which Judge Bates did not think was the Criminal Rules Committee’s intent.

A judge member asked about subparagraph (d)(3)(B), which requires that – in conjunction with other things – a defendant make a written request that proceedings be conducted by videoconference. The member wanted to know what the Criminal Rules Committee had in mind here. Professor King explained that there are two goals behind this requirement. First, it helps guarantee that the gravity of the waiver is well-understood by both the defendant and counsel. Second, it helps to create a record. The Advisory Committee did envision that the required writing would be filed with the court. An additional provision in paragraph (c)(2) provides for obtaining the defendant’s signature, written consent, or written waiver under emergency circumstances.

A judge member agreed with Judge Bates about subparagraph (d)(2)(A). This member said that there had been concerns among judges regarding whether one judge in a district holding in-person proceedings undermined findings by other judges that in-person proceedings could not be held. This member also asked about the timing requirement in subparagraph (d)(2)(A) and suggested it be mirrored in subparagraph (d)(3)(A).

Professor Capra asked whether there was inconsistency regarding the use of the word “court,” in draft Criminal Rule 62, but he thought it was clear enough in each provision whether the word referred to a single judge or to a court in the sense of a district or courthouse. He observed that the Criminal Rules already use the word “court” in both senses. Professor Beale said this was something each advisory committee should review for consistency and clarity. Professor Garner added that “court” is used to refer to an individual judge throughout the rules and that this was generally not a problem.

Miscellaneous Emergency Rules Issues. Professors Cooper and Marcus briefly explained how the Civil Rules Committee’s CARES Act Subcommittee had identified the Civil Rules that might warrant emergency changes. It conducted a thorough review of all the rules and identified only a few that were not sufficiently flexible. These were the rules that are in subdivision (c) of draft Civil Rule 87.

A judge member suggested that if the Judicial Conference is going to be the decisionmaker in all instances, it would be more uniform to rephrase Rule 87 in the same way as the others. Currently draft Bankruptcy Rule 9038 and Criminal Rule 62 default to enacting all the emergency provisions unless the emergency-declarer says otherwise, while draft Civil Rule 87 requires that the emergency-declarer affirmatively identify which emergency rules will go into effect. Professor Capra agreed that consistency would be good here.

Professor Capra next raised the issue of what happens if the Judicial Conference is unable to meet and declare an emergency? Should the rules account for such a situation? He said he didn’t think such a provision was needed because if events were so dire that the Judicial Conference or its Executive Committee couldn’t communicate for a significant amount of time that the Federal

Rules of Practice and Procedure would not be a particularly high priority. There would be bigger problems to deal with. Further, the Executive Committee of the Judicial Conference is a smaller body and that smaller group is the one that would be deciding. The judge member who had raised this issue in the first place found Professor Capra's reasoning was persuasive.

Another judge member thought it was worth considering an emergency in which communications are seriously disrupted. This member suggested that a judge or chief judge who cannot communicate with the Judicial Conference should be able to act. This member thought the fact that the situation was extreme did not mean it was not worth considering.

Finally, Professor Capra raised the issue of the termination of a declared rules emergency. Draft Bankruptcy Rule 9038, Civil Rule 87, and Criminal Rule 62 say that if the emergency situation on the ground ends before the declared rules emergency ends, there is a provision by which the rules emergency may be terminated. The Bankruptcy and Civil Rules Committees' draft rules provide that the rules emergency "may" be terminated; the Criminal Rules Committee's proposal said that it "must" be terminated. Professor Capra suggested that the termination should be permissive, not mandatory because imposing a mandate on the Judicial Conference seems extreme.

One judge member disagreed and thought that the mandatory language was preferable. These emergency rules should be preserved for extreme situations where there are no alternatives. The sunset provisions limit the damage somewhat but still if the emergency is resolved it is important to return to normal court operations. This member was not concerned about the possibility that someone would have a cause of action if the Judicial Conference was required to terminate the emergency but failed to do so. Professor Capra asked whether this would mean the initial emergency-declaring authority should also say "must" instead of "may." This member did not think so, and Professor Capra agreed.

An attorney member agreed that any rules emergency should not last any longer than the actual emergency, but this member thought that it was necessary to allow discretion. The relevant question at the end of an emergency would be how to terminate, not whether to terminate. Suggesting a mandatory obligation at the instant the emergency ends could distort the discussion because, at the end of the day, the Judicial Conference would have to determine the reasonable means of winding down the emergency operations.

A member expressed concern about writing a rule that forces the Judicial Conference to do anything. If – as it seemed – any mandatory language would not be enforceable, then maybe precatory language of some kind would be sufficient.

Judge Bates had one final question concerning proposed draft Bankruptcy Rule 9038. As currently drafted, paragraph (c)(1) provides that certain actions could be taken district-wide "[w]hen an emergency is declared" but paragraph (c)(2) which addresses actions that could be taken in a specific case or proceeding did not include that same phrase. Judge Bates asked whether paragraph (c)(2) should also say "when an emergency is declared." Professor Gibson explained that the style consultants had thought the current phrasing was clear – that yes, paragraph (c)(2)

also requires that an emergency must have been declared, but she and Judge Bates agreed that perhaps it did need to be clarified.

Other Matters Involving Joint Subcommittees

Judge Bates briefly addressed two ongoing joint subcommittee projects: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on October 20, 2020. The Advisory Committee presented four information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 195.

Information Items

Proposed Amendments Published for Public Comment. Judge Bybee explained that at the June 2020 Standing Committee meeting the Appellate Rules Committee had received some feedback concerning proposed Rule 42, which would address voluntary dismissals. The committee addressed the concern and would be seeking final approval of this proposed rule change in the spring of 2021. There was no present action to be taken. Professor Hartnett noted that the concerns raised at the Standing Committee related to how the requirement that parties agree to dismissal of an appeal might interact with local rules requiring the defendant's consent before dismissal. Judge Bates, who had raised this concern, stated that he was happy with the adjustments that the Appellate Rules Committee had made to proposed Rule 42.

Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing). The Appellate Rules Committee is still considering combining Rules 35 and 40. It was thought that consolidating these rules might eliminate some confusion in the Appellate Rules. This issue remains under careful study.

Suggestions Related to In Forma Pauperis Relief. Various suggestions relating to *in forma pauperis* relief had been submitted to the Appellate Rules Committee. Judge Bybee explained that it was not clear that the problems identified were problems with the Appellate Rules. The issues are under consideration, but may be put off.

Relation Forward of Notices of Appeal. The relation forward of notices of appeal was still under discussion by the committee.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Bankruptcy Rules Advisory Committee, which last met via videoconference on September 22, 2020. The Advisory Committee presented four action items and two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 241.

Action Items

Retroactive Approval of Official Form 309A–I (Notice of Bankruptcy Case). Judge Dow explained this action item concerning a series of forms that are used to notify recipients of the time and place of the first meeting of creditors and certain other deadlines. The information on these forms includes the web address of the PACER system. This web address had been changed, so the forms needed to be updated to reflect the new address. The change has already been made pursuant to the Bankruptcy Rules Advisory Committee's authority to make technical changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, and the Advisory Committee now sought that retroactive approval. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the changes to the Official Form 309A–309I.**

Proposed Amendments for Publication. An amendment to Rule 3011(Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases), was brought up in connection with a project on unclaimed funds and is intended to reduce the amount of such funds and clerks' offices' liabilities with regard to them. The Bankruptcy Rules Advisory Committee asked for a modification of Rule 3011 in order to achieve a wider circulation of information about unclaimed funds. The modification proposed by the Bankruptcy Rules Committee would add a new subdivision (b) that would require court clerks to provide searchable access on court websites to data about unclaimed funds on deposit with the clerk. The Bankruptcy Rules Committee added a proviso that would allow the clerk to limit access to this information in specific cases for cause shown (e.g., to protect sealed information). The Advisory Committee sought publication of this proposed amendment.

Related Amendments to Bankruptcy Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Form 417A (Notice of Appeal and Statement of Election) were proposed in order to maintain uniformity with recent amendments to the Federal Rules of Appellate Procedure. Rule 8003 would be amended to conform to pending amendments to Appellate Rule 3. The amendments would clarify that the designation in a notice of appeal of a particular interlocutory order does not preclude appellate review of all other orders that merge into that judgment or order. Form 417A, the Bankruptcy Notice of Appeal Form, would be amended to conform to the wording changes in Rule 8003. Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendments to Rule 3011, Rule 8003, and Form 417A.**

Information Items

Changes to Instructions for Official Form 410A (Proof of Claim, Attachment A). Judge Dow explained that a bankruptcy judge had pointed out a problem with Form 410A to the Bankruptcy Rules Committee. The Form is an attachment to a Proof of Claim Form that is filed in bankruptcy cases for mortgage-related claims. The problem related to how total debt is calculated when the underlying mortgage claim has been reduced to judgment and has merged into that judgment. A question can arise as to what governs the claim at that point in jurisdictions that have judicial foreclosure. Judge Dow said that the Advisory Committee added a paragraph to the instructions to Form 410A clarifying that the “principal balance” in this situation is the amount due on the judgment along with any other charges that may have been added to the claim by applicable law. Judge Dow explained that because only the instructions were changed, and not the form itself, that no Standing Committee action was required.

Bankruptcy Rules Restyling. Professor Bartell explained that the style consultants have been doing great work making the rules more comprehensible. Parts one and two of the restyled rules had been published, consideration of parts three and four were proceeding on schedule, and the style consultants had just given the committee a draft of part five. An official draft of part six was scheduled to be ready in February. Professors Garner and Kimble expressed their appreciation to the Bankruptcy Rules Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Civil Rules Committee, which last met via videoconference on October 16, 2020. The Advisory Committee presented three action items and four information items. The Advisory Committee’s report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

Action Items

Proposed Amendment to Rule 7.1 (Disclosure Statement). The Civil Rules Committee first sought final approval of a proposed amendment to Rule 7.1 which was presented at the Standing Committee’s June 2020 meeting and remanded to the Civil Rules Committee for further consideration in light of the feedback provided by the Standing Committee. Proposed paragraph (a)(1) and subdivision (b) have not changed since the June 2020 meeting. These provisions deal with adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. Proposed paragraph (a)(2) has been revised since the June 2020 meeting.

Proposed Rule 7.1(a)(2) seeks to require timely disclosure of information necessary to determine diversity of citizenship for jurisdictional purposes. Often this is not complicated, and citizenship is settled when the case is initially filed in federal court or removed from state court. However, determining citizenship is complicated in a number of cases, especially considering the proliferation of LLCs. The Civil Rules Committee thought it was worth amending Rule 7.1 because the consequences of failing to spot a jurisdictional problem early can be severe. As the committee’s report explains, the committee came up with two ways to address the issues raised by

the Standing Committee at the June meeting – one more detailed than the other. The Advisory Committee prefers the more detailed version but presented an alternative version for the Standing Committee’s consideration.

Professor Cooper described the alternatives. As published, the rule would have required disclosure of citizenship at the time the action was filed in federal court, with the idea that this would apply equally to cases removed from state court because the time at which the case is removed is the time at which it is first filed in federal court. Public comments suggested that the rule would be clearer if it referred to the time at which an action is “filed in or removed.” Proposed subparagraph (a)(2)(A) was revised and now reflects these suggestions. In committee discussion, it was noted that diversity may need to be evaluated at other times as well. Subparagraph (a)(2)(B) was added to account for this and required filing “at another time that may be relevant to determining the court’s jurisdiction.” Last June, some Standing Committee members were concerned that the language of this subparagraph was too open-ended. The proposal was remanded to the Advisory Committee for further consideration.

After extensive discussion, the Advisory Committee concluded again that it would be worthwhile to draw judges’ and practitioners’ attention to the complexity of the diversity rules and to the fact that diversity jurisdiction is not permanently fixed at the moment when the case first arrives in federal court. This led to the proposed revision of subparagraph (a)(2)(B)’s language presented at this meeting. The proposal would now require the filing of disclosures when “any subsequent event occurs that could affect the court’s jurisdiction.” The Advisory Committee recognized that this was still somewhat nonspecific, but felt that the alternative of trying to spell out all the events that could affect diversity jurisdiction as an action progresses was simply not feasible. The Advisory Committee also suggested that the Standing Committee could approve a version that simply omits subparagraphs (a)(2)(A) and (B) (and dropping the word “when” from the end of paragraph (a)(2)), but Professor Cooper explained that the Advisory Committee did not recommend this course of action.

Judge Bates wondered whether there was still ambiguity in the word “when” in paragraph (a)(2). He was concerned that someone could be confused as to whether this refers to the time for filing or the time the citizenship is attributed. Professor Cooper said that, in the Civil Rules, the word “when” is often used to mean “at the time.” He said that it was possible to add a few more words if it would help to clarify, but the Advisory Committee believed it was not necessary and was better to avoid unnecessary verbiage. Judge Bates noted that the second alternative proposed would avoid the problem by dropping subparagraphs (A) and (B).

A judge member offered a number of suggested alterations to the text of the proposed amendment. First, this member noted that no matter whether “when” or “at the time” was used, it was unlikely that practitioners would assume that the filing had to be made immediately. It might be helpful to provide a time limit to ensure prompt filing. This particular suggestion was later withdrawn. The member also asked whether the word “or” might be preferable to “and” at the end of subparagraph (A). Professor Cooper explained that “and” was used because the filing under subparagraph (A) would have to be made in every case and would often be sufficient to resolve questions. If something happens after that, having fulfilled the subparagraph (A) requirement in the past does not make the subparagraph (B) filing unnecessary. The member then suggested

moving the word “when” from before the colon to, instead, the start of both of subparagraphs (A) and (B). This same member suggested that the reference to a party that “seeks to intervene” in paragraph (a)(1) ought to be reflected in paragraph (a)(2) which currently refers only to an “intervenor.” Professor Cooper did not recall this issue having been raised before the Advisory Committee. For paragraph (2), though, Professor Cooper thought it might make sense to wait for intervention to be granted under some circumstances. Judge Bates noted that, if implemented in paragraph (a)(2), this change should also be made in subdivision (b). The committee member also suggested subparagraph (2)(B)’s reference to “any subsequent event . . . that could affect the court’s jurisdiction,” might be too broad. If, for example, a case arguably became moot, this would be an event that could affect the court’s jurisdiction. But this is not a circumstance where the re-filing of disclosures would be necessary or desirable. Professor Cooper agreed that an amendment to narrow the filing requirement could be added.

Professor Kimble said that although moving the word “when” to both (A) and (B) would not change the meaning, the current draft was consistent with what the style consultants would typically recommend. He said that the style consultants would typically change “at that time” to “when.”

Professor Hartnett asked if it would be helpful to break paragraph (a)(2) into two sentences. (“ . . . a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must”) Professor Cooper thought this was a good idea. Judge Dow wondered whether “intervenor or proposed intervenor” would be an appropriate way to refer to the party seeking to intervene, and he endorsed the suggestion that (a)(2) be split into two sentences.

Another attorney member asked why paragraph (a)(1) referred to “*A* nongovernmental corporate party” but to “*any* nongovernmental corporation that seeks to intervene,” rather than using “any” in both places. Professor Cooper thought it should be changed to whichever conforms to the Appellate and Bankruptcy Rules, and Judge Bates agreed. Professor Garner suggested that the style consultants would normally change “any” to “a” and that if other rules were phrased differently, those rules were inconsistent with the style guidelines.

Judge Bates reviewed and summarized the changes under consideration. A judge member pointed out that revisions to the committee note might also be necessary. Judge Bates determined that it was better to circulate the proposed amendment incorporating the changes made during the meeting via email, with an opportunity for discussion, followed by a vote by email. This was done later in the week. There was no call for discussion and, upon a motion that was seconded, the Standing Committee voted unanimously to **recommend for approval the proposed amendment to Rule 7.1**. The agenda book has been updated to reflect the final version of the proposed amendment that the committee approved.

Proposed Amendment to Rule 15(a)(1). Judge Dow presented a proposed amendment to Rule 15(a)(1), with a request that it be approved for publication for public comment. The proposed amendment is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently provides, in part, that “[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21

days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.” A literal reading of “within . . . 21 days after service of a responsive pleading or [pre-answer motion]” would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word “within” with “no later than.” **The Committee approved for publication the proposed amendment to Rule 15(a)(1).**

Proposed Amendment to Rule 72(b)(1). Judge Dow next presented a proposed amendment to Rule 72(b)(1), with a request that it be published for public comment. The rule currently directs that the clerk “must promptly mail a copy” of a magistrate judge’s recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means.

The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be “immediately served” on the parties as provided in Rule 5(b). In determining how to amend the rule to bring it in line with current practice, the Advisory Committee referred to Rule 77(d)(1) which was amended in 2001 to direct that the clerk serve notice of entry of an order or judgment “as provided in Rule 5(b).” In addition, Criminal Rule 59(b)(1) includes a provision analogous to Civil Rule 72(b)(1), directing the magistrate judge to enter a recommendation for disposition of described motions or matters, and concluding: “The clerk must immediately serve copies on all parties.” Criminal Rule 49, like Civil Rule 5, contemplates service by electronic means. Professor Kimble asked why the word “promptly” had been changed to “immediately.” Professor Cooper said this change was made for conformity with Criminal Rule 59(b)(1). Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 72(b)(1).**

Information Items

Subcommittee on Multidistrict Litigation. Judge Dow provided the report of the Multidistrict Litigation (MDL) Subcommittee. The first topic, formerly called “early vetting” is now called “initial census.” In three of the largest MDLs going on right now, a form of initial census has occurred over the past year. Judge Dow had spoken with the judges overseeing two of these three cases. Rather than have lengthy fact sheets, the judges in these cases have relied on the basic information on the first few pages of the fact sheets. The judges in these cases have used this basic information to organize the plaintiffs’ steering committee, to organize discovery, and to dismiss certain plaintiffs. The subcommittee has been very happy with how this has been developing in the big MDLs. It remains on the study agenda because a rule may be helpful, but it is also possible that these practices may just be circulated as best practices and could belong in the *Manual on Complex Litigation* or spread as a model by discussion at conferences. A rule may not be necessary.

An attorney member wanted to share their view. In this member’s experience, courts and the plaintiffs’ bar think there is little need for change and the defense bar does think there is a need

for change. This makes rulemaking difficult. On paper, the rules seem to suggest that defendants could have a number of cases that they might want to join together into an MDL. In practice, though, the existence of an MDL can lead to more cases against a defendant because there is less of a hurdle to additional plaintiffs joining – and in fact the plaintiffs’ bar wants more plaintiffs. Additionally, MDLs are perceived on both sides as settlement vehicles. A lot of work goes into them, but they nearly always settle. This member understood that the Advisory Committee was not inclined toward allowing interlocutory appeals, but thought that it was worth looking at the initial census option as a way of avoiding the multiplicity problem.

Another attorney member thought there might be an opportunity to craft a flexible rule that would allow the courts to craft an initial census tailored to the particular case. Judge Dow agreed that this was what the Advisory Committee had in mind – something prompting the lawyers and the judge to consider an initial census in every case.

Judge Dow next explained that the subcommittee had also been very focused on interlocutory appeals. The subcommittee had held a conference of judges and lawyers working on MDLs, including a particularly good representation of non-mass tort MDLs. The conference had had a large influence on the subcommittee’s thinking and in the recommendation that an interlocutory appeal rule should not be pursued at this time. Some feel that the current interlocutory appeal options (and mandamus) are sufficient. Other interested persons think that even if there are some gaps, there is no need for new rules or rules amendments because the current rules are good enough and any delays caused by interlocutory appeals would not be worth it. As an example of one problem that could arise if interlocutory appeals were permitted, Judge Dow explained that state courts might not be willing to wait around while a federal Court of Appeals takes up a case. At the end of the day, the members of the subcommittee all thought that an interlocutory appeal rule was not worth pursuing at this time. Professor Marcus added that there had also been definitional issues concerning what kinds of cases to which such a rule would apply.

Finally, Judge Dow explained that equity and fairness and the role of the court in the endgame of settlements of large MDLs was the area that the subcommittee would likely be focused on in the near term. There are obvious similarities between MDLs and class actions, and for class actions the rules require that courts approve settlements. This is not the case for MDLs unless they are resolved through a class action mechanism. Questions can arise about whether all parties are treated the same and about what the court’s role should be. Professor Cooper drafted a memo on these issues. At the last subcommittee meeting it was resolved that a conference convening stakeholders would be useful to help determine whether action should be taken on this issue.

An attorney member thought that it might be worth considering whether the attorneys with the most clients or client with the largest interest ought to be lead counsel, or at least whether this ought to be a factor in determining lead counsel. One criticism of MDLs is that they are lawyer-driven litigation and hinging lead counsel assignments on characteristics of the clients might ameliorate this somewhat (as opposed to giving prominence to the lawyer who files first or who is best-known in the district).

Another judge member suggested that in preparation for the conference, it might be worth asking the Federal Judicial Center to survey clients who received settlements in MDLs. An

attorney member said he feared the proposal of rewarding the lawyers who aggregated the most clients. This would incentivize lawyers to form coalitions and would undermine the courts' control overall. In securities litigation, there are policy reasons to put institutional shareholders in the lead, but those reasons don't necessarily carry over to MDLs across all kinds of subject areas. This member agreed it was worth investigating what happens with money that ends up in common benefit funds. Lawyers applying to be lead counsel could be questioned regarding what has happened to funds they have won or overseen in the past. The member cautioned these issues might not be appropriately resolved through a civil rule.

Items Carried Forward or Removed from the Advisory Committee's Agenda. Judge Dow briefly summarized items on the Advisory Committee's agenda. He explained that the Civil Rules Committee is continuing to consider an amendment to Rule 12(a) that would clarify the time to file where a statute sets time to serve responsive pleadings but that the Advisory Committee had not yet come to an agreement on that issue. The Advisory Committee was also interested in investigating a potential ambiguity lurking in Rule 4(c)(3)'s provision for service by a U.S. Marshal in *in forma pauperis* cases. This investigation had not proceeded recently because the Marshals Service had been preoccupied with pandemic-related security concerns and the committee did not want to bother them at this time. There had been suggestions that the Advisory Committee look into amending Rules 26(b)(5)(A) and 45(e)(2) to revise how parties provide information about materials withheld from discovery due to claims of privilege. The Civil Rules Committee plans to create a new Discovery Subcommittee to look into these issues. An Advisory Committee member submitted a suggestion to amend Rule 9(b), on pleading special matters – this would be discussed at the Advisory Committee's next meeting. Finally, Judge Dow explained that the Advisory Committee had removed from its agenda suggestions to amend Rule 17(d) (regarding the naming of defendants in suits against officers in their official capacity) and Rule 45 (concerning nationwide subpoena service).

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge presented the report of the Criminal Rules Committee, which met via videoconference on November 2, 2020. The Advisory Committee presented two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 395.

Information Items

Rule 6 Subcommittee. Judge Kethledge reported that the Advisory Committee was continuing to consider suggestions to amend the grand jury secrecy provisions in Rule 6. Since the last meeting, the Advisory Committee has received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances. The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the

authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers). The Advisory Committee anticipates having more to report at the June 2021 meeting.

Items Removed from the Advisory Committee's Agenda. A number of items had been removed from the Advisory Committee's agenda. Discussion of these items is in the committee's report.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on November 13, 2020. The Advisory Committee presented three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 441.

Information Items

Amendment to Rule 702 (Testimony by Expert Witnesses). Judge Schiltz explained that the committee was looking at two issues relating to testimony by expert witnesses. The first was what standard a judge should apply when considering whether to allow expert testimony. It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 are met by a preponderance of the evidence. The requirements are that the testimony will assist the trier of fact, that it is based on sufficient facts or data, that it is the product of reliable principles and methods, and that the expert reasonably applied those principles and methods to the facts at hand. It is not appropriate for these determinations to be punted to the jury, but judges often do so. For example, in many cases expert testimony is permitted because the judge thinks that a reasonable jury *could* find the methods are reliable. There is unanimous support in the Evidence Rules Committee for moving forward with an amendment to Rule 702 that would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met. This would not be a change in the law, but rather would consolidate information available in two different rules and two Supreme Court opinions.

The second expert testimony issue being considered by the Evidence Rules Committee is the problem of overstatement. Judge Schiltz explained that this refers to the problem of experts overstating the strength of the conclusions that can reasonably be drawn by the application of their methods to the facts. For example, an expert will testify that a fingerprint "was the defendant's" or that a bullet did come from a gun, with no qualification or equivocation. Experts will make these claims with certainty when the science does not support such strong conclusions. The defense bar has been asking for an amendment that would not permit such overstatements. The Evidence Rules Committee was divided on this suggestion from the defense bar. Only the DOJ, however, was opposed to a more modest proposed amendment that would draw attention to the need for every expert conclusion to meet the standard set under Rule 702. Judge Schiltz anticipates that the Advisory Committee will present something related to Rule 702 at the Standing Committee's June 2021 meeting, once he has received input from new members who recently joined the Advisory Committee.

Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements). The “rule of completeness” requires that if at trial one party introduces part of a writing or recorded statement, the opposing party can introduce other parts of that statement if in fairness those other parts should also be considered. Judge Schiltz explained that there are a couple of problems with this rule in practice. One is that the circuits are split on whether the “completing portion” can be excluded as hearsay. This can arise, for example, when a prosecutor misleadingly introduces only part of a statement and the defendant wants the jury to hear the completing portion. Some courts will exclude the completing portion under the hearsay rule out of a concern that the jury will overweight it. Other courts will allow the completing portion in but will instruct the jury not to consider it for the truth of the matter but only as providing context. Other courts just let it all in with no limit. The Evidence Rules Committee plans to draft an amendment to Rule 106 that would say that a judge cannot exclude the completing portion for hearsay, but that a judge may issue a limiting instruction.

Another problem with Rule 106 is that it only applies to written or recorded statements. If the statement was made orally, the common law governs and there is a lot of inconsistency in how it is applied. This is one of few areas of evidence law where the Evidence Rules are not considered to preempt the field. It is an odd area for that to be the case because generally this issue arises at trial and must be addressed on the fly, with minimal time for a judge to research the common law. The Evidence Rules Committee plans to draft an amendment rule that would apply to oral statements and supersede the common law.

The Evidence Rules Committee agreed to proceed with both changes to Rule 106. The Department of Justice opposed both changes.

Proposed Amendment to Rule 615 (Excluding Witnesses). Judge Schiltz explained that Rule 615 is, on its face, quite simple. It says that a judge must exclude witnesses from the courtroom during trial if the opposing side asks the judge to do so. These requests are common. There is confusion, though, over whether the ruling granting such a request only keeps the witness out of the courtroom or whether it also implies that the witness may not learn about what has been said in court – through conversations, reading a transcript, reading a newspaper, etc. Some circuits have said that the order automatically prevents the excluded witness from learning through these other avenues, while other circuits view the order as only effecting the physical exclusion. Because of this confusion, it can be very easy for witnesses to accidentally violate the order and find themselves in contempt of court. The Evidence Rules Committee unanimously agreed to draft an amendment retaining the part of Rule 615 that requires the court to exclude witnesses if any party asks but making clear that courts can also go further to prevent witnesses from learning about in court testimony. This should clarify that any additional restrictions must be made explicit.

A judge member noted that it was worth thinking about the implications of Rule 615 during trials held over videoconference or otherwise remotely. Additionally, this member noted that in bench trials direct testimony can be taken by affidavit and that it might be worth referring to that sort of testimony in the rule as well. Professor Capra thought the rule would help with these situations because it draws attention to methods of hearing about other witnesses’ testimony beyond simply sitting in the courtroom while the witness testifies.

OTHER COMMITTEE BUSINESS

The meeting concluded with a series of reports on other committee business. First Judge Bates addressed the 2020 *Strategic Plan for the Federal Judiciary*. The agenda book contains material concerning the strategic plan, beginning at page 471. Judge Bates explained that the Judicial Conference committees – including this one – were asked to provide input on what strategies and goals reflected in the *Plan* should receive priority in the next two years. Those recommendations would be reviewed at the upcoming meeting of the Executive Committee of the Judicial Conference. Committee members were instructed to send any suggestions to Judge Bates and to Shelly Cox of the Rules Committee Staff.

Julie Wilson delivered a report on the Judiciary's Response to the COVID-19 pandemic. Judge Campbell had discussed this at the Standing Committee's June meeting. The Administrative Office's COVID-19 Task Force was established early last year and continues to meet bi-weekly. The Task Force remains focused on safely expanding face-to-face operations at the AO and in the courts. Notably, the Task Force has formed a Virtual Judiciary Operations Subgroup, which will recommend technical standards along with policies and procedures regarding the operation of remote communications, including with defendants in detention. Another big part of their work will be to standardize virtual operations throughout the judiciary. In the Administrative Office, guidelines, data, and information are being posted regularly on the JNet website, including information about the resumption of jury proceedings. These materials are available to judges and their staff. The only Judicial Conference activity relating to COVID-19 that has occurred since the last meeting was the extension of the CJRA reporting period from September 30 to November 30.

Ms. Wilson also delivered a legislative report. She explained that the Administrative Office had requested supplemental appropriations from Congress to address various needs within the judiciary due to the pandemic. These appropriations were not made. The Administrative Office also submitted 17 legislative proposals. These were not taken up by the recently concluded 116th Congress. One notable law enacted last year was the Due Process Protections Act. This was introduced in the Senate in May 2019 and had been tracked by the Rules Committee Staff. It was passed quickly and unanimously in 2020. The Act statutorily amended Criminal Rule 5 (Initial Appearance) to require that judges issue an oral and written order confirming prosecutors' disclosure obligations under *Brady* and its progeny. The Act required the creation of model orders for each district. Judge Campbell and Judge Kethledge had sent a letter to the leadership of the House Judiciary Committee expressing the Rules Committees' preference for amending the rules through the Rules Enabling Act process, but the Act passed regardless. The 117th Congress was sworn in on January 3, 2021, just a few days before the Committee met. Some legislation that has been of interest to the Rules Committees in the past had already been reintroduced. Representative Andy Biggs reintroduced the Protect the Gig Economy Act. It would expand Civil Rule 23 to require that the prerequisites for a class action be amended to include a requirement that the claim does not concern misclassification of workers as independent contractors as opposed to employees. Representative Biggs also introduced the Injunctive Authority Clarification Act. This would prohibit the issuance of nationwide injunctions. Other familiar pieces of legislation will likely also be introduced in the coming weeks. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 22, 2021. The hope is that the meeting will be in person in Washington, D.C. if doing so is safe and feasible at that time.

Draft

TAB 1C

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Approve the proposed amendment to Civil Rule 7.1 and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 9-10

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

- Impact of the COVID-19 Pandemic on Jury Operations pp. 2-3
- Emergency Rules pp. 3-6
- Federal Rules of Appellate Procedurep. 6
- Federal Rules of Bankruptcy Procedure pp. 6-9
- Federal Rules of Civil Procedure..... pp. 10-12
- Federal Rules of Criminal Procedure..... pp. 13-14
- Federal Rules of Evidencep. 14
- Other Itemsp. 15

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| <p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p> |
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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 5, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S.

NOTICE

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.**

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, and Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five advisory committees and two joint subcommittees. The Committee also discussed the Rules Committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281. Additionally, the Committee discussed an action item regarding judiciary strategic planning and was briefed on the judiciary's ongoing response to the COVID-19 pandemic.

IMPACT OF THE COVID-19 PANDEMIC ON JURY OPERATIONS

The Committee considered a proposal from the jury subgroup of the judiciary's COVID-19 Task Force addressing the impact of COVID-19 on jury operations in criminal proceedings. In August 2020, the Executive Committee referred the proposal to this Committee, the Committee on Court Administration and Case Management, the Committee on Criminal Law, and the Committee on Defender Services, to consider whether rules amendments or legislation should be pursued that would allow grand juries to meet remotely during the pandemic. The chairs of the four committees discussed the proposal after consulting with their respective committees and, in a letter dated August 28, 2020, advised the Executive Committee that they did not recommend pursuing efforts to authorize remote grand juries. The letter

explained that although the pandemic has impacted the ability of courts around the country to assemble grand juries, courts have found solutions to the problem including using large spaces in courthouses, masks, social distancing, and other protective measures. Such measures protect public health to the greatest extent possible without compromising the secrecy and integrity of grand jury proceedings, and they have allowed investigations and indictments to proceed where needed.

EMERGENCY RULES

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. A significant portion of the Committee's meeting was dedicated to reviewing the draft rules developed by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules in response to that directive. The advisory committees began their work by soliciting public comments on challenges encountered during the COVID-19 pandemic in state and federal courts by lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. The advisory committees also formed subcommittees to begin work on the issue. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with:

- (1) identifying rules that might need to be amended to account for emergency situations; and
- (2) developing drafts of proposed rules for discussion at each advisory committee's fall 2020 meeting.

In the intervening months, the subcommittees collectively invested hundreds of hours to develop draft emergency rules for consideration at the fall 2020 advisory committee meetings.

At its January 2021 meeting, the Committee was presented with a report describing this process and was asked to provide initial feedback on the draft rules. The report reached several preliminary conclusions; among the most important was that an emergency rule was not needed for all rule sets. Early on, the Evidence Rules Committee concluded that its rules are already flexible enough to accommodate an emergency. And, although both the Appellate and Civil Rules Committees drafted emergency rules for consideration, they have left open the possibility that no emergency rule is needed in their rule sets.

The advisory committees also concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts “when the President declares a national emergency under the National Emergencies Act,” the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended. Their initial consensus was that the Judicial Conference in particular (or the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference) is the most appropriate judicial branch entity to make such determinations, in order to promote consistency and uniformity in declaring rules emergencies. In addition, the advisory committees concluded that any emergency rules should only be invoked for emergencies that are likely to be lengthy and serious enough to substantially impair the courts’ ability to function under the existing rules.

A guiding principle in the advisory committees’ work was uniformity. Considerable effort was devoted to drafting emergency rules that are uniform to the extent reasonably

practicable, given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. Notably, in the following respects, the proposed draft rules are uniform. First, the term “rules emergency” is used in each rule set to highlight the fact that not every emergency will trigger the emergency rule. Second, the basic definition of a rules emergency is largely uniform among the four rule sets. A rules emergency is found when “extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court’s ability to perform its functions in compliance with these rules.” (Draft Criminal Rule 62 contains an additional element discussed below). Third, the draft rules were reviewed in a side-by-side analysis by the Standing Committee’s style consultants with a view toward implementing style guidelines and eliminating differences that are purely stylistic.

Much of the Standing Committee’s discussion addressed the advisory committees’ request for input on substantive differences among the draft rules and whether those differences were justified. For example, in addition to the basic definition of a rules emergency, draft new Criminal Rule 62 (Criminal Rules Emergency) includes the requirement that “no feasible alternative measures would eliminate the impairment within a reasonable time.” As another example, all of the draft rules provide that the Judicial Conference can declare a rules emergency and subsequently terminate that declaration; however, the draft amendment to Appellate Rule 2 (Suspension of Rules) also gives that authority to the court of appeals (acting directly or through its chief judge), and draft Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) includes emergency-declaring authority for both the chief bankruptcy judge in a district where an emergency occurs and the chief judge of a court of appeals.

At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the

Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action). At this time, it remains to be seen which, if any, of the advisory committees will recommend publication of draft rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met by videoconference on October 20, 2020. In addition to discussion of the emergency rules project and possible related amendments to existing rules, agenda items included a review of previously-published proposed amendments. In addition, the Advisory Committee reviewed the criteria for granting in forma pauperis status, including potential revisions to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In response to a recent suggestion, the Advisory Committee also discussed a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to deal with premature notices of appeal. The issue was considered by the Advisory Committee ten years ago, but it is reviewing the issue again to determine if conditions have changed to justify an amendment. Finally, the Advisory Committee continued its comprehensive review of Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) regarding hearings and rehearings en banc and panel rehearings. Several options for amendment are under consideration in an attempt to align the two rules more closely.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3011 and 8003, and Official Form 417A, with a request that they be published for public

comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). The rule change would mirror a pending amendment to the *Guide to Judiciary Policy*, Vol. 13, Ch. 10, § 1050.10(c), which would require courts to provide notice of unclaimed funds on their websites (pursuant to that Committee's efforts to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds). The Bankruptcy Committee suggested an accompanying rules amendment because the *Guide* is not publicly available and Bankruptcy Rules are often the first place an attorney or pro se claimant looks to determine how to locate and request disbursement of unclaimed funds; a rule change would therefore inform the public where to access unclaimed funds data.

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal)

The proposed amendment revises Rule 8003(a) to conform to the pending amendment to Appellate Rule 3. The Appellate Rules amendment (which is on track to take effect on December 1, 2021 if adopted by the Supreme Court and Congress takes no contrary action) revises requirements for the notice of appeal in order to reduce the inadvertent loss of appellate rights. The proposed amendment to Bankruptcy Rule 8003(a) takes a similar approach and will help to keep the Part VIII Bankruptcy Rules parallel to the Appellate Rules.

Official Form 417A (Notice of Appeal and Statement of Election)

Parts 2 and 3 of Official Form 417A would be amended to conform to the wording of the proposed amendment to Rule 8003.

Retroactive Approval of Technical Conforming Amendments to Official Form 309A - I

The Rules Committee Staff was notified that the web address for PACER (Public Access to Court Electronic Records) was changed from pacer.gov to pacer.uscourts.gov. Because the PACER address is incorporated in several places on the eleven versions of the “Meeting of Creditors” forms (Official Forms 309A - I), the forms needed to be updated with the new web address.

Although the old PACER address is currently redirecting users to the new address, the Advisory Committee shared the Rules Committee Staff’s concern that users will experience broken links in the year or so it would take to update the forms via the normal approval process. Accordingly, the Advisory Committee approved changing the web addresses on the forms using the delegated authority given to it by the Judicial Conference to make non-substantive, technical, or conforming changes to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. The Standing Committee unanimously approved the form changes.

Information Item

The Advisory Committee met by videoconference on September 22, 2020. In addition to its recommendations discussed above, discussion items included an update on the restyling of the Bankruptcy Rules. Notably, the 1000 and 2000 series of the restyled Bankruptcy Rules were published for comment in August 2020, and the Advisory Committee will be reviewing the comments on those rules at its spring 2021 meeting.

The Restyling Subcommittee has completed its initial review of restyled versions of the 3000 and 4000 series of rules, and received feedback from the Standing Committee's style consultants on the subcommittee's proposed changes. The subcommittee received an initial draft of the 5000 series of restyled rules from the style consultants at the end of December 2020, and it expects to receive the initial draft of the 6000 series of restyled rules from the consultants by February 2021.

At its upcoming spring 2021 meeting, the Advisory Committee will consider recommending for publication in August 2021 the 3000 and 4000 series of restyled rules, along with the 5000 and 6000 series of restyled rules if those rules are ready. The Advisory Committee plans to continue work on the remaining rules (the 7000, 8000, and 9000 series) with the intent of recommending them for publication in August 2022, so that final approval of all the Restyled Bankruptcy Rules can be considered by the Standing Committee at its summer 2023 meeting, and by the Judicial Conference at its fall 2023 session.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 7.1 (Disclosure Statement) for final approval. An amendment to subdivision (a) was published for public comment in August 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment.

The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 2020).

The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. The proposal published for public comment identified the time that controls whether complete diversity exists as “the time the action was filed.” In light of public comments received, as well as discussion at the Committee’s June 2020 meeting, the Advisory Committee made clarifying and stylistic changes to the proposal to further develop the rule’s reference to the times that control for determining complete diversity. As approved by the Standing Committee at its January 2021 meeting, paragraph (a)(2) would require that a disclosure statement be filed “when the action is filed in or removed to federal court” and “when any later event occurs that could affect the court’s jurisdiction under § 1332(a).”

The Standing Committee unanimously approved the Advisory Committee’s recommendation that the proposed amendment to Rule 7.1 be approved and transmitted to the Judicial Conference.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 7.1 as set forth in the Appendix, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 15 and Rule 72, with a request that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee’s request.

Rule 15(a)(1) (Amendments Before Trial – Amending as a Matter of Course)

The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently

provides, in part, that “[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier” (emphasis added).

The difficulty lies in the use of the word “within.” A literal reading of “within . . . 21 days after service of a responsive pleading or [pre-answer motion]” would suggest that the Rule 15(a)(1)(B) period *does not commence until* the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment seeks to preclude this interpretation by replacing the word “within” with “no later than.”

Rule 72(b)(1) (Dispositive Motions and Prisoner Petitions – Findings and Recommendations)

Rule 72(b)(1) directs that the clerk “mail” a copy of a magistrate judge’s recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge’s findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

Information Item

The Advisory Committee met by videoconference on October 16, 2020. In addition to the action items discussed above, the Advisory Committee spent a majority of the meeting hearing the report of its CARES Act Subcommittee and discussing its draft Rule 87 (Procedure in Emergency). Other agenda items included an update on the Multidistrict Litigation (MDL) Subcommittee’s ongoing consideration of suggestions that rules be developed for MDL proceedings.

The MDL Subcommittee reported on the status of its three remaining areas of study:

1. Screening claims in mass tort MDLs – whether by using plaintiff fact sheets and defendant fact sheets or by using a “census” approach that employs a simplified version of a plaintiff fact sheet;
2. Interlocutory appellate review of district court orders in MDL proceedings; and
3. Settlement review, attorney’s fees, and common benefit funds.

At the Advisory Committee’s meeting, the MDL Subcommittee reported its conclusion that the second area of study – interlocutory appellate review – should be removed from the study agenda. The original suggestion was for a rule that would create a right to immediate review. Such a route would bypass the discretion that 28 U.S.C. § 1292(b) currently provides to the district court (whether to certify that § 1292(b)’s criteria are met) and to the court of appeals (whether to accept the appeal). The idea of creating a right to immediate review was quickly disfavored, with the subcommittee focusing instead on whether some other type of expanded interlocutory review might be worth pursuing. The subcommittee reviewed submissions from proponents and opponents of expanding appellate review. Subcommittee representatives attended multiple conferences addressing the topic, including a June 2020 meeting that included lawyers and judges with extensive experience in MDL proceedings beyond the mass tort context. The subcommittee found insufficient evidence to justify proposing an expansion of appellate review, especially in light of the many difficulties that would be involved in crafting such a proposal.

The Advisory Committee agreed with the subcommittee’s recommendation that expanded interlocutory review be removed from the list of topics under consideration; the remaining two topics continue to be studied by the subcommittee. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Item

The Advisory Committee on Criminal Rules met by videoconference on November 2, 2020. The meeting focused on the emergency rules project and the Advisory Committee’s draft Rule 62 (Criminal Rules Emergency). The agenda also included a report from the Rule 6 Subcommittee.

At its May 2020 meeting, the Advisory Committee formed a subcommittee to consider two suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee’s agenda in 2012. As previously reported to the Conference in September 2020, the suggestions seek to add additional exceptions to the secrecy provisions in Rule 6(e). A group of historians and archivists seeks, in part, an amendment adding records of “historical importance” to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended “to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public.” The question of inherent authority has also been raised in recent Supreme Court cases. First, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in “appropriate cases” outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that “[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.” *Id.* Second, the respondent in *Department of Justice v. House Committee on the*

Judiciary, No. 19-1328 (cert. granted July 2, 2020), has relied on the courts’ inherent authority as an alternative ground for upholding the lower court’s decision.

The Advisory Committee has now received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances.

The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ’s proposal that courts be given the authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers).

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met by videoconference on November 13, 2020. Discussion items included possible amendments to Rule 106 (Remainder of or Related Writings or Recorded Statements) to exempt the “completing” portion of a statement from the hearsay rule and to extend the rule of completeness to oral as well as written statements; possible amendments to Rule 615 (Excluding Witnesses) to clarify the application of sequestration orders to out-of-court communications to sequestered witnesses; and possible amendments to Rule 702 (Testimony by Expert Witnesses) to clarify that the admissibility requirements must be found by a preponderance of the evidence, and to prohibit “overstatement” by forensic experts.

OTHER ITEMS

An additional action item before the Standing Committee was a request by Chief Judge Jeffrey R. Howard, Judiciary Planning Coordinator, that the Committee review the 2020 *Strategic Plan for the Federal Judiciary* and submit suggestions regarding prioritization of strategies and goals. The agenda materials included a copy of the *Plan* for Committee members to review prior to the meeting. After opportunity for discussion, the Standing Committee did not identify any particular strategies or goals to recommend for priority treatment over the next two years. This was communicated to Chief Judge Howard by letter dated January 11, 2021.

The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Respectfully submitted,



John D. Bates, Chair

| | |
|------------------------|---------------------|
| Richard P. Donoghue | William K. Kelley |
| Jesse M. Furman | Carolyn B. Kuhl |
| Daniel C. Girard | Patricia A. Millett |
| Robert J. Giuffra Jr. | Gene E.K. Pratter |
| Frank M. Hull | Kosta Stojilkovic |
| William J. Kayatta Jr. | Jennifer G. Zipp |
| Peter D. Keisler | |

Appendix – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

TAB 1D

NEWLY EFFECTIVE AMENDMENTS TO THE FEDERAL RULES

Effective December 1, 2020

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2020)
- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|-------------------------|---|-----------------------------------|
| AP 35, 40 | Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes. | |
| BK 2002 | Amendment (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan. | |
| BK 2004 | Subdivision (c) amended to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016. | CV 45 |
| BK 8012 | Conforms rule to proposed amendment to Appellate Rule 26.1. | AP 26.1 |
| BK 8013, 8015, and 8021 | Eliminated or qualified the term “proof of service” when documents are served through the court’s electronic-filing system, conforming the rule to the 2019 amendments to AP Rules 5, 21, 26, 32, and 39. | AP 5, 21, 26, 32, and 39 |
| CV 30 | Subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, amended to require that the parties confer about the matters for examination before or promptly after the notice or subpoena is served. The subpoena must notify a nonparty organization of its duty to confer and to designate each person who will testify. | |
| EV 404 | Subdivision (b) amended to expand the prosecutor’s notice obligations by: (1) requiring the prosecutor to “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose”; (2) deleting the requirement that the prosecutor must disclose only the “general nature” of the bad act; and (3) deleting the requirement that the defendant must request notice. The phrase “crimes, wrongs, or other acts” replaced with the original “other crimes, wrongs, or acts.” | |

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2020)

REA History:

- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|------------------|--|-----------------------------------|
| AP 3 | The proposed amendment to Rule 3 addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the <i>expressio unius</i> approach, and adds a reference to the merger rule. | AP 6, Forms 1 and 2 |
| AP 6 | Conforming amendment to the proposed amendment to Rule 3. | AP 3, Forms 1 and 2 |
| AP Forms 1 and 2 | Conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders. | AP 3, 6 |
| BK 2005 | The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142. | |
| BK 3007 | The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim. | |
| BK 7007.1 | The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1. | |
| BK 9036 | The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute. | |

Revised March 2021

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|--|--|--|
| AP 25 | The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. | |
| AP 42 | The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020). | |
| BK 3002 | The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if “the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.” | |
| BK 5005 | The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified. | |
| BK 7004 | The proposed amendments add a new Rule 7004(i) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title. | |
| BK 8023 | The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties. | AP 42(b) |
| BK Restyled Rules (Parts I & II) | The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024. | |
| SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019) | The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020. | |

Revised March 2021

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|--|---|--|
| SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A) | The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments. | |
| CV 12 | The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. | |
| CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) | Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). | |
| CR 16 | Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule. | |

TAB 1E

**Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)**

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|--|------------------|--|--|
| Protect the Gig Economy Act of 2021 | <u>H.R. 41</u> <i>Sponsor:</i> Biggs (R-AZ) | CV 23 | Bill Text: https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf Summary (authored by CRS): This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors. | <ul style="list-style-type: none"> • 1/4/21: Introduced in House; Referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |
| Injunctive Authority Clarification Act of 2021 | <u>H.R. 43</u> <i>Sponsor:</i> Biggs (R-AZ) | CV | Bill Text: https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf Summary (authored by CRS): This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. | <ul style="list-style-type: none"> • 1/4/21: Introduced in House; Referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |
| COVID-19 Bankruptcy Relief Extension Act of 2021 | <u>S.473</u> <i>Sponsor:</i> Durbin (D-IL) <i>Co-sponsor:</i> Grassley (R-IA) <u>H.R.1651</u> <i>Sponsor:</i> Nadler (D-NY) <i>Co-sponsor:</i> Cline (R-VA) | BK | Bill Text: https://www.congress.gov/bill/117th-congress/senate-bill/473/text Summary The bill would amend the CARES Act and the CAA of 2021 to extend certain temporary provisions of those acts (notably, an expanded definition of debtors who can take advantage of Chapter 11, Subchapter V of the Bankruptcy Code) until March 27, 2022. | <ul style="list-style-type: none"> • 2/25/21: S.473 Introduced to Senate and referred to Judiciary Committee • 3/8/21: HR.1651 introduced to the House and referred to Judiciary Committee • 3/18/21: H.R. 1651 passed the house. |

TAB 2

TAB 2A

FORDHAM

University School of Law

Lincoln Center, 150 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail: dcapra@law.fordham.edu

Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra and Liesa L. Richter
Re: Possible Amendment to Rule 702
Date: April 1, 2021

The Advisory Committee has been considering possible amendments to Rule 702 for the last seven meetings. A subcommittee, chaired by Judge Schroeder, assisted the Committee in narrowing the issues. By the time of the last meeting, the Committee's focus had narrowed to two possible changes:

1. An amendment that would prevent an expert from overstating conclusions.
2. An amendment clarifying that the questions of sufficiency of facts or data and reliable application of method are questions for the court, and must be proved to the court by a preponderance of the evidence under Rule 104(a).

At the Fall, 2020 meeting, the Committee made significant strides in developing an amendment to Rule 702, that will be voted on at this meeting.

The Minutes of the Fall, 2020 meeting describe the resolutions of the Committee regarding Rule 702 --- straw votes that set the table for this meeting.

What follows are excerpts from the Minutes regarding adding preponderance language to the text:

1. Committee members expressed substantial support for a preponderance amendment. All agreed that the existing circuitous path through *Daubert*, Rule 104(a), and *Bourjaily* to get to the preponderance standard for Rule 702 was challenging for lawyers

and judges. . . . Committee members expressed confidence that adding an express preponderance requirement to the language of Rule 702 would provide a clear signal to judges that would improve consideration of expert opinion testimony.

2. With respect to the form of a potential amendment to Rule 702, Committee members were in agreement [that] the draft amendment . . . adding the preponderance requirement after the existing language regarding an expert’s qualifications would be superior, because it would address the problem found in the cases and yet would retain the existing structure of Rule 702. The Department of Justice agreed that a preponderance amendment would be a helpful clarification to the Rule and expressed support for the draft amendment. . . . The Federal Public Defender also expressed support for an amendment to add a preponderance standard . . . noting that such an amendment would make it clear that the trial judge is supposed to act as the gatekeeper with respect to expert opinion testimony.

3. Hearing unanimous approval from the Committee to move forward with a preponderance amendment . . . the Chair asked the Reporter to prepare that draft for the Spring meeting, along with a draft Advisory Committee note. The Chair explained that the Committee could discuss the details of the note at the spring meeting, but emphasized that an Advisory Committee note would need to state that a preponderance amendment in the text of Rule 702 was not intended to create a negative inference about applying the standard to other rules.

4. The Reporter notified the Committee that some federal courts have also added an intensifier to the Rule 702(a) requirement that an expert’s opinion “will help” the trier of fact. These courts have required that an expert’s opinion will “appreciably help.” The Reporter explained that this misstatement of the Rule 702 standard by some courts did not by itself justify an amendment to the Rule, but noted that he had included language in brackets in the draft Advisory Committee note to the proposed preponderance amendment to emphasize that expert opinion testimony need only “help” and need not “appreciably help” under Rule 702. The Chair asked the Reporter to leave that bracketed language in the draft note to be taken up and considered by the Advisory Committee at its spring meeting.

What follows are excerpts from the Minutes of the last meeting that describe the Committee’s determinations regarding language addressed to overstatement. (Note that the choices for the Committee were: 1) adding a new subdivision (e) that would specifically prohibit experts from overstating an opinion; 2) a modest amendment to Rule 702(d) that would focus the provision more clearly on connecting the opinion to a reliable application of a methodology; and 3) to do nothing.

1. After discussion and pursuant to a question from a Committee member, the Chair stated that the Department clearly prefers no amendment to Rule 702 to address overstatement, draws a red line at an amendment that would add express “overstatement” regulation in a new subsection (e), and could live with the modest modification to subsection (d) depending on the content of the accompanying Committee note. The

Department representative agreed with the Chair’s characterization of its views. One Committee member stated definite support for an amendment to subsection (d) and confessed to being “on the fence” about the addition of a subsection (e). That Committee member expressed an inclination to support (e) as well due to the problems in the existing Rule 702 precedent, but expressed concerns about adding a subsection (e) on overstatement to civil cases.

Another Committee member expressed clear support for a new subsection (e), but stated support for a modification to (d) as a compromise, if necessary. Another Committee member agreed with those preferences and priorities. The Federal Defender agreed with the position that a new (e) is critical to address the testimony that comes out of an expert’s mouth on the stand, but noted that modifications to subsection (d) would be better than nothing. Another Committee member stated a preference for the modification to subsection (d) only, expressing doubt that a new subsection (e) would fix the problems that do exist in the precedent and concerns about drafting in a manner that would avoid unintended consequences. . . . Another Committee member stated opposition to the addition of a new subsection (e), arguing that it would represent too dramatic a change and that it was not needed to address what is essentially a lawyering issue in light of evolving forensic standards. This Committee member was also concerned about adding complexity to already extensive *Daubert* proceedings in civil cases, but had no objection to the language proposed to alter existing subsection (d).

2. The Chair rounded out the straw poll by expressing agreement with those Committee members who opposed a new subsection (e), articulating concerns that it was too substantial a change that could have unintended collateral effects. He suggested that the real problem in the expert testimony arena is not caused by Rule 702 and may not be solved by an amendment to Rule 702. He opined that the new criminal discovery rules would help fix problems with expert testimony, as would the Department of Justice’s efforts to craft uniform testimonial language for forensics experts. In closing, the Chair said he would not vote for (e), could support (d), but could live with doing nothing with respect to overstatement.

Here is the final entry in the Minutes regarding Rule 702:

In closing, the Chair asked the Reporter to prepare two draft alternatives of Rule 702 for the Committee’s consideration at its spring meeting:

- 1) A draft including preponderance language in the opening paragraph of Rule 702 and a slightly modified subsection (d). This draft should be accompanied by an Advisory Committee note that includes some brief reference to forensic evidence.
- 2) A draft including preponderance language in the opening paragraph of Rule 702 and a new subsection (e) regulating overstatement. This draft should be

accompanied by a more comprehensive Advisory Committee note, with passages specifically directed to forensic evidence.

This memorandum provides background on the issues that the Committee will vote upon at this meeting. It is divided into three parts. Part One sets forth some background on the overstatement problem. Part Two is a discussion of the admissibility/weight problem. Part Three sets forth two drafting alternatives with accompanying draft Committee Notes, in accordance with the direction at the last meeting.

This memo is significantly shorter than the Rule 702 memos for previous meetings --- because the Committee’s resolutions at the last meeting render much of the analysis from the prior memos moot. Anyone who seeks a refresher course should look at the Rule 702 memo for the Fall, 2020 meeting.

I. The Problem of Overstatement

A. Overstatement of Results in Forensics

The forensic case law digest, set forth after this memo, indicates many instances of forensic experts providing conclusions that cannot be supported by the methodology they employ. Expert overstatement was a significant focus of the PCAST report. And a report from the National Commission on Forensic Sciences addresses overstatement, with its proposal that courts should forbid scientific experts from stating their conclusion to a “reasonable degree of [field of expertise] certainty,” because that term is an overstatement, has no scientific meaning and serves only to confuse the jury.

As you know, the Department has issued a prohibition on use of the “reasonable degree of certainty” language by forensic experts, as well as important limitations on testimony regarding rates of error. Whether these measures taken by the Department are sufficient to control overstatement is a question on which reasonable minds can differ.

Judge Rakoff, at the Boston Symposium, suggested that a provision prohibiting an expert from overstating results should be added to Rule 702 --- and that this would be a meaningful change because the courts generally have not relied on any language in the existing rule to control the problem of overstatement. The participants at the Vanderbilt symposium were not of one mind as to the need for a specific limitation on overstatement. Some judges stated that a limit on overstatement can already be teased out of the existing language of the rule (i.e., reliable method reliably applied). Others said addressing overstatement specifically might help the judge, as text could then be directly relied upon.

B. Overstatement Outside Forensics?

The Committee decided early on that it would not propose an amendment to Rule 702 that was directed only to forensic experts. The rules of evidence are written to apply to all cases, and Rule 702 applies to all experts. Moreover, there might well be problems of definition if a rule were limited to “forensics.”

So if there is to be an overstatement amendment, it must apply to all experts. Is that justified? Previous memos have included cases indicating that the overstatement problem exists with a wide variety of experts. Experts in civil cases are essentially incentivized to exaggerate their opinions. And studies have shown that the more overstated the opinion, the more it has an effect on juries. So there is at least an argument that an overstatement amendment could be useful as to all experts.

On the other hand, there is an argument that extending the overstatement limitation to all cases can have unintended consequences. For one thing, it is not exactly clear how the requirement will apply to every kind of expert, such as experience-based experts, social scientists, accountants, etc. Notably, the American Association of Justice, in a written comment to the Committee, opposes an amendment on overstatement precisely because of its uncertain application to experts outside of forensics|:

It is AAJ’s position that the proposed amendment [on overstatement] should be rejected as it needlessly divides the bar, would not work for the variety of cases that use the rule, and has numerous likely unintended consequences—including judicial misapplication of the rule.

So there is cause for concern when an overstatement amendment is applied to all experts.

C. Cross-examination as a Solution to the Overstatement Problem

At previous meetings, it has been asserted that the question of overstatement of expert opinion can be adequately handled by cross-examination. For example, if a forensic expert says that he has determined, by a reasonable degree of scientific certainty, that there is a match between a trace substance and the defendant, the defense counsel can attack that testimony on cross-examination --- defense counsel can contradict the conclusion by referring to the PCAST report, or the DOJ standards; counsel might establish through cross-examination the subjective choices that the expert made. And so forth.

Whether cross-examination is a sufficient device to regulate overstatement is a difficult question to assess. There are few data points to rely on, although at least one empirical study has indicated that cross-examination has little impact on the jury when a forensic expert overstates a conclusion. See Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 *Hastings L.J.* 1159, 1167-69 (2008) (explaining that “[w]hether or not jurors were informed about the limitations of microscopic hair examination on cross-examination or by the judge had little measurable or meaningful impact

on their judgments about the likelihood that the defendant was the source of the crime-scene hair or their perceived understanding of the expert's testimony”).

Perhaps another data point is all the criminal convictions in which forensic experts overstated their conclusions (including the hair identification scandal in which the DOJ admitted that experts overstated their results in hundreds of cases that resulted in conviction). Apparently, cross-examination was *not* a sufficient regulator in all of these cases --- including the very recent cases set forth in the case digest.

Moreover, reviews of cases involving forensic evidence indicate that *forensic experts often don't get cross-examined at all*. For example, forensic experts were not cross-examined in almost half of the wrongful convictions that have been documented by the Innocence Project. So if cross-examination is the answer to overstatement, it hasn't always been employed that way.

Perhaps another way to think about cross-examination as a remedy is to compare the overstatement issue to the issues of sufficiency of basis, reliability of methodology, and reliable application of that methodology. As we know, those three factors must be shown by a preponderance of the evidence. The whole point of Rule 702 --- and the *Daubert*-Rule 104(a) gatekeeping function --- is that these issues *cannot* be left to cross-examination. The underpinning of *Daubert* is that an expert's opinion could be unreliable and the jury could not figure that out, *even given cross-examination and argument*, because the jurors are deferent to a qualified expert (i.e., the white lab coat effect). The premise is that cross-examination cannot undo the damage that has been done by the expert who has power over the jury. This is because, for the very reason that an expert is needed (because lay jurors need assistance) the jury may well be unable to figure out even after cross-examination whether the expert has a sufficient basis, is using reliable methodology, and it reliably applying it.

The real question, then, is whether the dangers of juror mistakes regarding overstatement are any different from the dangers of being unable to assess insufficient basis, unreliability of methodology, and unreliable application. Why would cross-examination be insufficient for the latter yet sufficient for the former?

It is hard to see any difference between the risk of overstatement and the other risks that are regulated by Rule 702. When an expert says that they are certain of a result --- when they cannot be --- how is that easier for the jury to figure out than if an expert says something like “I relied on four scientifically valid studies concluding that PCB's cause small lung cancer.”¹ When an expert says he employed a “scientific methodology” when that is not so, how is that different from an expert saying “I employed a reliable methodology” when that is not so?

¹ That was the expert's testimony in *Joiner* and the Supreme Court held that the trial judge correctly exercised the gatekeeping function in excluding the testimony, because the studies did not actually support a conclusion of causation. But why wasn't it sufficient that the lack of support could have been brought up on cross-examination? The answer is, the imposition of the gatekeeping function assumes that cross-examination will be insufficient when there is an analytical gap between the expert's methodology and the expert's conclusion.

Judge Rakoff, in *United States v. Glynn*, 578 F.Supp.2d 567, 574 (S.D.N.Y. 2008), when evaluating the admissibility of ballistics evidence, directly addressed the need for a gatekeeper when it comes to overstatement:

The problem is how to admit [the expert opinion] into evidence without giving the jury the impression—always a risk where forensic evidence is concerned—that it has greater reliability than its imperfect methodology permits. The problem is compounded by the tendency of ballistics experts . . . to make assertions that their matches are certain beyond all doubt, that the error rate of their methodology is “zero,” and other such pretensions. *Although effective cross-examination may mitigate some of these dangers, the explicit premise of Daubert and Kumho Tire is that, when it comes to expert testimony, cross-examination is inherently handicapped by the jury's own lack of background knowledge, so that the Court must play a greater role, not only in excluding unreliable testimony, but also in alerting the jury to the limitations of what is presented.*

It should also be noted that cross-examination has its work cut out for it when it comes to experts expressing unjustified confidence in an opinion. Research on juries (including post-trial interviews) indicates that the greater the expert's confidence in her conclusion, the more the expert's testimony is likely to sway the jury. If this confidence is unfounded, the risk of inaccurate verdicts runs high.² Moreover, there is research on juries demonstrating that even when jurors are apprised of the problems with forensic evidence on cross-examination, that information has little impact on their decisionmaking.³

In sum, it seems difficult to argue that cross-examination is the solution for overstatement, while gatekeeping is required for the related questions of reliable methodology and reliable application. The remaining question, though is whether a new subdivision on overstatement is required to address the problem. The contrary argument is that overstatement can be regulated under the existing rule, especially if subdivision (d) is slightly modified to require the court to focus more closely on whether the opinion can be justified by a reliable application of the methodology.

² See, e.g., Vidmar, *Expert Evidence, the Adversary System, and the Jury*, 95 American J. of Pub. Health, S137 (2005) (finding that an expert's confidence in an opinion was a critical factor in assessing the weight of the expert's testimony).

³ See, e.g., McQuiston-Surrett & Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences: Accuracy and Impact*, 59 Hastings L.J. 1159, 1167-69 (2008) (“Whether or not jurors were informed about the limitations of microscopic hair examination on cross-examination or by the judge had little measurable or meaningful impact on their judgments about the likelihood that the defendant was the source of the crime-scene hair or their perceived understanding of the expert's testimony.”).

D. Isn't an Overstatement Limitation Already in the Rule?

One important argument against an overstatement amendment, raised by several members at the last meeting, is that adding a new subdivision on overstatement is not necessary because overstatement is simply an aspect of the existing requirements in the rule: reliable methodology reliably applied. For example, an expert who testifies that “I am certain that there is a match” might be using a reliable methodology (e.g., ballistics), but is not applying it reliably (because the methodology is subjective and so not error-free).

Amendments can create difficulties if new language is added to existing language that already covers the problem. There is a risk of confusion and unintended consequences by this duplication.

That said, there is an argument that it could be useful to break overstatement out as a separate factor, in order to draw attention to it --- because the case digest shows that many courts are *not* regulating overstatement as seriously as they are the reliability factors set forth in the text of Rule 702.

It is fair to state, though that some courts have read the existing Rule as requiring the court to regulate overstatement. A recent example is *United States v. Valencia-Lopez*, 971 F.3d 891 (9th Cir. 2020), where the court held that the trial judge abused discretion by allowing an ICE Supervisory Special Agent to testify as an expert that there was no possibility that drug cartels would coerce a truck driver at gunpoint to carry illegal drugs across the border --- as the defendant claimed in his defense. The court of appeals stated: “It is one thing for a witness with Agent Hall’s expertise to testify as to the risks to a cartel of using a coerced courier. But that is a far cry from testifying essentially that the cartel never does it.” *See also United States v. Requena*, 980 F.3d 30 (2d Cir. 2020) (expert testimony about drug identification, noting that “a district court could well abuse its discretion by permitting an expert to affirm that substantial similarity *is* a matter of objective scientific fact rather than a subjective conclusion based on a conventional understanding of the words ‘substantial’ and ‘similar’”).

It can be argued that some sharpening of subdivision (d) would be a good compromise: it might focus courts on the expert’s actual opinion, and consequently the possibility of overstatement, without an additional subsection on overstatement that might raise questions if limitations are already in the rule. The compromise approach is more of a sharpening, rather than a new limitation that might be seen by some as duplicative. That compromise is discussed immediately below.

E. Proposed Change to Rule 702(d), Instead of a Separate Provision Prohibiting Overstatement.

At the last meeting, both Judge Kuhl, the Liaison from the Standing Committee, and Judge Schroeder suggested a change to Rule 702(d) (reliable application) that would focus a court on the expert’s opinion, and thus the potential of overstatement. That suggestion is as follows:

(d) the ~~expert has reliably applied~~ expert's opinion [reflects or is limited to] a reliable application of the principles and methods to the facts of the case.

Here is Judge Kuhl's explanation for her suggestion:

It's not a large change to subpart (d), obviously. But by making the expert's conclusion the subject of the sentence, the language more clearly empowers the court to pass judgment on that conclusion. It seems clear (to me) that overstatement cannot be said to arise from *reliable* application of acceptable principles and methods.

As stated above, the majority of the Committee voted in favor of adding a focus on the expert's opinion in Rule 702(d). This change of emphasis can possibly direct the court and the parties to focus on the overstatement problem, and more generally to consider the importance of looking at the expert's conclusion as well as the methodology --- the point made by the Supreme Court in *Joiner*. It could also serve to emphasize that the supportability of the conclusion is an admissibility requirement rather than a question of weight.

The question remaining is how best to draft the provision. It can be argued that the use of the term "limit" is a bit more precise, because, after all, what the court is doing is enforcing a limit on the expert's opinion. The term "reflect" is used in Rule 803(5) --- the past recollection recorded must accurately reflect the declarant's knowledge. It is also used twice in the Best Evidence Rules. The term "limit" is more customary in the Evidence Rules. It is used 11 times, all in the context of imposing restrictions on the use or admissibility of evidence (sometimes in stating that the rule imposes no limits on a certain use). So there is something to be said for choosing the more common term, one that arises in similar situations.

Assuming that "limit" is the preferable term, some adjustment needs to be made to the draft that was reviewed by the Committee at the last meeting. The amendatory language, in terms of "limit" was that "the opinion is limited to a reliable application of the principles and methods to the facts of the case." That seems to be missing something. It is not the opinion that is limited to a reliable application. It seems more accurate to say that "the opinion is limited to what may be drawn from a reliable application of the principles and methods of the case." Interestingly, if "reflects" is used, the extra language does not seem as necessary. An opinion can "reflect a reliable application of the principles and methods to the facts of the case." But in the end, it may be better to go with the more prevalent term, "limit," and add those few extra words. The draft in Section III does use the term "limit" for the proposed amendment to subsection (d).

One final point. On reviewing this modification to subsection (d), the Chair had another refinement that would be an improvement. He suggests that (d) should read "the witness's opinion is limited to what may be drawn from reliably applying the principles and methods to the facts or data" (rather than "to the facts of the case"). He explains this modification as follows:

I think that (d) should clearly connect to (b) and (c) — i.e., that it should be clear that the “principles and methods” to which (d) refers are the same “principle and methods” to which (c) refers and that the “facts or data” to which (d) refers are the same “facts or data” to which (b) refers. As drafted, the connection between (d) and (c) is clear, but the connection between (d) and (b) is muddled by using one expression in (b) (“facts or data”) and another in (d) (“facts of the case”). I fear that may lead to mischief.

This is a good point, and it does provide a better connection with (b) and (d). So I have added that change to the draft.

II. A Discussion of the Admissibility/Weight (Rule 104(a)) Problem

As stated above, the Committee has, in a straw poll, voted unanimously in favor of an amendment to Rule 702 that would emphasize that the questions of sufficiency of basis (subdivision (b)) and reliability of application (subdivision (d)) are questions of admissibility and not weight.

The Committee’s work in this area was in response to a law review article highlighting a number of cases that appear not to have read the Rule as it is intended. The Rule provides that the requirements of sufficient basis and reliable application must be treated as questions of admissibility --- and so, according to the Supreme Court cases of *Daubert* and *Bourjaily*, as admissibility requirements these factors must be established by a preponderance of the evidence under Rule 104(a). But the cases cited in the law review article appeared to be treating these admissibility requirements as questions of weight --- meaning that these courts are applying the lesser Rule 104(b), “sufficient to support a finding” standard.

A previous memo to the Committee on this subject took a deep dive into the cases that have been cited as the leading examples of courts ignoring the Rule 104(a) standard for questions of sufficiency of basis and reliability of application. The takeaway points from the case law survey were as follows:

- A court’s declaration that sufficiency of basis and reliability of application are “questions of weight” is not necessarily a misapplication of Rule 702/104(a) in a particular case. That is because even under 104(a) there are disputes that will go to weight and not admissibility. When the proponent has met the preponderance standard and the opponent responds with some deficiency that does not sufficiently detract from the proponent’s showing of a

preponderance, then that deficiency is a question of weight and not admissibility --- under the preponderance standard.

- Many opinions can be found with broad statements such as “challenges to the sufficiency of an expert’s basis raise questions of weight and not admissibility” --- a misstatement made by circuit courts and district courts in a disturbing number of cases. And those broad misstatements of the law can have a pernicious effect beyond the specific case.

- In some of the reviewed cases, even though the court incorrectly stated that questions of sufficiency of data and reliability of application are questions of weight, the expert arguably satisfied the Rule 104(a) standard anyway, so the court’s cavalier treatment of Rule 702(b) and (d) appears to make no difference to the result. In other cases, it cannot be determined whether the court used the 104(a) or the 104(b) standard in assessing sufficiency of basis and application. Evaluation of the cases is muddled by the fact that, unfortunately, courts rarely articulate the standard of proof that they are employing.

- There are certainly a number of cases in which the court not only misstates the appropriate standard, but also misapplies it in the specific case--- by allowing experts to testify even though the proponent has not established more likely than not that there is a sufficient basis for the opinion and/or that the methodology has been reliably applied.⁴ Before the last meeting, the defense bar submitted to the Committee several lengthy studies, as well as a number of letters, analyzing the case law and concluding that the admissibility requirements of Rule 702(b) and (d) have been ignored by many courts --- both in terms of statements of the law, and in application. A review of those cases by the

⁴ A recent example is *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020): The court affirmed two defendants’ convictions for various offenses arising from their payments of bribes to officials of global and regional soccer organizations in exchange for broadcasting and marketing contracts. They challenged the trial judge’s admission of the government’s expert witness testimony about the economic impact that officials accepting bribes would have on soccer organizations such as FIFA and CONMEBOL. The expert, a professor of sports management at the University of Michigan, conducts research on the economics and business of sports, but had not performed any empirical analysis of actual data relating to FIFA. The trial judge ruled that the insufficiency of facts or data went to the weight of the expert’s testimony, not its admissibility. The court stated that “while a trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that an expert’s assumptions are unfounded go to the weight, not the admissibility, of the testimony.” This looks like a Rule 104(b) application, as the expert looked at no data relating to FIFA. Notably, the court stated that expert testimony is presumptively admissible, which is decidedly not the case.

Reporter indicated that most were in fact properly pegged as applying the lesser Rule 104(b) standard to the questions of sufficiency of basis and reliable application.

Specifying in Rule 702 the Standard of Proof that Currently Applies Anyway.

An undeniable concern in amending Rule 702 to add the Rule 104(a) standard is that the standard *already* applies to the admissibility requirements in the Rule. The court in *Daubert* stated that the gatekeeper function was grounded in Rule 104(a); and *Bourjaily* interpreted Rule 104(a) to mandate the application of a preponderance of the evidence standard for all admissibility requirements other than those involving conditional relevance, which are subject to the lesser “sufficient to support a finding” standard of proof.

Adding the preponderance standard to the text of the rule may raise questions about its applicability to all the other rules --- the Rule 104(a) standard applies to almost all the admissibility requirements in the Federal Rules, but it is not specifically stated in the text of any of them.

But there is also a counterargument: While Rule 104(a) applies to most FRE admissibility requirements, including those in Rule 702, there is nothing in Rule 702 *itself* that directs the parties or the court to the preponderance standard. Indeed, there is *nothing in Rule 104(a) itself* that speaks to a preponderance standard --- that construct of Rule 104(a) comes from *Bourjaily* and from a footnote in *Daubert*. So a lot of thinking (and reading outside the Rules) needs to be done to get to applying the preponderance standard to the Rule 702(b) and (d) admissibility requirements.

And while it is true that Rule 104(a) applies well beyond the admissibility requirements of Rule 702, it is in applying Rule 702 that most of the problems have occurred. (There is nothing in the reported cases about disputes over the standard of proof in the admissibility requirements of the excited utterance exception, for example). So, if there is a problem that the courts are having in applying the general requirement to Rule 702 specifically, it makes sense to change the specific rule to remind the courts that the general requirement applies --- with a proviso in the Committee Note to say that no change is intended for any other rule, and that the Committee simply found it necessary to remind courts about the Rule 702 admissibility requirement because many courts have ignored them. Such a proviso is placed in the draft Committee Note set forth in Section III.

Possible Confusion About the Helpfulness Standard in Rule 702

Beyond the issues surrounding the reliability requirements of Rule 702 (b)-(d), discussed above, there is a question in the case law about the application of the “helpfulness” standard of Rule 702(a). Rule 702(a) requires the court to find that the expert’s testimony will “help the trier of fact to understand the evidence or determine a fact in issue.” The operative word is “help”. But there are some courts that have read into the rule a requirement that the testimony not only help, but “appreciably help” the trier of fact. *See, e.g., Cunningham v. Wong*, 704 F.3d 1143, 1167 (9th Cir. 2013) (“Admissible expert testimony is meant to provide the jury with ‘appreciable help’ in their determinations.”); *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973) (expert testimony on the unreliability of identifications was properly excluded as it did not “appreciably help” the jury). Courts following this potentially higher standard have cited to Wigmore’s treatise on evidence to establish the “appreciable help” requirement as the “essential question” of expert admissibility. *See Keys v. Wash. Metro. Area Transit Auth.*, 577 F. Supp. 2d 283, 286 (D.D.C. 2008) (“As Professor Wigmore stated, the admissibility of expert testimony is guided by one essential question: ‘On this subject can a jury from this person receive appreciable help?’”) (citing WIGMORE ON EVIDENCE § 1923 (3d ed. 1940)). *See also Sullivan v. Alcatel-Lucent USA, Inc.*, 2014 U.S. Dist. LEXIS 97011, at *15 (N.D. Ill.) (“[T]he crucial question is, on this subject can a jury from this person receive appreciable help?”); *Cage v. City of Chicago*, 979 F. Supp. 2d. 787, 834 (N.D. Ill. 2013) (expert must appreciably help).

Other courts, however, have found that there is no heightened standard of helpfulness for expert testimony that satisfies the other requirements of the rule. *See, e.g., United States ex rel. Morsell v. Symantec Corp.*, 2020 U.S. Dist. LEXIS 54847, *12 (D.D.C. 2020) (“[T]he ‘help’ requirement [from Rule 702] is satisfied where the expert testimony advances the trier of fact’s understanding to any degree.”) (quoting 29 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 6264.1 (2015)); *United States v. Lamarre*, 248 F.3d 642, 648 (7th Cir. 2001) (testimony of the defendant’s mental disability was helpful in a fraud case: “Trial courts are not compelled to exclude all expert testimony merely because it overlaps with matters within the jury’s experience.”); *United States v. King*, 898 F.3d 797, 805–06 (8th Cir. 2018) (in a pill mill case, the court uses the “to any degree” standard, and states: “While Dr. Roman acknowledged that he could not definitively state that any particular prescription was illegitimate absent more information, his opinion on the general operation of the clinic based on the accumulated evidence was still relevant. On the whole, Dr. Roman’s opinion on the PMP charts advanced the trier of fact’s understanding of the clinical practices at KJ and Artex and how they differed from ordinary medical facilities.”); *United States v. Archuleta*, 737 F.3d 1287, 1297 (10th Cir. 2013) (expert testimony about the operation of a gang was properly admitted: “At bottom, Archuleta simply fails to explain how relevant evidence, which no other witness covered, was unhelpful to the jury’s understanding of the implications of his membership in the Tortilla Flats. *See* 29 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure: Evidence § 6265, at 250 (1997) (“[T]he ‘assist’ requirement is satisfied where expert testimony advances the trier of fact’s understanding to any degree.”)).

There is some doubt about whether there is any daylight between “help” and “appreciably help” in the case results. For example, in *Keys*, the court quoted the Wigmore “appreciably help” language but ultimately excluded the expert’s testimony because it was “irrelevant.” And in *Sullivan, supra*, the “appreciably help” standard was employed but it was quite clear that the expert’s testimony was not helpful at all --- as he just read out documents and applied his interpretation without any indication of how he came to those interpretations. The “conflict” appears to be more about what treatise a court uses rather than a real difference in the standard. The “appreciable help” cases quote Wigmore, while the “any help” cases quote Wright and Gold.

I haven’t seen a case where a court held the following: “I find that the expert’s testimony is helpful, but not appreciably so, and therefore I am excluding the evidence.” Nor have I seen a case in which the court declared the reverse: “I am admitting the evidence because I find it helpful, though I cannot say it is appreciably helpful.” In some sense, the problem of figuring out whether there is any difference in the standards as applied is similar to the admissibility/weight question: different standards are bandied about but in many cases it makes no difference to the result.

That said, it is troublesome that courts say they are applying a standard that is not supported by the text of the rule. The wayward language problem that applies to the admissibility/weight question is also an issue here. It is probably not problematic enough to justify an amendment to Rule 702 on its own, but it may be something to address as an “add-on.” As discussed in the Rule 615 memo, an “add-on” is often a good idea because otherwise a mild improvement to a rule might never be made --- and if you get essentially one shot at a particular rule every decade or so, you might as well try to improve what you can.

So let us assume that the Committee finds it worthwhile to address the “help vs. appreciable help” question. Which of the two is the correct standard? It seems clear that the correct standard is “help” rather than “appreciably help” --- the obvious reason being that “appreciably” is not in the text of the Rule. Wigmore is the fountainhead of the “appreciably help” line of cases, and the problem with Wigmore as a source is that he was not construing the text of Rule 702 (unlike Wright and Gold). The original Committee Note to Rule 702, while citing Wigmore, pointedly does not give any imprimatur to an “appreciably help” standard. The Committee Note states that the standard is whether the opinion “assist[s] the trier” and provides that when expert opinions are excluded, “it is because they are unhelpful and therefore superfluous and a waste of time.” So there is nothing in the text or note that supports a higher standard than “helpfulness.”

Moreover, as a matter of policy, it would appear that an “appreciably help” standard is too strict (if actually applied as a higher threshold). It would allow a court to exclude reliable and helpful expert testimony on the mushy ground that it wasn’t helpful *enough*. That would leave a lot to the discretion of a trial judge, and would make review quite difficult. Given all the other requirements for expert testimony (especially if Rule 104(a) is correctly applied to them), there is a risk that an “appreciable help” standard could operate as an extra hurdle that could make it too difficult to admit relevant and reliable expert testimony.

Now let us assume that something in the amendment should reject the “appreciable help” standard. How should the issue be addressed? It is pretty clear that it *cannot* be addressed in the

text of the amendment. That is because the “appreciably help” courts have *added* a word that is not in text. So you can’t cut anything out. And you definitely do not want to take out the word “help” for some other word, as there is a lot of case law on that word. And you definitely don’t want to add something like:

the expert’s . . . knowledge will help . . . but it need not appreciably help . . .

It should be noted here that the problem to be addressed is not exactly the same as with the admissibility/weight question. As found above, some courts have read the preponderance of the evidence requirement out of Rule 702(b) and (d). But in fact there is nothing explicit about the standard of proof in Rule 702. To get to the preponderance of the evidence requirement, you have to read *Daubert*, *Bourjaily*, etc. So, adding text that specifies the preponderance of the evidence requirement can be thought to be a clarifying improvement. In contrast, as to the “appreciable help” requirement, courts are adding a requirement that is not in the text. There seems to be little to do in the text to clarify its meaning or to correct the error.

What this means is that if the “appreciable help” standard is to be addressed, it should probably be in the Note. **Here is some language that might work in the Note.**

Rule 702 requires that the expert’s knowledge must “help” the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert’s testimony to “appreciably help” the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

At the last meeting, this language was included in the draft Committee Note, but was not the subject of discussion. Per the Chair’s direction, the language is one again set forth in the draft Committee Notes set forth in Section III.

III. Drafts of a Possible Amendment to Rule 702

1. Draft One --- Amendment Modifying 702(d) and Adding 104(a) language to rule text

Rule 702. Testimony by Expert Witnesses

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 court finds that the proponent has demonstrated by a preponderance of the evidence that:

(a) the ~~expert's~~ witness'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- witness's~~ has reliably applied opinion is limited to what may be drawn from reliably applying the principles and methods to the facts of the case or data.

Draft Committee Note

Rule 702 has been amended in two respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence. *See* Rule 104(a). Of course, the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States*, 483 U.S. 171 (1987). But unfortunately many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a) and are rejected by this amendment.

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying the reliability requirements of that Rule.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000. But of course other admissibility requirements in the rule ---

such as that the expert must be qualified --- are governed by the Rule 104(a) standard as well. The amendment focuses on subdivisions (b)-(d) because those are the requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard.

Of course, some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis generally or always go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusion based on contested sets of facts. Where that is so, the preponderance of the evidence standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

Rule 702(d) has also been amended to provide that a trial judge should exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert. A testifying expert's opinion should stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology.

[Option 1: For example, a forensics expert may not be permitted to testify to a "zero rate of error" if the methodology is subjective and thus necessarily is subject to error.]

[Option 2: For example, a forensics expert who states or implies that a method or conclusion is "infallible," "certain," or "error-free" will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is "scientific" is not supported --- and is prohibited under this amendment.]

Testimony that mischaracterizes the conclusion that an expert's basis and methods can reliably support undermines the purposes of the Rule and requires intervention by the judge. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the conclusions of an expert that go beyond what the expert's basis and methodology may reliably support.

Nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are unsupported by the expert's basis and methodology.

2. Draft Two – Adding Rule 104(a) Language to Rule Text and Adding an Overstatement Limitation

Rule 702. Testimony by Expert Witnesses

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 by a preponderance of the evidence that:

- (a) the ~~expert's~~ witness'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~~ witness has reliably applied the principles and methods to the facts of the case; and
- (e) the witness does not overstate the conclusions that may be drawn from a reliable application of the principles and methods

Draft Committee Note

Rule 702 has been amended in two respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by to the court a preponderance of the evidence. *See* Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States*, 483 U.S. 171 (1987). But unfortunately many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment.

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying the reliability requirements of that Rule.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000. But of course other admissibility requirements in the rule --- such as that the expert must be qualified --- are governed by the Rule 104(a) standard as well. The

amendment focuses on subdivisions (b)-(d) because those are the requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always or generally go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusion based on contested sets of facts. Where that is so, the preponderance of the evidence standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

Rule 702 has also been amended to provide that an expert may "not overstate" the conclusions that can be drawn from a reliable application of the expert's principles and methods, and emphasizes that the court must regulate conclusions of experts even if they are employing a reliable method. Testimony that inaccurately states the conclusion that an expert's methods can reliably support undermines the purposes of the Rule and requires intervention by the judge as gatekeeper. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the conclusions that an expert's methodology may reliably support.

The amendment is especially pertinent to testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities – for example, when comparing features to assess the possible origin of an evidence sample. It is important that the expert accurately inform the factfinder of the meaning of the results that are reached. A forensic expert who states or implies that a method or conclusion is "infallible," "certain," or "error-free" will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is "scientific" is not supported --- and is prohibited under this amendment.

Under the amendment the expert must accurately state the meaning of the results found by the expert. Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, based where appropriate on empirical studies of how often the method

produces correct results, as well as other relevant limitations inherent in the methodology. Claims of a match, or of probabilities based only on the expert's experience, without empirically valid support, would not be admissible because they are not reasonably drawn from the method used.

Claims that a forensic expert expresses an opinion to a "reasonable degree of [scientific/forensic] certainty" should be strictly scrutinized under the amendment. That phrase has no scientific meaning; it was developed by lawyers, not scientists. See National Commission on Forensic Science, *Testimony Using the Term "Reasonable Scientific Certainty"*, <https://www.justice.gov/ncfs/file/795146/download> ("Rather than use 'reasonable...certainty' terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination."). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as "cannot be ruled out" or "more likely than not." Of course this amendment does not bar testimony that satisfies a state law standard of proof in cases where state law provides the rule of decision.

Nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are clearly unsupported by the expert's basis and methodology.

Reporter's Note: If a subdivision (e) is added to regulate overstatement, then the amendment to (d)--- requiring a greater focus on the expert's opinion --- should not be included. The proposed change to (d) while relatively minor, is likely to create confusion when considered with the overstatement provision. There would obviously be some overlap in the two provisions. As the amendment to (d) was offered as a compromise on the overstatement question, it would make no sense to enact both the compromise and the explicit rule against overstatement.

TAB 2B

FORENSIC CASE DIGEST

2008-Present

Prepared by Daniel J. Capra

Several Committee members have expressed an interest in development of a case digest on forensic expert testimony, as a way to evaluate the scope of the problem --- particular the problem of an expert opinion that overstates the conclusion that can reliably be drawn from the methodology. The Reporter has prepared a digest on federal appellate cases and federal district court cases. The digests run from 2008 to date --- 2008 was picked because that was when the first challenges in the scientific community were voiced. (I threw in a couple of older cases that I wrote up for other projects).

The case digest has gotten so large that I decided to put it in its own file.

A. Federal Appellate Cases on Forensic Evidence

Acid-phosphate testing: *United States v. Rodriguez*, 581 F.3d 775 (8th Cir. 2009): The court affirmed a conviction for kidnapping resulting in death, finding no abuse of discretion in permitting a government pathologist to testify about acid-phosphate tests on the victim's body, indicating the presence of semen. The pathologist "did not invent acid-phosphate testing; he testified to attending national medical conferences and reviewing scientific literature on the topic." The expert's conclusion was based on living people, and the defendant pointed out that there was uncertainty about the timing of the chemical process on a corpse. But the court found that this variable went to weight and not admissibility.

Ballistics --- **Overstatement Problem: *United States v. Williams*, 506 F.3d 151 (2nd Cir. 2007):** The court found no abuse of discretion in allowing a ballistics expert to testify to a "match." The court found that the district court was not required to hold a *Daubert* hearing on the admissibility of ballistics evidence, as the district court had relied on precedent:

We think that *Daubert* was satisfied here. When the district court denied a separate hearing it went through the exercise of considering the use of ballistic expert testimony in other cases. Then, before the expert's testimony was presented to the jury, the government provided an exhaustive foundation for Kuehner's expertise including: her service as a firearms examiner for approximately twelve years; her receipt of "hands-on training" from her section supervisor; attendance at seminars on firearms identification, where firearms examiners from the United States and the international community gather to present papers on current topics within the field; publication of her writings in a peer review journal; her obvious expertise with toolmark identification; her experience examining approximately

2,800 different types of firearms; and her prior expert testimony on between 20 and 30 occasions. Under the circumstances, we are satisfied that the district court effectively fulfilled its gatekeeping function under *Daubert*.

The court did impose a qualification on admitting ballistics testimony:

We do not wish this opinion to be taken as saying that any proffered ballistic expert should be routinely admitted. *Daubert* [did not] “grandfather” or protect from *Daubert* scrutiny evidence that had previously been admitted under *Frye*. Thus, expert testimony long assumed reliable before Rule 702 must nonetheless be subject to the careful examination that *Daubert* and *Kumho Tire* require. * * * Because the district court's inquiry here did not stop when the separate hearing was denied, but went on with an extensive consideration of the expert's credentials and methods, the jury could, if it chose to do so, rely on her testimony which was relevant to the issues in the case. We find that the gatekeeping function of *Daubert* was satisfied and that there was no abuse of discretion.

Ballistics: *United States v. Mikos*, 539 F.3d 706 (7th Cir. 2008): The court found no error in admitting the testimony of a ballistics expert that the defendant's revolver was one of the models that could have been the murder weapon. The expert disclosed that at least 15 other models could have fired the bullets, *so he did not overstate his findings*. The expert reliably applied the data he obtained to conclude that the rifling on the bullets did not rule out the defendant's make and model of gun.

Ballistics --- testimony of a match allowed without comment by the court: *United States v. Brown*, 973 F.3d 667 (7th Cir. 2020): Here is the court's description of the testimony of four ballistics experts (three state experts and one from the FBI):

Pomerance examined 9mm cartridge casings that were recovered from the area where Cordale Hampton and his uncle were shot. He compared them to 9mm cartridge casings from an October 2005 shooting. The individual characteristics *were the same on both, and so he determined that they were fired by the same firearm*. Pomerance also compared a 5.7 x 28mm cartridge casing from the Eddie Jones shooting to a 5.7 x 28mm cartridge casing from the Simmons shooting. *The markings matched*. Murray *found a match* between 5.7 x 28mm casings from the Jonte Robinson shooting and comparable casings from the Simmons shooting. Murray also found that a firearm seized from Bush's storage locker *fired the cartridge casings* from the Eddie Jones shooting. Stevens *found a match* between .40 caliber cartridge casing from the Wilber Moore murder and the same type from the October 2005 shooting. *Jiggets testified that the .45 caliber cartridge casings recovered from the Bluit/Neeley murder scene matched casings* found at the Daniels murder scene.

The defendants challenged the ballistics match testimony by relying on the PCAST report. The Court of Appeals stated that the trial court “chose not to give it dispositive effect, and that choice was within its set of options.”

As to the reliability of ballistics testing, the court declared that it has “almost uniformly accepted by federal courts.” See, e.g., *Cazares*, 788 F.3d at 989. It noted that “several reliability studies have been conducted on it” and although the error rate varies from study to study, “overall it is low—in the single digits.” So the court found no abuse of discretion in admitting the testimony. The court did not comment at all on the overstatements made by the experts.

Ballistics --- some limitation on overstatement: *United States v. Parker*, 871 F.3d 590 (8th Cir. 2017): In a trial on charges of illegal possession of firearms, the defendant argued that the trial court erred in allowing testimony of a ballistics expert. The trial court prohibited the expert from testifying that she was “100% sure” or “certain” that the relevant guns matched the relevant shell casings. The defendant argued that the expert violated that restriction by describing the general reliability of the ballistics testing process. But the court, after reviewing the trial transcript, concluded that the expert’s testimony “stayed within the bounds set by the district court.”

Ballistics --- Overstatement--- reasonable degree of ballistics certainty: *United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017): In a felon-gun possession case, the expert testified that two bullets matched to a “reasonable degree of ballistics certainty.” The court found that this “qualification” was sufficient to justify admission of the expert testimony – i.e., the expert did not state, categorically that there was a match. The court rejected the defendant’s argument --- based on a report and recommendation from National Commission of Forensic Science --- that the “reasonable degree of ballistics certainty” test was itself insupportable and misleading. The court did not address the Commission report but instead simply relied on lower court cases employing the standard and stated that there was “only one case in which a ‘reasonable degree of ballistics certainty’ was found to be too misleading.” That case is *United States v. Glynn*, 578 F.Supp.2d 567 (S.D.N.Y. 2008). Finally, the court rejected the defendant’s argument that ballistics is inherently unreliable and fails to satisfy the *Daubert* factors. But instead of rebutting the defendant’s attack on ballistics as unscientific, the court simply relied on precedent and stated that the defendant had not cited a case in which ballistics testimony was “excluded altogether.”

Cell Site Location --- regulation of overstatement: *United States v. Hill*, 818 F.3d 289 (7th Cir. 2017): The court held that the science and methods supporting historical cell site location are understood and well-documented. But the court found it important that the trial expert “emphasized that Hill’s cell phone’s use of a cell site did not mean that Hill was right at that tower or at any particular spot near that tower.” It concluded that the expert’s disclaimer “save[d] his testimony” because historical cell-site analysis can only “show with sufficient reliability that a phone was in a general area, especially in a well-populated area.”

Because the *Hill* court was concerned that a jury might overestimate the meaning of the information provided by historical cell-site analysis, it cautioned the Government “not to present historical cell-site evidence without clearly indicating the level of precision—or imprecision—with which that particular evidence pinpoints a person’s location at a given time.” And it warned that “[t]he admission of historical cell-site evidence that overpromises on the technique’s precision—or fails to account adequately for its potential flaws—may well be an abuse of discretion.”

Comparative bullet lead analysis: *Kennedy v. Peele*, 552 Fed. Appx. 787 (10th Cir. 2014): The plaintiff sought damages for suffering a wrongful conviction. The defendant, an agent with the FBI, conducted comparative bullet-lead analysis (“CBLA”) linking the plaintiff to multiple murders. The plaintiff argued that CBLA is unreliable (an argument since validated), and that the defendant knew “there was a question regarding the scientific reliability of the lead matching theory,” but failed to disclose that the CBLA method lacked a statistical and scientific basis. The court held that the defendant was entitled to qualified immunity. It stated that it could not “ignore the fact that CBLA was widely accepted at the time of the events at issue.” And the plaintiff’s attack was on CBLA in general rather than any specific misconduct by the defendant.

DNA mixed source sample: *United States v. Kelsey*, 917 F.3d 740 (D.C. Cir. 2019): In a prosecution for sexual assault, the government relied at trial on a DNA match taken from the victim’s sexual assault kit. One witness, Shana Mills, testified as to the processing of DNA swabs from the kit – i.e., taking cuttings from swabs, placing them in test tubes, and loading them into a machine called a genetic analyzer which produced electropherograms (charts that list the alleles present at different locations of a length of DNA). The data that Mills generated was transferred to another lab and analyzed by an expert, Hope Parker. Mills testified and compared the information in a report she wrote with the information that Parker used. Mills also testified that she identified a male profile in the DNA sample, which helped to explain why the electropherogram analysis was sent to Parker for a mixture analysis. The court held that Mills’s testimony was properly admitted and that the trial judge did not abuse discretion in precluding cross-examination of Mills as to alleged deficient mixture analyses at the Department of Forensic Sciences’ Laboratory. The court reasoned that any problems were irrelevant to Mills’s credibility, because the benchwork in this case predated the problems with mixture analysis in the lab.

DNA Mixed Source Sample --- FST Outmoded Method Sufficiently Reliable: *United States v. Jones*, 965 F.3d 149 (2nd Cir. 2020): The court upheld the admission of a DNA identification from a multi-source sample, where the process used --- known as FST --- had been abandoned by the only lab that had ever used it (the New York City Medical examiner). This was referred to by the court as OCME using “its internally-developed, then-usual methodology for this type of mixed DNA sample, called the Forensic Statistical Tool (“FST”).”

The court explained that in 2017, OCME stopped using FST for new cases. At that time, the Combined DNA Index System (“CODIS”)--the FBI’s national database, to which OCME

contributes its data--raised the minimum number of loci that must be amplified during the preliminary stage of analysis. FST, which had conformed to CODIS's prior standards, became incompatible because it did not comply with the higher standard. Rather than altering the FST codes to comply with these new standards, and be forced to go through another rigorous validation process, OCME opted to switch to a DNA testing program that was commercially available.

The court found that the trial court did not abuse its wide discretion in admitting the FST-based expert testimony. Here is the court's analysis:

We see no error, much less any manifest error, in the decision of the district court in the present case. * * * [T]he five-day *Daubert* hearing exhaustively dissected FST's development, methodology, and implementation. The court permissibly found that the only two *Daubert* factors that were meaningfully in dispute were the known rate of error in FST analysis, and the question of general acceptance of FST in the scientific community. It permissibly found that both factors favored denial of Jones's motion to exclude the Glove DNA evidence.

While the hearing testimony indicated that FST does not have what experts would describe as a "known error rate," the court had leeway to find it appropriate to substitute consideration of the rate at which FST would produce false positive results. And in considering the false-positive rate, there was no abuse of discretion in the court's decision to focus on FST's overall rate of false positives instead of, as urged by Jones, limiting its focus to one single early element in the process--the estimation of quant, where there is a 30-percent rate of error. Notably, all DNA analysis involves quantitation, and the *Daubert* hearing testimony indicated that the quantitation method OCME uses is considered the "gold standard." Further, to the extent that FST integrates quantitation more directly into its analysis than other programs do (i.e., in estimating drop-out), the false-positive rate takes this into account. Thus, despite the rate of error in determining quant, the evidence showed that FST's overall false-positive rate is 0.03 percent, a mere three-hundredths of one percent; and that for "very strong support" likelihood ratios (i.e., those more than 1,000)--including that for the Glove DNA here, which was 1,340--the false-positive rate is a mere 0.0009 percent. We see no abuse of discretion in the district court's conclusion that this evidence indicated reliability sufficient to support admission of the Glove DNA evidence.

[T]he district court clearly explained its finding that FST is sufficiently accepted--both in its admission in scores of New York State cases and in "the fact that the FST has been approved for use in casework by members of the relevant scientific community and subjected to peer review" to warrant its admission here.

DNA mixed source sample --- procedure subsequently determined unreliable was properly admitted: *United States v. Barton*, 909 F.3d 1323 (11th Cir. 2018): The defendant was convicted of felon-firearm possession, in part on the basis of testimony by a DNA expert who extracted a sample from a gun. The defendant did not challenge the process of DNA identification itself, but argued that the identification was from a sample that was a mixture from a number of

individuals, and that the expert used a flawed process in extracting the DNA that she tested. The court held that the trial court “rightly reached its decision based on an evaluation of the foundations of Zuleger’s testimony and the failure of the defense to rebut it with anything but the testimony of a competing expert, who employed the same general methodology.” The court concluded that “[t]he issues raised by Johnson’s competing testimony went to the weight owed Zuleger’s expert opinion, and were properly left to the jury.”

The defendant pointed up that between the time of his conviction and the appeal, a scientific body published new guidelines concluding that the prosecution expert’s methods of extraction from the mixed source were not reliable. (The prosecution expert was relying on guidelines that were primarily designed to cover single-source samples and two-person mixtures, while the sample in the case was a mixture of DNA from at least three persons.). According to the court, “the updated SWGDAM guidelines support Barton’s claim that analysis of a low-quantity three-person mixture should be based on interpretation guidelines drawn from validation studies performed on low-quantity three-person mixtures. Validation studies go to the heart of reliability.” The court found that the new guidelines are “potentially important evidence cutting against reliability.” But because they were not presented to the trial court, the court held that they could not be considered on appeal. The remedy, if any, would lie in a motion for a new trial under Fed.R.Crim.P. 33.

In a subsequent decision appealing the trial court’s refusal to grant a new trial, the court held that the SWGDAM guidelines would have been admissible only to impeach the expert, and a new trial may not be awarded based on merely impeaching evidence:

On their face, the 2017 SWGDAM Guidelines make clear that they did not create minimum standards for DNA analysis. Further, the Guidelines expressly provide that they did not intend to “invalidate or call into question” work performed prior to the 2017 revision, which would include the DNA analysis and validation used for Barton’s trial. In addition, Zuleger testified that her laboratory adhered to the FBI Quality Audit Standards, which the Guidelines themselves say have precedence over the 2017 SWGDAM Guidelines. As Barton correctly notes, the 2017 SWGDAM Guidelines could be used as impeachment evidence through which he could attempt to discredit the DNA evidence and Zuleger’s expert testimony.

DNA single source samples --- typographical error: *United States v. Silva*, 889 F.3d 704 (10th Cir. 2018): In a felon-firearm possession case, the government called a DNA expert who testified on the basis of “single source samples” (i.e., no problem of extraction of one source from multiple sources), that she could not exclude the defendant’s profile as the donor of the samples collected from a truck and a house. The defendant argued that the testimony should have been excluded because the numbers of the samples on her digital record did not match up with the numbers on the tubes. The expert recognized the error but said it was a typo, and that the error “had nothing to do with what’s labelled on the actual tube.” The court found no error in admitting the expert’s testimony because the errors “were typographical only and did not affect her analysis and its result.” The court then stated that “errors in the implementation of otherwise-reliable DNA methodology typically go to the weight that the trier of fact should accord to the evidence and not to its admissibility.”

Comment: It is surely true that the typographical error should not render the testimony inadmissible, because the actual test was reliably conducted. Therefore the court did not need to state as a general proposition --- twice --- that errors in application are questions of weight and not admissibility. This wasn't even an error in application. Or if it was, the trial judge could easily have found, by a preponderance of the evidence, that the test was reliably conducted even given the typo.

DNA—PCR methodology: *United States v. Eastman*, 645 Fed. Appx. 476 (6th Cir. 2016): The defendant argued that polymerase chain reaction (PCR)—the process used to identify Eastman as the likely major DNA profile found on three dust masks—has no known error rate or accepted procedure for determining an error rate, and therefore should be rejected. But the court found no abuse of discretion in admitting the DNA identification. The court relied almost exclusively on precedent.

The defendant's argument confuses the error-rate factor with an admissibility requirement. More than ten years ago, we noted that “[t]he use of nuclear DNA analysis as a forensic tool has been found to be scientifically reliable by the scientific community for more than a decade.” *United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004). *Eastman* presents no groundbreaking evidence that leads us to question that decision. At least one of our sister circuits even permits trial courts to take judicial notice of PCR's reliability. See *United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996). Of course, a defendant may challenge sound scientific methodology by showing that its reliability is undermined by procedural error—failure to follow protocol, mishandling of samples, and so on. But *Eastman* did not do so here.

DNA identification: *United States v. Preston*, 706 F.3d 1106 (9th Cir. 2013): In a sexual assault prosecution, the defendant argued that the expert's testimony regarding DNA identification should have been excluded. The court analyzed and rejected this argument in the following passage:

The district court properly applied Rule 702 to determine whether to admit the testimony of the DNA analyst. The trial judge fulfilled his “gatekeeper” role pursuant to *Daubert* and allowed the expert's testimony based on the foundation laid by the prosecutor that established the relevance and reliability of the testimony and the scientific method by which the DNA was analyzed; the DNA was subjected to a common procedure for analysis. * * * Preston argues that the “analyst went below her lab's quality threshold.” However, the expert explicitly stated that while the test conducted may have fallen below the lab's “reporting threshold,” the analysts are “allowed to go below that level to try and eliminate or exclude someone.” This is exactly what the expert did. * * *

Drug identification --- Cautioning against overstatement: *United States v. Requena*, 980 F.3d 30 (2d Cir. 2020): The court affirmed two defendants’ convictions for conspiring to distribute a controlled substance analogue and of conspiring to commit money laundering. It held that the trial judge did not abuse discretion in permitting the government’s experts to opine that the synthetic cannabinoids at issue were substantially similar in structure and pharmacological effect to scheduled controlled substances. The court reasoned that, although “substantial similarity” was not itself a scientific standard, the judge had ample basis to conclude that the experts’ opinions were the product of reliable principles and methods that were reliably applied to the facts of case. The court stated that “the inferential step between the experts’ uncontroversial scientific observations and the ultimate question of whether the substances have substantially similar properties is not unduly speculative, conjectural, or based on assumptions that are so unrealistic and contradictory as to suggest bad faith.” The court did caution, however, that “a district court could well abuse its discretion by permitting an expert to affirm that substantial similarity *is* a matter of objective scientific fact rather than a subjective conclusion based on a conventional understanding of the words ‘substantial’ and ‘similar.’”

Drug identification --- Testimony about an “infinitesimal” error rate: *United States v. Mire*, 725 F.3d 665 (7th Cir. 2013): The court found no error in the admission of testimony by a chemist that the defendant was carrying the controlled substances cathinone and cathine. The court found the forensic testing process to be reliable. The expert relied on published literature and peer-reviewed studies to support the reliability of the methodology. The expert stated that the rate of error was “infinitesimal” --- and while that ought to raise some concern, the court found that conclusion to be a factor *supporting* reliability.

Drug identification: *United States v. Carlson*, 810 F.3d 544 (8th Cir. 2016): The court affirmed convictions for selling misbranded synthetic drugs, finding no abuse of discretion in the admission of testimony from a DEA chemist regarding the substantial similarity in chemical structure between scheduled controlled substances and the products sold by the defendants. The entirety of the court’s analysis is as follows:

The district court did not abuse its discretion by permitting Dr. Boos to testify. He testified that his conclusion was based on relevant evidence he had observed, his specialized knowledge in the field, his review of the scientific literature, and discussions with other scientists at the DEA. Although the defendants contend that Dr. Boos’s testimony did not flow naturally from disinterested research, that his methodology was not subject to peer review or publication, and that his theory had no known rate of error, these objections go to the weight of Dr. Boos’s testimony, not to its admissibility.

Comment: Charges of suspect motivation, lack of peer review, and no known rate of error clearly do not go to weight. The *Daubert* Court itself says that these matters affect admissibility.

Drug identification: *United States v. Gutierrez*, 2020 U.S. App. LEXIS 12679 (11th Cir.): The defendant was convicted of conspiracy to distribute methamphetamine and argued, on appeal, that the government failed to prove the reliability of the methodology used by the government's two forensic experts, who testified as to the nature, weight, and purity of the substances found. The court found no abuse of discretion, even though the experts provided no rate of error and could not identify any studies that supported their methods. The court relied heavily on the general acceptance factor. Its analysis was as follows:

The district court did not abuse its discretion in admitting the testimony of the government's experts. Gutierrez does not question the experts' experience or background, but he argues that their testimony was unreliable because they did not know the rate of error regarding the techniques they used and were unable to identify any experts or studies that supported or discredited the methods they used. But as we have explained, expert testimony does not necessarily need to meet all or most of the *Daubert* factors to be admissible.

And here, * * * the "general acceptance" *Daubert* factor was met. Shire testified that the various techniques he and Conde used in the DEA labs to identify substances—including gas chromatography, mass spectrometry, and infrared spectroscopy—were "commonly used in the industry for identifying compounds." The district court was permitted to credit this testimony that the experts' testing methods were generally accepted and to conclude that the methods were, therefore, sufficiently reliable to be considered by the jury. The reliability of the expert testimony was further supported by Shire's testimony that DEA chemists employed "multiple testing using a variety of techniques," as well as testing multiple samples of the substance, which provided multiple results that could be compared with "authenticated reference materials from an outside source" and which permitted identification with confidence. Given the flexible nature of the gatekeeping inquiry, Gutierrez has not shown that the court abused its discretion in admitting the expert testimony as to the nature, purity, and weight of the substances.

EDTA testing offered by the defendant, rejected: *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007): In a habeas challenge to a conviction for multiple murders, the defendant argued that a forensic test for the preservative agent ethylene-diamine tetra-acetic acid (EDTA) on a bloody T-shirt would show that blood had been taken from a vial and planted on the shirt. The court found no abuse of discretion in the trial judge's conclusion that the EDTA testing lacked sufficient indicia of reliability to be admissible, because it had not been subjected to peer review, "there has been no discussion of forensic EDTA testing in scientific literature since a 1997 article that headlines the need for a better analytical method," and it is not possible to determine the error rate of EDTA testing because of the widespread presence of EDTA in the environment.

Fabric-impression analysis found unreliable in part by trial court: *United States v. Williams*, 576 F.3d 385 (7th Cir. 2009): The defendants challenged the trial court's admission of an expert's conclusion that an impression on a glass door at the robbery scene was left by a non-woven fabric and could have been made by a glove. The expert also sought to testify that the

impression was consistent with the pair of gloves containing Williams’s DNA, but the district court excluded that testimony because it considered the underlying science, fabric impression analysis, unreliable under *Daubert*. The defendants argued that the admitted testimony relied on the same science as the excluded testimony--fabric impression analysis--and therefore also should have been excluded. The court of appeals did not rule on the argument, finding any error to be harmless.

Fingerprint identification: Overstatement --- zero rate of error --- *United States v. Straker*, 800 F.3d 570 (D.C.Cir. 2015): The court rejected the defendant’s argument that fingerprint identification, using the ACE-V method, was unreliable. The expert testified that there are two different types of error—the error rate in the methodology and human error. She further testified that there is a “zero rate of error in the methodology.” She did not articulate the rate of human error, though she acknowledged the potential for such error. The defendant argued that the failure to articulate the rate of human error in the ACE–V methodology rendered her testimony based on that methodology inadmissible. But the court disagreed, arguing that “the factors listed in *Daubert* do not constitute a definitive checklist or test” and that “[n]o specific inquiry is demanded of the trial court.” The court stated that the reliability of the ACE-V methodology was “properly taken for granted” because courts routinely find fingerprint identification based on the ACE–V method to be sufficiently reliable under *Daubert*.

Fingerprint Identification: Overstatement – infinitesimal error rate --- *United States v. Casanova*, 886 F.3d 55 (1st Cir. 2018): The court held that it was not plain error to allow a latent print examiner to testify to an identification. The expert, Truta, a senior criminalist in the Latent Print Unit of the Boston Police Department, testified about the history of fingerprint examinations in criminal investigations, the “ACE-V” method (analysis, comparison, evaluation, and verification) used to compare fingerprints and perform identifications, and the results of analyses he performed on prints collected from the scene of the shooting. Truta identified one particular palm impression, located on a straw wrapper found in the back seat of the car in which the victim was shot, as belonging to Casanova. Witnesses had testified that Casanova was in that back seat. On cross-examination, Truta testified, “[a]s far as I know, in the United States the[re] are not more than maybe 50 erroneous identification[s], which comparing with identification[s] that are made daily, thousands of identification[s], the error rate will be very small.” Truta had previously testified that it would be inappropriate to claim that the rate of false-positive identifications is zero. Truta emphasized that his testimony was based on what he had read in the literature, and acknowledged that at the time of his testimony, there was “no known database of latent prints” that would permit a statistical analysis of false-positive rates for fingerprint identifications.

The defendant argued that Truta “claimed falsely that the error rate in fingerprint comparisons was effectively zero.” But the court stated that “Truta never testified that the error rate for fingerprint examinations was ‘effectively zero.’ * * * Rather, Truta testified that in light of the number of recorded errors he knew of from his own review of the literature, and the number of fingerprint identifications made daily, he expected the error rate to be ‘very small.’ He did not calculate or assert any particular error rate and he specifically cautioned that whatever the rate may be, it would not be zero. On redirect he acknowledged that there was no statistical method generally

accepted in the field for determining actual statistical probabilities of erroneous identifications. This is the classic stuff of cross-examination and redirect.”

The defendant relied on the PCAST report, and the court had this to say about that:

Casanova grounds his entire challenge on a single post-trial report that provided recommendations to the executive branch regarding the use of fingerprint analysis as forensic evidence in the courtroom. See President's Council of Advisors on Sci. and Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016). The report, issued after Casanova's trial had already ended, is not properly before this court, and in any event it does not endorse a particular false-positive rate or range of such rates.

Comment: Saying “I have read some stuff and it is, uh, about 50 mistakes in all the fingerprints ever done” is not much different from saying that the error rate is effectively zero. The court makes a big deal about the distinction but what else is a jury to take from the testimony? It’s a clear case of overstatement. Note that the testimony was from a state expert, not from the FBI, and so the DOJ standards are not directly applicable.

Fingerprint identification: Overstatement --- testimony of a match --- *United States v. Pena*, 586 F.3d 105 (1st Cir. 2009): The trial judge expressed doubts about the reliability of an expert’s fingerprint identification, because the governing protocol used no specific minimum number of points for an identification. The defendant argued that the ACE-V method was unreliable because it involved merely a visual comparison of the two prints, the trooper conducting the initial analysis knew that the inked print was taken from a suspect, and the trooper made no diagrams, charts, or notes as part of his evaluation. But the judge relied on precedent, describing the case law as “overwhelmingly in favor of admitting fingerprint experts under virtually any circumstance.” The trial judge essentially imposed the burden on the defendant to present data to overcome the uniform precedent, and held that the defendant did not satisfy that burden by producing a (Fordham) law review article questioning latent fingerprint identification as being impermissibly subjective. The court of appeals found no abuse of discretion, given the precedent allowing the use of fingerprint identification.

Fingerprint identification: Testimony of a match --- limitation of cross-examination: *United States v. Muhanad Mahmoud Al-Farekh*, 956 F.3d 99 (2nd Cir. 2020): A fingerprint expert concluded that 18 latent prints recovered from the adhesive packing tape in an undetonated bomb “matched” the defendant’s fingerprints. The defendant sought to cross-examine the expert by raising the famous error in fingerprint identification that occurred in the investigation of the bombing of a train in Madrid (in which a fingerprint expert incorrectly identified a latent print as a “match” for Brandon Mayfield, a lawyer in Portland). The trial judge precluded the cross-examination under Rule 403, concluding that the Mayfield misidentification was not very probative to this expert’s conclusion, and would create a risk of jury confusion. The court found

no error. It found that “the misidentification of Mayfield is only marginally relevant” because “the fingerprint examiners in the Mayfield incident were not involved in the instant case.” It concluded that “a defendant may attack the subjectivity of fingerprint examinations as a category of evidence, but is not entitled without more to rely on a fingerprint examiner’s mistakes in a wholly unrelated case to undermine the testimony of a different examiner.” *Accord, United States v. Bonds*, 922 F.3d 343 (7th Cir. 2019) (upholding trial court’s exclusion of the Mayfield incident when offered to impeach a different examiner); *United States v. Rivas*, 831 F.3d 931 (7th Cir. 2016) (same).

Fingerprint identification: Overstatement --- testimony of a match ---*United States v. John*, 597 F.3d 263 (5th Cir. 2010): The court found no abuse of discretion in allowing a fingerprint expert to testify to a “match.” It recognized that the methodology is subjective, because “there is no universally accepted number of matching points that is required for proper identification.” But it relied on precedent holding that the method was “testable, generally accepted, and sufficiently reliable and that its known error rate is essentially zero.” The defendant pointed out that the expert’s opinion had not been subjected to blind verification, but the court responded that no case law holds that blind verification is required.

Note: The DOJ says this entry is misrepresentative because, while the court used the term “match” the witness never did. Rather the witness “identified” the print as coming from the defendant, in accordance with DOJ standards. But this only shows that courts (like pretty much everyone else) do not get the DOJ’s fine distinction between a match and an identification. And if courts don’t understand it, how are juries supposed to?

Fingerprint testimony: Overstatement --- testimony that the methodology was error-free: *United States v. Watkins*, 450 Fed. Appx. 511 (6th Cir. 2011): The defendant relied on the 2009 NAS report to argue that latent fingerprint identification (the ACE-V method) is unreliable and should have been excluded. The examiner had testified that the method was 100% accurate. But the court found no error. It stated that the error rate “is only one of several factors that a court should take into account when determining the scientific validity of a methodology. These factors include testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique’s operation, and general acceptance in the relevant scientific community.” At the *Daubert* hearing in this case, the fingerprint examiner testified about custody-control standards, generally accepted standards for latent fingerprint identification, peer review journals on fingerprint identification, and the system of proficiency testing within her lab. The court “decline[d] to hold that her allegedly mistaken error-rate testimony negates the scientific validity of the ACE-V method given all the other factors that the district court was required to consider.”

Comment: The court seems to say that because the methodology is sufficiently reliable, it is a question of weight when the expert says it is error-free. This makes no sense. Surely a methodology can be reliable by a preponderance of the evidence and yet have a rate of error. Why can’t the court allow the testimony about the procedure, but preclude the expert from testifying that it is error-free? It would seem that highlighting the problem of

overstatement --- as an admissibility requirement --- might get courts to focus more on it and not leave it to the jury to sort out.

Fingerprint identification: Limitations on cross-examination: *United States v. Bonds*, 922 F.3d 343 (7th Cir. 2019): The defendant argued that his right to confront an FBI fingerprint expert was impaired when the trial judge prohibited him from cross-examining the expert about an error that the FBI lab had made in the Brandon Mayfield (Madrid bombing) case. The court found no error in prohibiting this cross-examination. The court stated that the defendant had “ample opportunity to supply the jury with evidence about the reliability of the ACE-V method” -- specifically the analysis provided in the NAS and the PCAST reports. The court specifically noted that the summary on fingerprint identification provided in the PCAST report “provides the defense bar with paths to cross-examine witnesses who used the ACE-V approach. Have they avoided confirmation bias? Have they avoided contextual bias? Has their proficiency been confirmed by testing?” The court noted that Bonds was not arguing that he was precluded from using the NAS and PCAST reports on cross. His only complaint was that he was not allowed to raise the Mayfield error.

Fingerprint identification: *United States v. Herrera*, 704 F.3d 480 (7th Cir. 2013): upholding the use of latent fingerprint matching, the court noted that the expert received “extensive training” and that “errors in fingerprint matching by expert examiners appear to be very rare.” It conceded that latent fingerprint matching is “judgmental rather than scientifically rigorous because it depends on how readable the latent fingerprint is and also on how distorted a version of the person’s patent fingerprint it is.” But it compared fingerprint-matching favorably to another form of subjective matching --- eyewitness identification. It stated that “[o]f the first 194 prisoners in the United States exonerated by DNA evidence, none had been convicted on the basis of erroneous fingerprint matches, whereas 75 percent had been convicted on the basis of mistaken eyewitness identification.”

Comment: The comparison of fingerprint-matching and eyewitness identification is a false one, as Judge Edwards has pointed out. They are not comparable because a fingerprint-matcher touts his experience and training, and testifies to a match.

Fingerprint identification: *United States v. Calderon-Segura*, 512 F.3d 1104 (9th Cir. 2008): This is an unusual case in which the defendant challenged fingerprint identification testimony which found a match when comparing two inked thumb-print exemplars. The court noted that the defendant’s challenge related to questions about *latent* fingerprints, whereas the reliability and admissibility of comparison of two inked fingerprints is “well-established.” The court emphasized that the defendant made no showing that the exemplars “lacked clarity, were fragmented, or contained any other defects or artifactual interference that might call into question the accuracy or reliability of their identification.”

Fingerprint identification --- Bench trial: *United States v. Flores*, 901 F.3d 1150 (9th Cir. 2018): The court affirmed the defendant’s conviction for attempting to reenter the United States after being deported. It held that the trial judge did not abuse discretion in admitting the

testimony of a government fingerprint expert. The defendant presented evidence that the expert failed to consult with other professionals, had taken no certification test in forty years, had no verification of his work done in this case, and had no regular continuing education in the field. But the court found this not troubling at all. It first noted that this was a bench trial, and that the trial court's gatekeeping function is less stringent when it also acts as the trier of fact. It further noted that the witness had over 25 years' experience in fingerprint comparison, had worked as a FBI fingerprint technician, and had been qualified as an expert in federal and state court more than thirty times. It finally declared that "fingerprinting is far from junk science—it can be tested and peer reviewed and is generally accepted by the relevant scientific community." In making that assessment it relied on precedent, specifically *United States v. Calderon-Segura*, 512 F.3d 1104, 1109 (9th Cir. 2008) ("[F]ingerprint identification methods have been tested in the adversarial system for roughly a hundred years.").

Fingerprint identification --- Abdicating the gatekeeper function: *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183 (9th Cir. 2019): In an illegal reentry case, a government expert was called to testify that the fingerprint he took from the defendant matched the fingerprint on an order of removal. The expert's methodology was ACE, but not –V: meaning that he did not have his conclusion of a match validated in any way. The expert was not a member of the International Association for Identification ("IAI") or the Scientific Working Group on Friction Ridge Analysis, Study, and Technology ("SWGFAST"). The trial judge essentially ruled that the expert's qualifications and methodology were questions for the jury. The court found error, because qualifications and reliability of methodology are clearly admissibility questions for the court under Rule 702 and *Daubert*. The court concluded as follows:

Here, the district court abused its discretion by failing to make any findings regarding the reliability of Beers's expert testimony and instead delegating that issue to the jury. Indeed, the district court made this error three times during Ruvalcaba's * * * trial. After the government conducted an initial voir dire of Beers and "move[d] to have [him] qualified as an expert fingerprint technician," the court responded, "That's a determination for the jury." After Ruvalcaba cross-examined Beers and the government again "move[d] to qualify him as an expert," the court responded, "Again, that's an issue for the jury." And when Ruvalcaba "object[ed] to the qualifying [of Beers] as an expert," the court overruled the objection and told the jury that it was up to them "to decide whether the witness by virtue of his experience and training is qualified to give opinions." * * * The district court's failure to make an explicit reliability finding before admitting Beers's expert testimony in this case constituted an abuse of discretion.

Fingerprint identification --- Overstatement, testimony of a match: *United States v. Baines*, 573 F.3d 979 (10th Cir. 2009): The court found that the trial court did not abuse discretion in admitting expert testimony that a latent fingerprint *matched* the fingerprint of the defendant that was taken when he was arrested. The defendant argued that fingerprint analysis is unreliable under *Daubert*, because comparison of a latent print to a known print is essentially a subjective evaluation, with no rate of error established, and the only verification is done by a second investigator who is usually closely associated with the first investigator. The court recognized that

there are “multiple questions regarding whether fingerprint analysis can be considered truly scientific in an intellectual, abstract sense” but declared that “nothing in the controlling legal authority we are bound to apply demands such an extremely high degree of intellectual purity.” The court stated that “fingerprint analysis is best described as an area of technical rather than scientific knowledge.” Turning to the *Daubert/Kumho* factors, the court recognized that fingerprint analysis was subjective, and that there was really no peer review of the process. As to rate of error, the court concluded that whatever the flaws in the studies conducted on false positives, “the known error rate remains impressively low.” As to the factor of general acceptance, the defendant argued that fingerprint analysis had not been accepted in any unbiased scientific or technical community, and that its acceptance by law enforcement and fingerprint analysts should be considered irrelevant. But the court disagreed, noting that the Court in *Kumho* “referred with apparent approval to a lower court’s inquiry into general acceptance into the relevant expert community” and also referred to testing “by other experts in the industry.” The court concluded that while acceptance by a community of unbiased experts “would carry greater weight, we believe that acceptance by other experts in the field should also be considered. And when we consider that factor with respect to fingerprint analysis, what we observe is overwhelming acceptance.”

Fingerprint identification: *United States v. Watkins*, 880 F.3d 1221 (11th Cir. 2018): In an illegal reentry prosecution, the government called an expert to testify to a fingerprint identification. The court of appeals found that the trial court “likely erred” in admitting the testimony but found any error to be harmless. The court did not discuss the particulars. It simply concluded that the fingerprint analyst’s testimony was “probably not reliable” because the analyst “did not specifically testify about her scientific methods and her testimony may not have been based on sufficient facts or data.”

Fingerprint identification: *Overstatement, testimony of a match: United States v. Scott*, 403 Fed. Appx. 392 (11th Cir. 2010): The defendant challenged the expert’s use of the ACE-V method. The court simply relied on precedent to reject the challenge. In *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005), the court had concluded that the error rate of latent fingerprint examination was infinitesimal, and that latent fingerprint examiners follow a uniform methodology. The *Abreu* court also gave significant weight to the fact that latent fingerprint methodology was generally accepted --- by the field of latent fingerprint examiners (which is not a large surprise). The *Scott* court concluded as follows:

Although there is no scientifically determined error rate, the examiner’s conclusions must be verified by a second examiner, which reduces, even if it does not eliminate, the potential for incorrect matches. The ACE-V method has been in use for over 20 years, and is generally accepted within the community of fingerprint experts. Based on this information, the district court did not commit an abuse of discretion by concluding that fingerprint examination is a reliable technique.

Reporter’s Note: The term “match” is used by the court. It is unknown what the witness testified to. But the fact that a court thinks it is a “match” is cause for concern.

Footwear-impression testimony allowed --- Overstatement, zero error rate: *United States v. Mahone*, 453 F.3d 68 (1st Cir. 2006): The court found no abuse of discretion when a government witness was permitted to testify as an expert on footwear-impression identification, even though she was not qualified through the International Association for Identification --- and despite the fact that the expert testified that the methodology had a zero error rate. The expert relied on the ACE-V method (analysis, comparison, evaluation, and verification) for assessing footwear impressions. The defendant argued that the ACE-V method “utterly lacks objective identification standards” because: 1) there is no set number of clues which dictate a match between an impression and a particular shoe; 2) there is no objective standard for determining whether a discrepancy between an impression and a shoe is major or minor; and 3) the government provided “absolutely no scientific testing of the premises underlying ACE-V.” The court essentially relied on precedent to find no abuse of discretion:

From the outset, it is difficult to discern any abuse of discretion in the district court's decision, because other federal courts have favorably analyzed the ACE-V method under *Daubert* for footwear and fingerprint impressions. See *United States v. Allen*, 207 F.Supp.2d 856 (N.D.Ind.2002) (footwear impressions), *aff'd*, 390 F.3d 944 (7th Cir.2004); *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir.2004) (favorably analyzing ACE-V method under *Daubert* in latent fingerprint identification case); *Commonwealth v. Patterson*, 445 Mass. 626, 840 N.E.2d 12, 32-33 (2005) (holding ACE-V method reliable under *Daubert* for single latent fingerprint impressions).

Footwear-impression analysis --- Overstatement--- testimony of a match--- *United States v. Turner*, 287 Fed. Appx. 426 (6th Cir. 2008): the defendant appealed the district court's denial of his motion to exclude the boot-print analysis of the government's expert. The court found no error. The court noted that both the government and defense expert testified that photographic analysis was recognized as a valid method of shoe-print analysis within the scientific community. The government expert testified that the government lab methods were tested by an independent agency once during the year, and that he had never failed a proficiency test. Also, the government presented evidence indicating that a book entitled *Footwear Impression Evidence* by William J. Bodziak stated that “[p]ositive identifications may be made with as few as one random identifying characteristic.” The court rejected arguments that an electrostatic method should have been used, and that the four points of comparison used by the government expert were insufficient to conclude that the boot and the print on the glass matched. It stated that “the government and defense experts disagreed as to whether the photographic or the electrostatic method would be better to use on the boot print at issue--not whether the photographic method was a valid method, tested and accepted by the larger scientific community. In addition, the record reveals that the experts also disagreed about the number of points of comparison necessary for a positive match between the boot and the print. These disputes go to the weight of the evidence rather than its admissibility.”

Comment: Shouldn't a question of the necessary number of points of comparison be decided by the judge? That is the critical aspect of the methodology itself; if not that, it is at least a critical question about the application of the methodology. The court, in

throwing up its hands and leaving questions about the methodology to the jury, appears to be using the Rule 104(b) standard, in violation of Rule 702.

Footwear-impression testimony: *United States v. Smith*, 697 F.3d 625 (7th Cir. 2012): The defendant argued that the trial court erred in admitting footwear-impression testimony by an FBI examiner. The expert testified that the left Nike shoe worn by the defendant at the time of the robbery made the partial impression on the piece of paper recovered from the tellers' counter at the bank and that the impressions left on the bank carpet were “consistent with” the shoes worn by defendant Smith at the time of his arrest. The court found no error. It relied on prior precedent predating the scientific reports that challenge the reliability of footprint identification methodology. See *United States v. Allen*, 390 F.3d 944, 949–50 (7th Cir. 2004). The court stated that “In *Allen*, we affirmed the admission of footprint analysis testimony where the expert testified that ‘accurate comparisons require a trained eye; the techniques for shoe-print identification are generally accepted in the forensic community; and the methodologies are subject to peer review.’” In this case the FBI Examiner testified that the four-step approach he used is employed by forensic laboratories throughout the United States, in Canada, and in thirty other countries. He also explained that there have been peer reviews of the methodology published in several books and articles. And he explained in detail how he applied this methodology to the footprint impressions recovered at the bank. This was enough to establish that the testimony met the criteria of Rule 702.

Comment: Assuming the footprint methodology is reliable, the fact that subjective judgment is required means that there is a rate of error. Therefore, while it seems correct to allow the expert to testify that a footprint is “consistent with” the defendant’s shoe, it is surely an overstatement to say that the defendant’s shoe is the one that made a partial impression on a piece of paper.

Gun residue testing upheld: *United States v. Stafford*, 721 F.3d 380 (6th Cir. 2013): In a felon-firearm prosecution, the defendant challenged gunshot-residue evidence. He argued that the testing is imprecise and that there is no consensus in the discipline as to how many particles must be identified in order to find a positive for residue. But the court found that the expert’s test had revealed five particles, and that this was more than the minimum required by the most stringent standard used by experts in the field. The defendant also argued that he could have been exposed to gunshot residue without ever having fired a gun. The court conceded that this was so, but concluded that this affected the probative value of the test result, not the reliability of the conclusion that five particles of gunshot residue were found on the defendant’s hands.

Hair identification – overstatement – violation of constitutional rights by government presentation of overstated, “false” expert testimony: *United States v. Ausby*, 916 F.3d 1089 (D.C.Cir. 2019): At the defendant’s trial on rape and murder in 1972, the government’s forensic expert testified that hairs found at the crime scene were “microscopically identical” to the defendant’s hair, and that hair is “unique to a particular individual.” The defendant was convicted and sentenced to life in prison. In 2012, the FBI concluded that the expert in Ausby’s case “misled the jury by implying that he could positively identify the hairs taken from the crime scene as

belonging to Ausby.” The government conceded error, but in this proceeding argued that the error was not material to the conviction. The court, in light of the government’s concession, found that the government had violated *Napue v. Illinois*, 360 U.S. 264 (1959) by presenting false testimony. The court concluded that the false testimony was material, and held that Ausby should be granted relief under §2255, and that the trial court erred in refusing to vacate Ausby’s conviction. *See also United States v. Butler*, 955 F.3d 1052 (D.C. Cir. 2020) (conviction vacated where hair identification expert testified that the defendant’s hair sample was “the same” as the hair found at the crime scene; the government itself conceded that hair comparison testimony “exceeded the limits of science”).

Handwriting: *United States v. Mallory*, 902 F.3d 584 (6th Cir. 2018): Defendants were convicted on charges arising from a scheme to steal Fewlas’s sizeable estate by forging a signature on his will. On appeal, the defendants objected to the trial court’s admission of testimony by government handwriting expert Olson, who testified that the signature on the forged will was “probably” not Fewlas’s, but instead a “simulation” performed by someone else. The court held that the district court did not abuse its discretion in admitting Olson’s handwriting analysis. Citing *Daubert*, *Kumho Tire*, and Sixth Circuit precedent, the court found that the district court faithfully applied these legal standards in deeming Olson’s handwriting analysis to be reliable, and affirmed the general reliability of expert handwriting analysis.

The court relied most heavily on *United States v. Jones*, the handwriting case that was cited in the Committee Note to the 2000 amendment to Rule 702 --- the citation that some people have argued opened the gate to admission of unreliable forensic evidence. The court’s analysis of *Jones*, *Daubert*, and *Kumho* is as follows:

The reliability of expert handwriting analysis has come before our court before. In *United States v. Jones*, our court upheld the admissibility of such testimony. 107 F.3d 1147, 1161 (6th Cir. 1997). In so holding, *Jones* explained that handwriting analysis is not a science *per se*. Handwriting analysts “do not concentrate on proposing and refining theoretical explanations about the world,” as scientists do. Instead, handwriting analysts “use their knowledge and experience to answer the extremely practical question of whether a signature is genuine or forged.” Handwriting analysts see things in handwriting that laypeople do not—both because of analysts’ training in the minutiae of loops, swoops, and dotted ‘i’s, and because of the volume of handwriting they inspect—and therefore assist the trier of fact by bringing their training and experience to bear. Thus, while handwriting analysis may not boast the “empirical” support underpinning scientific disciplines, it is nevertheless “technical” or “specialized” knowledge that, subject to thorough gatekeeping, is a proper area of expertise.

Our court decided *Jones* without the benefit of *Kumho Tire*. In *Kumho Tire*, the Supreme Court clarified that the *Daubert* factors may also be useful in scrutinizing non-scientific expertise. * * * [T]he *Kumho* Court referenced handwriting analysis as an area where strict *Daubert*-type analysis might be less appropriate, indicating that “the relevant reliability concerns may focus upon personal knowledge or experience.” Since *Jones* predated *Kumho Tire*, it did not apply the *Daubert* factors in evaluating the handwriting

analysis at issue. Still, *Jones*'s focus on handwriting analysts' experience-based expertise is consistent with *Kumho Tire*, even though *Daubert*-type inquiries may also be appropriate in evaluating such testimony.

The court then proceeded to consider the trial court's review of the handwriting expert's opinion in this case.

Here, the district court faithfully applied *Daubert*, *Jones*, and *Kumho Tire* in deeming Olson's handwriting analysis admissible. The court conducted thorough *voir dire* to ascertain Olson's experience and methodology. Olson testified to his thirty-one years' experience as an ink chemist and forensic document examiner at the IRS National Forensic Laboratory, during which he has performed countless handwriting analyses and testified in court on multiple occasions. He explained that his laboratory is accredited by an international organization that polices general standards practiced throughout the discipline. In addition, Olson walked through the principles and basic approach he used in performing his analysis. To perform the analysis, Olson studied approximately ninety-one known examples of Fewlas's signature. From those samples, he discerned various unique characteristics, many of which he then found lacking in the signature on the forged will. As Olson explained, this approach embodies two precepts—no two people write exactly alike, and no one person writes exactly the same every time—which he represented as having been tested in various studies and experiments. *See United States v. Prime*, 431 F.3d 1147, 1153 (9th Cir. 2005) (affirming admission of handwriting expert citing one of the same studies). Those studies and experiments, according to Olson, further establish that his mode of analysis is highly accurate. Moreover, Olson testified that his laboratory requires document examiners to review each other's work, and that in this case, another document examiner not only reviewed his work but independently verified his opinion. *See Prime*, 431 F.3d at 1153 (highlighting similar review and verification); *accord United States v. Crisp*, 324 F.3d 261, 271 (4th Cir. 2003). Based on this testimony, the district court did not abuse its discretion in deeming Olson's testimony reliable.

The defendants argued that the trial court erred in referring to handwriting as a "science." But the court had this to say about that:

Handwriting analysis, of course, is not a science—*Jones* makes that much clear. The district court's loose language in describing handwriting analysis as a science, however, was more of an afterthought to otherwise thorough gatekeeping. The court's *voir dire* demonstrates that, rather than viewing handwriting analysis as a science, it sought to ascertain whether Olson's experience-based expertise was reliable. * * *

Reporter's comment: The court's analysis indicates that the reference to *Jones* in the Committee Note is not the gateway to disaster. That is because *Kumho* itself paves the way for admission of handwriting testimony as a technical rather than scientific skill. The Committee Note essentially tracks *Kumho* to that effect. One can argue that the real problem of handwriting evidence is the distinct possibility of *overstatement* --- for example, testifying that it is scientific, or has a zero rate

of error. In this case, no such testimony was given. The expert only testified that a forgery was “probable.”

Handwriting Identification --- error to admit in the absence of verification: *Crew Tile Distribution, Inc. v. Porcelanosa L.A., Inc.*, 2019 U.S. App. LEXIS 4988 (10th Cir.): In an appeal of a judgment in a contract dispute, the appellant argued that the trial court erred in admitting the testimony of a handwriting expert, Carlson, because she did not complete the verification step of the ACE-V methodology before submitting her expert report. The court agreed and found error. It explained as follows:

[T]he district court assessed the reliability of Carlson's testimony without the aid of a *Daubert* hearing. Moreover, [the appellee] did not offer any evidence to support its contention that Carlson's ACE methodology satisfied Rule 702. As a result, the district court based its finding on one Fourth Circuit case and two district court cases in which expert testimony was admitted despite a failure to complete the verification step of the ACE-V methodology. But none of these cases explain why the ACE methodology is reliable, and certainly none discuss the lack of verification with respect to Carlson's analysis in this case.

It may be that verification adds so little to the reliability of an expert's opinion that there is no real difference between the ACE and ACE-V methodologies. But it might also be true that verification adds just enough to the reliability of the ACE-V methodology to push handwriting analysis over the line from worthless pseudoscience to valuable expert testimony. [The appellee's] attempt to resolve this uncertainty was lacking. Accordingly, the district court did not have sufficient evidence to perform its gatekeeping function and its decision to admit Carlson's testimony was error.

Handwriting Identification (and fingerprinting): *United States v. Dale*, 618 Fed. Appx. 494 (11th Cir. 2015): The court found no error in admitting latent fingerprinting and handwriting identification. It relied solely on precedent. It did not consider any of the recent challenges to these methodologies:

We have held that fingerprint analysis utilizes scientifically reliable methodology, and Dale cites to no binding authority holding that the methodology applied in this case was scientifically unreliable. See *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005) (per curiam) (fingerprint evidence is reliable scientific evidence, satisfying the Daubert criteria for admissibility).

Dale's assertion that handwriting analysis is not reliable scientific evidence is without merit and has been squarely foreclosed by this court's precedent. See *United States v. Paul*, 175 F.3d 906, 909–10 & n.2 (11th Cir. 1999) (finding that the argument that handwriting analysis does not qualify as reliable scientific evidence is meritless).

Post-Mortem Root Banding of Hair: *Restivo v. Hesseman*, 846 F.3d 547 (2nd Cir. 2017): In an unusual case, Restivo was convicted of murder, exonerated by DNA, and sued police officers for malicious prosecution. The victim’s hair was found in Restivo’s van and Restivo contended that an officer took hair from the victim at an autopsy and then planted it in the van. Experts testified that the hair in the van exhibited post-mortem root banding (PMBR) which will not be found unless the hair was on a dead body for a number of hours. The parties conceded that if the victim was ever in the van, she was still alive. Thus, Restivo sought through expert testimony to prove the existence of PMBR on the hairs found in the van in support of his theory that they were planted after the autopsy. The trial court found that certain aspects of PMRB had not been established to “a reasonable degree of scientific certainty” [which is a standard that scientists don’t use and that the National Commission on Forensic Science has rejected]. But the trial court nonetheless admitted the testimony as non-scientific testimony that was reliable under *Kumho Tire*. The trial court found that the experts were using the same degree of intellectual rigor in reaching their opinion as they would in their real life as experts. The trial court also found that the rate of error was low, and that the experts’ opinions were consistent with the academic literature. The court of appeals found no abuse of discretion.

Toolmark examination --- no error to exclude: *United States v. Smallwood*, 456 Fed. Appx. 563 (6th Cir. 2012): On interlocutory appeal, the government challenged the trial court’s order excluding the proposed testimony of its toolmark examiner. The trial court reasoned that she did not have the skill and experience with knife marks to reliably make the required subjective determination. The government argued that although the Association of Firearms and Toolmark Examiners (“AFTE”) theory lacks an objective standard, competent firearms toolmark examiners still operate under standards controlling their profession, and the fact that the expert had less experience with knife toolmarks than with firearms toolmarks was not a valid reason to preclude her testimony. But the court found no error in excluding the expert --- relying in part on the NAS report.

The court noted that the AFTE guidelines provide that a qualified examiner may determine that there is a match between a tool and a tool mark when there is “sufficient agreement” in the pattern of two sets of marks --- meaning that “it exceeds the best agreement demonstrated between toolmarks known to have been produced by different tools and is consistent with agreement demonstrated by toolmarks known to have been produced by the same tool.” The court noted that because toolmark determinations “involve subjective qualitative judgments” the accuracy of an examiner’s assessment “is highly dependent on skill and training.” The court concluded that the expert’s opinion that there was sufficient agreement between her test marks and the puncture marks found in the tires of a vehicle was “unreliable under the AFTE’s own standard because she has virtually no basis for concluding that the alleged match exceeds the best agreement demonstrated between tool marks known to have been produced by different tools.”

Toolmarks: *United States v. Wells*, 879 F.3d 900 (9th Cir. 2018): The court affirmed convictions for murder and use of a firearm in relation to a crime of violence resulting in death,

finding no abuse of discretion in allowing a government forensic tire expert to testify that a nail in a tire found in the defendant's truck had been manually inserted into the tire, undermining the foundation of the defendant's alibi that he had run over a nail while driving to work on the morning of the murders. The defendant argued that the tire expert's testing caused destruction of the evidence, but the court found that the testing neither destroyed nor substantially altered the tire or the nail. The court stated as follows:

In an effort to identify an alleged perpetrator for formal accusation, the Government took reasonable actions in evaluating [the defendant's] stated alibi, followed industry standards, and documented all steps in [the government's tire expert's] report. [The defendant's tire expert] then had full access to all photographs, testing, methodology, and reports from the Government's nail and tire experts, in addition to the nail and tire themselves.

[The defendant's tire expert] could have, and indeed *did*, launch extensive challenges to [the government's tire expert's] tests and conclusions. As *Daubert* confirmed, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Furthermore, as found in the district court, [the defendant] can only speculate as to whether his own expert would have reached any different conclusions as to the condition, location, or angle of the nail while still in the tire.

B. Federal District Court Cases on Forensics

Ballistics and bullet trajectory: Unqualified expert with insufficient foundation: *Krause v. County of Mohave*, 2020 WL 2316091 (D.Ariz.): Krause was shot and killed after he refused to drop his gun during an interaction with a police officer. The defendants challenged the admissibility of the plaintiff's expert Lauck, a law enforcement officer, who concluded that Krause was perpendicular to the [officer] when shot and [...] thus, even if Krause's firearms was raised to the ninety-degree position, it was probably not pointing directly at the [officer]." The court found Lauck to lack expertise in the area of ballistics and bullet trajectories, and that his opinion lacked sufficient foundation:

Lauck's opinions are entirely based on his general firearms and law enforcement experience. The Court does not discount that experience. However, that experience simply does not bear on his expertise to assess ballistic evidence or judge bullet trajectories. Lauck's decades of experience as a law enforcement officer, competitive shooter, and gunsmith cannot replace qualifications in ballistic forensics and do not qualify him to opine on the highly technical area of bullet path reconstruction or ballistics. Lauck made no measurements or calculations to support his conclusions. His investigation is entirely devoid of scientific analysis for which he is unqualified to conduct. Other courts have excluded expert testimony in similar circumstances. See *Rojas Mamani v. Sanchez Berzain*, 2018 WL 2980371, at *2 (S.D. Fla.); *Lee v. City of Richmond*, 2014 WL 5092715, at *6 (E.D. Va.). Finding Lauck's general firearms expertise inadequate to support his opinions regarding bullet trajectories (and conclusions derived thereof), the Court will exclude Lauck's testimony on the topic.

Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Cerna*, 2010 WL 3448528 (N.D. Cal.): The court allowed ballistics testimony that was based on a method approved by the Association of Firearms and Toolmark Examiners (AFTE). The court stated that in February 2007, it had ruled in *United States v. Diaz*, 2007 WL 485967 that the AFTE theory, as applied by the SFPD crime lab, was sufficiently reliable under *Daubert*. It concluded that "[n]o new developments since the *Diaz* ruling cast sufficient doubt on the reliability of the AFTE theory such that expert testimony must be kept from the jury simply because it is based on the AFTE theory." The court conceded that the 2009 NAS report highlighted the weaknesses and subjectivity of ballistics feature-comparison. But it concluded that these weaknesses "do not require the automatic exclusion of any expert testimony based on the AFTE theory. The weaknesses highlighted by the NAS report—subjectivity in a firearm examiner's identification of a 'match' and the absence of a precise protocol—are concerns that speak more to an individual expert's specific procedures or application of the AFTE theory, rather than the universal reliability of the theory itself." Thus, the NAS report did not "undermine the proposition that the AFTE theory is sufficiently reliable to at least be presented to a jury, subject to cross-examination."

The court reviewed Judge Rakoff's opinion in *Glynn*, which focused on the problem of overstatement and limited the expert's conclusion to "more likely than not." The court argued that the *Glynn* limitation was "not appropriate as it suggests that the expert is no more than 51% sure

that there was a match.” The court concluded that the standard previously used in *Diaz*—that a bullet or casing came from a particular firearm to a “reasonable degree of certainty in the ballistics field”—would be used.

Reporter’s Note: The DOJ memo states that this case is not problematic because “it was the court (not the witness) that ordered the witness to use the offending phrase, one that is not permitted under current Departmental policy, unless ordered by a court.” But it is hard to see how it is better when it is the court rather than the witness who is responsible for the overstatement. It actually seems that it is worse when it is the court that is responsible.

Ballistics: *United States v. Sleugh*, 2015 WL 3866270 (N.D. Cal. 2015): The court allowed a ballistics expert to testify. The defendant argued that photographs of the two shell casings appeared dissimilar to a layperson's eye. This did not trouble the court, because the defendant “conceded Smith is highly qualified and did not point out any flaws in Smith's methodology that would render his resulting opinion unreliable.” The court emphasized that the expert had reached only limited conclusions, and accurately rendered those limitations — he stated that his comparison only pointed to the possibility that a firearm of the class depicted was used during the shooting, and conceded that many others may have been used instead.

Comment: This seems to be a relatively rare case in which a ballistics expert seeks to keep the testimony within the bounds of what the methodology can support.

Ballistics: *United States v. Harris*, 2020 U.S. Dist LEXIS 205810 (D. D. C. Nov. 4, 2020): In a prosecution for firearms offenses, the defendant moved to exclude ballistics expert testimony. The court admitted the testimony with limitations consistent with the DOJ’s Uniform Language standards. It concluded that the issues raised by the PCAST Report with respect to the reliability of firearm and toolmark identification are for cross-examination, not exclusion, as recent advancements in the field in the four years since the release of the PCAST Report address many of the defendant’s concerns. The court noted that the defendant remains free to have his own expert examine the firearm and ballistics evidence and contradict the government’s case.

The court addressed the defendant’s *Daubert* challenges in great detail:

1. Whether the methodology has been tested

The court noted that there are subjective elements to ballistics methodology, but that the testability criticism leveled at ballistics in the PCAST Report was out of date. First, the court contended that the black-box requirement set forth by the PCAST Report goes beyond what is required by Rule 702. In any event, the court found that the government had provided three recent scientific studies which meet the PCAST's black-box model requirements and demonstrate the reliability of ballistics feature comparison. These tests included (i) tests administered during a study which used 3D image technology to assess the process used by trained firearm examiners when identifying casings to a particular firearm (“Heat Map Study”); (ii) a recent black box study testing the identification of fired casings, which resulted in a .433% false positive error rate from

three errors among 693 total comparisons (“Keisler Study”); and (iii) another report that followed the PCAST recommended black-box model and found that of 1512 possible identifications tested, firearms examiners correctly identified 1508 casings to the firearm from which the casing was fired (“Lilien Study”). Based on this evidence, the court concluded that even under the PCAST’s stringent black-box only criteria, firearm and toolmark identification can be tested and reasonably assessed for reliability. The court also considered the fact that the expert had the results validated by another qualified examiner to be demonstrative of the strength of the testability prong. [Though there was no showing that this verification was blind.]

2. *The known or potential error rate*

First, the court concluded that the only relevant error rate is for false positives. (Although the scientific experts at the Boston College seminar criticized that conclusion as faulty). The court found that the evidence showed low error rates for false identifications made by trained examiners, even under the PCAST’s black-box study requirements. (The Heat Map and Keisler Studies both had an overall error rate of zero percent, and the Lilien Study produced a false positive rate of only 0.433%.)

3. *Whether the methodology has been subject to peer review and publication*

The court concluded that this factor weighed in favor of admissibility as well. The government’s *Daubert* hearing expert cited to numerous scientific studies in the field of firearm and toolmark identification that had been published in eleven other peer-reviewed scientific journals. Furthermore, the court questioned whether “excluding certain journals from consideration based on the type of peer review the journal employs goes beyond a court’s appropriate gatekeeping function under *Daubert*.”

4. *The existence and maintenance of standards to control the methodology’s operation*

The court concluded that firearm toolmark identification does not provide objective standards because the AFTE Theory of Identification is vague and subjective in nature (authorizing a finding of a match when there is “sufficient agreement” between the samples). The court found that “[w]hile Mr. Monturo’s additional use of “basic scientific standards” through taking contemporaneous notes, documenting his comparison with photographs, and the use of a second reviewer for verification surely assist in maintaining reliable results, without more the Court cannot conclude this *Daubert* factor is met.” However, the court noted that “even if this factor cannot be met, a partially subjective methodology is not inherently unreliable, or an immediate bar to admissibility” and that while this factor weighed against Monturo’s testimony, it did not disqualify it.

5. *Whether the methodology has achieved general acceptance in the relevant community*

Despite the criticism contained in the PCAST Report, the court found that this factor weighed in favor of admitting Monturo’s testimony as the Government had put forth more than sufficient evidence to show that the AFTE theory as used by Monturo enjoys widespread scientific acceptance.

Finally, the court addressed the defendant's argument that the expert should not be allowed to testify to a "match." It noted that the government had agreed to limitations in accordance with the DOJ standards: that the expert "will not use terms such as 'match,' he will 'not state his expert opinion with any level of statistical certainty,' and he will not use the phrases when giving his opinion of 'to the exclusion of all other firearms' or 'to a reasonable degree of scientific certainty.'" But the court noted that the defendant, in accordance with the DOJ standards, would be allowed to testify that "casings were fired from **the same firearm**" after finding that all class characteristics are in agreement, and the quality and quantity of corresponding individual characteristics is such that the examiner would not expect to find that same combination of individual characteristics repeated in another source and has found insufficient disagreement of individual characteristics to conclude they originated from different sources.

Comment: As has been discussed for three years, the line between a "match" and "the same firearm" is so thin as to not be a line at all, and even if the DOJ can make that distinction in its own collective head, a jury probably cannot.

Ballistics – NAS Report – Overstatement – testimony of a match: *Jackson v. Vannoy*, 2018 U.S. Dist. LEXIS 46297 (E.D. La.): In a habeas challenge to a conviction for second degree murder, the petitioner raised a claim of actual innocence, offering the NAS Report as "new reliable evidence" not presented at trial to undermine the inculpatory toolmark evidence. The firearms expert examined two nine-millimeter cartridge casings and two nine-millimeter bullets recovered from the crime scene, and concluded that the casings and bullets were each fired from the same weapon. The petitioner argued that the NAS Report called into question the ability of toolmark analysis to individuate shell casings. The court denied the petition for writ of habeas corpus, concluding that the NAS Report was not new evidence and was insufficient to show that it was more likely than not that no reasonable juror would have convicted the petitioner.

Ballistics: Limitation on Overstatement: *United States v. Willock*, 696 F. Supp. 2d 536 (D. Md. 2010): The defendant moved to exclude the testimony of a ballistics expert. The court denied the motion, "consistent with every reported federal decision to have addressed the admissibility of toolmark identification evidence." The court noted, however, that "in light of two recent National Research Council studies that call into question toolmark identification's status as 'science,' * * * toolmark examiners must be restricted in the degree of certainty with which they express their opinions." In response to this ruling, the government stated that "it would not seek to have [its expert] state his conclusions with any degree of certainty."

Ballistics: Admissible testimony of exclusion of a gun: *Ricks v. Pauch*, 2020 WL 1491750 (E.D. Mich.): Plaintiff brought this 1983 action against three Detroit police officers after having spent 25 years in prison for a wrongful conviction of murder. One of the experts for the plaintiff examined digital photographs of the bullets entered into evidence, and stated that they were mutilated and damaged to the extent that an identification with a suspect firearm would have likely not been possible. He further testified that the evidence bullets had certain characteristics such that they could not have been fired from the type of gun that the defendant had. The

defendants moved to suppress the plaintiff's expert testimony on the grounds that the "field of firearms identification overall is subjective and based on the expertise of the examiner and therefore unreliable under *Dauber* and *Kumho Tire*." They further contested the reliability of the methodology because Ricks' firearm had been destroyed following his conviction. However, the court stated that "AFTE theory does not require having a suspect weapon" and the plaintiff's experts "do not opine that the evidence bullets were fired from a specific gun, but only that the evidence bullets have 5R characteristics, and that those bullets could not have been fired from a 6R gun," which was the gun attributed to Ricks in 1992. As a result, the court emphasized that "comparison of the evidence bullets with the bullets test-fired from Ricks' Rossi handgun was not relevant or necessary" and held that the experts' proposed opinions for the plaintiff met the admissibility requirements of Rule 702.

Ballistics: *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to ballistics testimony. It relied exclusively on precedent, stating that "[m]atching spent shell casings to the weapon that fired them is a recognized method of ballistics testing. Other than the argument raised by magazine articles cited by the defense and an out-of-state federal district court ruling, [Judge Rakoff's ruling in *Glynn*] the Court has not found a case from the Fifth Circuit which shows that [the ammunition expert's] findings are unreliable. On the contrary, firearm comparison testing has widespread acceptance in this Circuit."

Ballistics – generally accepted, testimony to a reasonable degree of certainty: *United States v. Hylton*, 2018 WL 5795799 (D. Nev. Nov. 5, 2018): In an armed bank robbery prosecution, the defendant moved to strike the Government's firearm expert's proposed testimony, or in the alternative, to conduct a *Daubert* hearing on the method that the expert used to identify the firearm at issue. The court denied the defendant's motion, finding that the Association of Firearm and Toolmark Examiners ("AFTE") ballistics methodology is generally accepted:

The AFTE methodology is generally accepted by federal courts, and has repeatedly been found admissible under *Daubert* and Rule 702. See *United States v. Johnson*, 875 F.3d 1265 (9th Cir. 2017). See also *United States v. Johnson*, 2015 WL 5012949 (N.D.Cal. 2015); *United States v. Diaz*, 2007 WL 485967 (N.D.Cal. Feb. 12, 2007); *United States v. Arnett*, 2006 WL 2053880 (E.D.Cal. 2006). Defendant fails to identify a single case in which AFTE ballistics testimony was excluded under *Daubert*. See *Johnson*, 875 F.3d at 1282.

[T]he Court finds that a *Daubert* hearing is neither required nor necessary in the instant matter. Further, to the extent Defendant wishes to criticize the AFTE methodology, or ballistics evidence generally, he may do so through the presentation of his own expert and cross-examination of FS Wilcox.

Note: The court stated that the government "notes that some courts have required experts to testify that casings can be matched *only* to a reasonable degree of ballistics certainty, and that FS Wilcox's testimony will comply with this directive." But under the

DOJ’s own guidelines, a ballistics expert is not permitted to testify to a reasonable degree of certainty, unless the court requires it, and the court did not require it in this case. The DOJ has stated that many of the cases involving overstatement in this case digest preceded the guidelines and so are to be discounted. Maybe so --- but not this one. The opinion is dated November 5, 2018. And what is especially troublesome is that the court considers the “reasonable degree of certainty” testimony to be a *tempered* form of conclusion, when in fact it is a classic form of overstatement.

Ballistics: *United States v. Romero-Lobato*, 2019 WL 2150938 (D. Nev.): In a prosecution for robbery and related offenses, the government called a ballistics expert to testify, in the court’s words, “that the Taurus handgun found in the stolen Yukon following the police chase is the *same gun* that was used to fire a round into the ceiling of Aguitas Bar and Grill.” The trial court held a *Daubert* hearing in which it considered the NAS and PCAST reports as applied to ballistics analysis using the Association of Firearm and Tool Mark Examiners (“AFTE”) method. In its opinion, the court first summarized the case law:

The cases surveyed by the Court indicate that some federal courts have recently become more hesitant to automatically accept expert testimony derived from the AFTE method. While no federal court (at least to the Court's knowledge) has found the AFTE method to be unreliable under *Daubert*, several have placed limitations on the manner in which the expert is allowed to testify. The general consensus is that firearm examiners should not testify that their conclusions are infallible or not subject to any rate of error, nor should they arbitrarily give a statistical probability for the accuracy of their conclusions. Several courts have also prohibited a firearm examiner from asserting that a particular bullet or shell casing could only have been discharged from a particular gun to the exclusion of all other guns in the world. These restrictions are in accord with guidelines issued by the Department of Justice for its own federal firearm examiners which went into effect in January 2019. But it is also important to note that the courts that imposed limitations on firearm and toolmark expert testimony were the exception rather than the rule. Many courts have continued to allow unfettered testimony from firearm examiners who have utilized the AFTE method.

In a lengthy analysis, the court applied the *Daubert* factors and concluded that the ballistics expert would be permitted to testify. It summed up as follows:

Balancing the *Daubert* factors, the Court finds that Johnson's testimony derived from the AFTE method is reliable and therefore admissible. The only factor that does not support the admission of the testimony is the lack of objective criteria governing the application of the AFTE method. But this lack of objective criteria is countered by the method's relatively low rate of error, widespread acceptance in the scientific community, testability, and frequent publication in scientific journals. The balance of the factors therefore weighs strongly in favor of the admission of Johnson's testimony. The Court also notes that the defense has not cited to a single case where a federal court has completely prohibited firearms identification testimony on the basis that it fails the *Daubert* reliability

analysis. The lack of such authority indicates to the Court that defendant's request to exclude Johnson's testimony wholesale is unprecedented, and when such a request is made, a defendant must make a remarkable argument supported by remarkable evidence. Defendant has not done so here.

In its analysis, the court discussed the case law, such as *Glynn*, that has sought to put limitations not on ballistics as a whole but on the overstatement of an expert's conclusion. While the court does not specifically reject those cases, ***there is nothing in the final order that appears to impose any limitation on the expert's conclusions --- which are described by the court as testimony of a match.***

Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Otero*, 849 F. Supp. 2d 425 (D.N.J. 2012): The court denied a motion to exclude the government's expert on the subject of firearms and toolmark identification. The court allowed the expert to testify to a reasonable degree of ballistics certainty. It addressed the impact of the NAS report:

The Government has demonstrated that Deady's proffered opinion is based on a reliable methodology. The Court recognizes, as did the National Research Council in *Strengthening Forensic Science in the United States: A Path Forward*, that the toolmark identification procedures discussed in this Opinion do indeed involve some degree of subjective analysis and reliance upon the expertise and experience of the examiner. The Court further recognizes, as did the National Research Council's report, that claims for absolute certainty as to identifications made by practitioners in this area may well be somewhat overblown. The role of this Court, however, is much more limited than determining whether or not the procedures utilized are sufficient to satisfy scientists that the expert opinions are virtually infallible. If that were the requirement, experience-based expert testimony in numerous technical areas would be barred. Such an approach would contravene well-settled precedent on the district court's role in evaluating the admissibility of expert testimony.

Ballistics: attempt to limit overstatement of results, but allowing testimony to a reasonable degree of certainty: *United States v. Taylor*, 663 F. Supp. 2d 1170 (D.N.M. 2009): The court allowed ballistics testimony, but limited it in several respects, relying on the NAS report. The court stated that "[b]ecause of the seriousness of the criticisms launched against the methodology underlying firearms identification, both by various commentators and by Defendant in this case, the Court will carefully assess the reliability of this methodology, using *Daubert* as a guide." The court noted that NAS concluded that ballistics methodology was weak on the *Daubert* factor of standards and controls, because "the decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates."

The court noted that Judge Rakoff, in *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008), resolved one of the problems of ballistics testimony "by sending the case back for retrial and ordering that the ballistics opinions offered at the retrial may be stated in terms of

‘more likely than not,’ but nothing more.” The court adopted the reasoning in *Glynn*, concluding that the firearms identification testimony is admissible under Rule 702 and *Daubert*, but imposing limitations on that testimony.

Because of the limitations on the reliability of firearms identification evidence discussed above, [the expert] will not be permitted to testify that his methodology allows him to reach this conclusion as a matter of scientific certainty. [The expert] also will not be allowed to testify that he can conclude that there is a match to the exclusion, either practical or absolute, of all other guns. He may only testify that, in his opinion, the bullet came from the suspect rifle to within a reasonable degree of certainty in the firearms examination field.

Note: It is a bit sad that after all that analysis, and in a good faith attempt to prohibit the expert from overstating his conclusions, the court allows him to testify to a reasonable degree of certainty --- which is a meaningless, confusing standard that the jury may well equate with “beyond a reasonable doubt.”

Ballistics: Limiting overstatement: *United States v. White*, 2018 WL 4565140 (S.D.N.Y. Sept. 24, 2018): In a gang prosecution, the defendant moved to exclude the testimony of the government’s proposed ballistics expert. Citing the NAS Report and other federal cases restricting ballistics experts’ testimony, the court concluded that the proposed testimony was admissible, *subject to the limitation* that the expert could not testify to any specific degree of certainty that there was a match between the firearms seized from the defendant and those used in the various shooting incidents:

The general admissibility of expert testimony regarding ballistics analysis has been repeatedly recognized by federal courts. *See, e.g., United States v. Glynn*, 578 F. Supp. 2d 567, 569 (S.D.N.Y. 2008); *Ashburn*, 88 F. Supp. 3d at 247. Moreover, the Second Circuit has recently affirmed the admission of this kind of expert ballistics testimony. *See Gil*, 680 F. App’x at 14. As such, White’s motion to exclude Detective Fox’s testimony in its entirety is denied.

Still, certain restrictions to Detective Fox’s testimony are warranted. Recent reports have challenged ballistics analysis as a science. For example, the National Research Council has noted the subjectivity of the analysis and the lack of any definitive error rate. *See, e.g., Nat’l Res. Council, Strengthening Forensic Science in the United States: A Path Forward* 154-55 (2009); *Nat’l Res. Council, Ballistic Imaging: Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database* 3 (2008). The Government’s detailed description of Detective Fox’s anticipated testimony is insufficient to persuade the Court that the concerns raised by such reports are unjustified. Specifically, the evidence fails to establish that the theory of uniqueness on which Detective Fox relies has been proven as a matter of empirical science, that there is any objective standard for declaring a “match,” or that there is any reliable basis on which Detective Fox could state the degree to which he is certain of his conclusions.

For these reasons, consistent with other federal opinions, the Court finds that Detective Fox’s testimony must be limited in certain respects. *See, e.g., Glynn*, F. Supp. 2d at 575 (restricting ballistics expert’s opinion to statement that match was “more likely than not”); Order, *United States v. Barrett*, No. 12-cr-45, at 1 (S.D.N.Y. Mar. 11, 2013); *Ashburn*, 88 F. Supp. 3d at 249 (precluding expert from testifying that he is “certain” or “100%” sure of his matches); *United States v. Willock*, 696 F. Supp. 2d 536, 574 (D. Md. 2010) (prohibiting expert from stating that it was a “practical impossibility” that any other firearm fired the cartridges in question); *United States v. Green*, 405 F. Supp. 2d 104, 124 (D. Mass. 2005) (precluding expert from testifying that his methodology permits “the exclusion of all other guns” as source of certain shell casings). In particular, Detective Fox may not testify to any specific degree of certainty as to his conclusion that there is a ballistics match between the firearms seized from White and those used in the various shooting incidents. However, if pressed to define his degree of certainty during cross-examination, Detective Fox may state his personal belief on that issue.

Ballistics: Limits on Overstatement: *United States v. Shipp*, 2019 WL 6329658 (E.D.N.Y.): The court relied on the PCAST report and stated that its findings “cast considerable doubt on the reliability of the theory behind matching pieces of ballistics evidence.” It concluded that the ballistics expert “will be permitted to testify only that the toolmarks on the recovered bullet fragment are consistent with having been fired from the same firearm. In other words, Detective Ring may testify that the recovered firearm cannot be excluded as the source of the recovered fragment and shell casing, but not that the recovered firearm *is*, in fact, the source of the recovered fragment and shell casing.”

In reaching this conclusion preventing overstatement of the expert’s results, the court made the following important points:

- A court evaluating the reliability of forensic testimony should not be precluded by precedent, given the recent studies challenging the reliability of feature-comparison testimony.
- The *Daubert* peer review factor is somewhat questionable when it comes to ballistics, because the AFTE peer review process is not rigorous --- the reviewers are all members of AFTE, and have “a vested, career-based interest in publishing studies that validate their own field and methodologies.”
- The potential rate of error for matching ballistics evidence based on the AFTE theory of comparison “does not favor a finding of reliability at this time” because “the study that most closely resembles fieldwork estimated that a firearms toolmark examiner may incorrectly conclude that a recovered piece of ballistics evidence matches a test fire one out of every 46 examinations.”
- The AFTE theory of examination, which bases a finding of a match upon “sufficient agreement” between the compared toolmarks, is “circular and subjective” and is distinguishable from other expert testimony, such as from a psychologist, because it is not

about “an ambiguous question on which experts can disagree.” Rather, it is on an unambiguous question, which should be answered without subjectivity.

- On the *Daubert* question of general acceptance, the relevant scientific community cannot be limited to self-interested toolmark experts. Therefore, it is appropriate “to consider the opinions of the authors of the NRC report and the PCAST report who, while admittedly not members of the forensic ballistic community, are preeminent scientists and scholars and are undoubtedly capable of assessing the validity of a metrological method.” The court consequently concluded that the AFTE theory “has not achieved general acceptance in the relevant community.”

- The court recognized that the limitation on the expert’s testimony--- that the firearm cannot be excluded as a source --- was more restrictive than other courts that have sought to limit overstatement. For example, Judge Rakoff in *Glynn, infra*, allowed the expert to say that it was more likely than not that the bullet came from the defendant’s gun. But the court found the more restrictive limitation appropriate “given the concerns raised by the PCAST report about the lesser probative value of certain study designs and the reproducibility and accuracy of an individual examiner’s application of the ‘sufficient agreement’ standard.” The court concluded as follows:

Placing this limitation on Detective Ring’s testimony will prevent the jury from placing unwarranted faith in an identification conclusion based on the AFTE Theory, which the current research has yet to show can reliably determine, to a reasonable possibility, whether separate pieces of ballistics evidence have the same source firearm.

Note: Despite the DOJ standards that purport to limit a forensic expert’s testimony, the expert in this case was prepared to testify that the cartridge casing and bullet fragment were fired from the recovered firearm. The explanation is probably that the expert was a detective, not an expert from a lab subject to the DOJ guidelines. But that shows that the DOJ guidelines are not completely effective in regulating overstatement by forensic experts.

Ballistics: *United States v. Sebborn*, 2012 WL 5989813 (E.D.N.Y.): The court denied a motion to exclude ballistics testimony. It recognized that there are legitimate questions about the validity of ballistics, and discussed the NAS report and Judge Rakoff’s opinion in *Glynn*:

The comparison of test bullets and cartridges to those of unknown origins involves “the exercise of a considerable degree of subjective judgment.” *Glynn*, 578 F.Supp.2d at 573. First, some subjectivity is involved in the examination of the evidence, which is done visually using a comparison microscope. * * * In addition, the standards employed by examiners invite subjectivity. The AFTE theory of toolmark comparison permits an examiner to conclude that two bullets or two cartridges are of common origin, that is, were fired from the same gun, when the microscopic surface contours of their toolmarks are in “sufficient agreement.” In part because of this reliance on the subjective judgment of the examiners, the AFTE Theory has been the subject of criticism. For example, in a 2009

report, the National Research Council of the National Academy of Sciences (the ‘NRC’) observed that AFTE standards acknowledged that ballistic comparisons “involve subjective qualitative judgments by examiners and that the accuracy of examiners’ assessments is highly dependent on their skill and training.”

In *Glynn*, Judge Rakoff found that ballistics identification had garnered sufficient empirical support as to warrant its admissibility. Accordingly, he permitted the ballistics expert to testify, but limited the degree of confidence which the expert was permitted to express with respect to his findings. Opining that the expert would “seriously mislead the jury as to the nature of the expertise involved” if he testified that he had matched a bullet or casing to a particular gun “to a reasonable degree of ballistic certainty,” Judge Rakoff limited the expert to stating that it was “more likely than not” that the bullet or casing came from a particular gun. Accordingly, *Glynn* does not support the argument that the government’s ballistics expert should be entirely precluded from testifying.

The court concluded that Judge Rakoff’s ruling in *Glynn* “may support a request to limit the degree of confidence which the expert can express with respect to his findings.” But the defendant had moved for exclusion and not limitation. Because the motion did not argue for a specific limitation, the court did not address that question. The court ultimately relied on case law to conclude that ballistics methodology is reliable.

Ballistics: Extensive analysis, discussion of overstatement: *United States v. Johnson*, 2019 WL 1130258 (S.D.N.Y.): In a prosecution of a street gang, the government offered expert testimony from a ballistics examiner. The expert report stated that the cartridge casings produced from test fires were “discharged from the SAME firearm” as the thirteen cartridge casings recovered from the scene of the Bronx Restaurant Shooting, “based on the observed agreement of their class characteristics and sufficient agreement of their individual characteristics.” The court denied the defendant’s motion to exclude the expert testimony.

The court discussed the NAS and PCAST reports, and summarized the federal court treatment of those reports as applied to ballistics testimony:

All of these courts admitted expert testimony concerning toolmark identification, rejecting arguments that the 2008-2016 scientific reports had rendered such evidence inadmissible. While acknowledging that toolmark identification evidence does not feature the full rigor of a science, and suffers from subjectivity and an absence of a precise, widely accepted methodology, these courts concluded that it is nonetheless a proper subject for expert testimony. These courts found such evidence “sufficiently plausible, relevant, and helpful to the jury to be admitted in some form,” *Willock*, 696 F. Supp. 2d at 568, and reasoned that the weaknesses in toolmark identification can be effectively explored on cross-examination. These courts also precluded toolmark identification experts from expressing their opinions in terms of absolute scientific certainty. See, e.g., *Ashburn*, 88 F. Supp. 3d at 248-50; *Monteiro*, 407 F. Supp. 2d at 369; *Cerna*, 2010 WL 3448528, at *5.

Courts have also emphasized that the demanding scientific standards on display in the three reports require a level of certainty and infallibility not properly applied in a courtroom.

The court then proceeded to an application of the *Daubert* factors. As to *testability*, the court stated as follows (with many citations omitted):

There appears to be little dispute that toolmark identification is testable as a general matter. The PCAST Report observed that “[o]ver the past 15 years, the field has undertaken a number of studies that have sought to estimate the accuracy of examiners' conclusions.” While the PCAST Report dismissed “many of the[se] studies [as] not appropriate for assessing scientific validity and estimating the reliability because they employed artificial designs that differ in important ways from the problems faced in casework,” PCAST acknowledged that one study was appropriately designed, and called for additional such studies to be performed.

Indeed, many courts have relied on the existing scientific literature – including the studies examined in the PCAST Report — in concluding that toolmark identification analysis satisfies the “testability” factor of *Daubert*. * * * While some courts have acknowledged the limitations of these “validation studies,” even the PCAST Report – which is the report most critical of toolmark identification – conceded that these studies “indicate that examiners can, under some circumstances, associate ammunition with the gun from which it was fired.”

The “testability” of Detective Fox’s methods and conclusions is also supported by the annual proficiency testing he undergoes. While these proficiency tests do not validate the underlying assumption of uniqueness upon which the AFTE theory rests, they do provide a mechanism by which to test examiners' ability – employing the AFTE method – to accurately determine whether bullets and cartridge casings have been fired from a particular weapon.

Finally, * * * Detective Fox testified that he is required to photograph “positive comparisons” so that “if a qualified examiner w[ere] to reexamine [his] case[,] ... he could have an idea of what [Detective Fox] was looking at and what [he] was comparing” in reaching his conclusions. Moreover, Detective Fox testified that a second microscopist reviews his conclusions, by performing “an independent verification and technical review of [Detective Fox’s] findings to see if they are correct or not.” The firearms examiner conducting the review is not aware of Detective Fox’s conclusions when he or she conducts the review. These procedures demonstrate that Detective Fox’s methodology can be challenged and reasonably assessed for reliability.

As to *peer review*, the court noted that most of the literature concerning the AFTE theory and methodology has been published in AFTE’s peer-reviewed journal, the AFTE Journal. The defendant argued that this should be discounted as peer review because the AFTE is essentially a

captive journal for ballistics experts. But the court found that other courts have found the AFTE journal to be a scholarly publication. [Though not Judge Garaufis in *Shipp, supra*].

As to *standards and controls*, the court declared as follows (with many citations omitted):

AFTE has a well-known standard for toolmark identification, which the Government and Detective Fox have repeatedly invoked – “sufficient agreement.” As discussed above, both courts and the scientific community have voiced serious concerns about the “sufficient agreement” standard, characterizing it as “tautological,” “wholly subjective,” “circular,” “leav[ing] much to be desired,” and “not scientific.” The Court shares some of these concerns. Having heard Detective Fox’s testimony, however, the Court is persuaded that his methodology is governed by controlling standards sufficient to render it reliable.

As an initial matter, several aspects of Detective Fox’s methodology discussed in connection with the “testability” *Daubert* factor constitute “standards controlling ... [toolmark identification’s] operation.” For example, the photographic documentation and verification requirements are industry standards adhered to by most, if not all, other crime labs in the country. Similarly, the extensive AFTE training and proficiency testing Detective Fox has received — which appear to be administered to firearms examiners nationwide – also supply such standards.

Moreover, Detective Fox’s testimony about his methodology demonstrates the existence of standards controlling his determination as to whether “sufficient agreement” exists with respect to a particular comparison. As discussed above, the photographic comparisons included in Detective Fox’s December 5, 2018 report demonstrate how he can determine – from the individual characteristics of two casings or bullets – whether striations line up or “match” one another. The photographic comparisons at issue here reflect striations that line up exactly between the test-fired cartridge casings and those recovered from the scene of the Bronx Restaurant Shooting. The “matching” of the striations is stark, even to an untrained observer. Accordingly, the issue is not whether the ballistics evidence in this case shares specific individual characteristics. Instead, the issue is at what point Detective Fox concludes that the shared individual characteristics he has observed and photographically documented are sufficient to declare that the casings or bullets were fired from the same firearm.

On cross-examination, Detective Fox resisted defense counsel’s efforts to have him specify the number of matching individual characteristics that are necessary before a “sufficient agreement” conclusion can be reached. Instead, Detective Fox stated that “[e]very single case is different,” and that he employs a holistic approach incorporating his “training as a whole” and his experience “based on all the cartridge casings and ballistics that [he] ha[s] identified and compared.” Detective Fox did set out certain principles that ground his conclusions, however. For example, the CMS standard – six consecutive matching striations or two groups of three matching striations – represents a “bottom standard” or a floor for declaring a match. Detective Fox will not declare that “sufficient agreement” exists unless microscopic examination reveals a toolmark impression with one

area containing six consecutive matching individual characteristics, or two areas with three consecutive matching individual characteristics. Detective Fox’s analysis does not end at that point, however. Instead, Detective Fox goes on to examine every impression on the ballistics evidence. “All these lines should match,” as well, and if they do not, Detective Fox will not find “sufficient agreement.”

These criteria provide standards for Detective Fox’s findings as to “sufficient agreement.” While Detective Fox’s ultimate findings are subjective — a fact which he readily concedes — all technical fields which require the testimony of expert witnesses engender some degree of subjectivity requiring the expert to employ his or her individual judgment, which is based on specialized training, education, and relevant work experience. Accordingly, the presence of a subjective element in a technical expert’s field does not operate as an automatic bar to admissibility.

As to *rate of error*, the court recognized that no error rate for ballistics examination has been conclusively established. It also noted that based on studies conducted, PCAST concluded that the error rate is as high as 1 in 46. But it concluded that “even accepting the PCAST Report’s assertion that the error rate could be as high as 1 in 46, or close to 2.2%, such an error rate is not impermissibly high. The court concludes that the absence of a definite error rate for toolmark identification does not require that such evidence be precluded.”

Finally, as to *general acceptance*, the court concluded that “[t]here is no dispute here that toolmark identification analysis is a generally accepted method in the community of forensic scientists, and firearms examiners in particular.” [Again, this assessment is rejected by Judge Garaufis in *Shipp, supra.*]

After finding that tool mark comparison withstood a *Daubert* challenge, the court turned to possible limitations on the ballistics expert’s testimony. The defendant asked the court to limit the expert’s testimony “to a factual description of the method he applied and his observations of similarities and differences he found between sets of ballistics.” But the court declined to do so. It discussed the case law concerning potential overstatement of a ballistics expert’s conclusion, and noted that most of it was related to testimony to a “specific degree of scientific certainty.” Citing *Glynn*, the court stated that “[o]ften these limitations are imposed because of judicial or defense counsel concern that the firearms examiner intends to offer an opinion with absolute or 100% certainty.” The court concluded that in this case, it was clear that the expert did not intend to assert – and the Government did not intend to elicit – “any particular degree of certainty as to his opinions regarding the ballistics match.” The court stated that “Detective Fox’s repeated concession at the *Daubert* hearing that his conclusions are based on his subjective opinion stands in stark contrast to the “tendency of [other] ballistics experts ... to make assertions that their matches are certain beyond all doubt. *Glynn*, 578 F. Supp. 2d at 574.” The court also emphasized that the expert stated that he “would never” state his conclusion that ballistics evidence matches to a particular firearm “to the exclusion of all other firearms in a court proceeding, because I haven’t looked at all other firearms.” The court concluded that “[g]iven the testimony at the *Daubert* hearing and the Government’s representations as to what it will elicit from Detective Fox, there is no need for this Court to impose limitations on Detective Fox’s opinions.”

Ballistics: No identification of a specific gun: *United States v. Tucker*, 2020 WL 93951 (E.D.N.Y.): In a robbery case, the government offered ballistics testimony from NYPD Detective Parlo who concluded that the bullet fragments from the scene came from at least three different firearms. The defendant argued that this testimony should be excluded because toolmark identification is subjective, unreliable, and unverified, especially in light of the PCAST report. But the court distinguished the subject of the PCAST report from the case at hand – the PCAST report discusses the validity of attributing bullets to a specific firearm; whereas in this case, Parlo’s testimony focuses on class characteristics. The court did note that it was troubled by Parlo’s claim that the second examiner conducts their own investigation and comes to a conclusion without taking notes prior to comparing their results to those of Parlo’s. Ultimately, the court found that because Parlo’s analysis was routine, well-documented, and subject to cross-examination, his testimony was admissible.

Ballistics: Overstatement --- reasonable degree of ballistics certainty: *United States v. Ashburn*, 88 F. Supp. 3d 239 (E.D.N.Y. 2015): The defendant challenged ballistics testimony pursuant to the AFTE methodology. He argued for exclusion and, if not, limitation on the expert’s conclusion. The court denied the motion to exclude and granted the motion to limit the conclusion. The court first addressed the findings of the NAS Report:

In 2009, the National Academy of Sciences published a comprehensive report on the various fields of forensic science. National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) [hereinafter ‘NAS Report’]. With respect to toolmark and firearms identification, the NAS Report found that the field suffers from certain “limitations,” including the lack of sufficient studies to understand the reliability and repeatability of examiners’ methods and the inability to specify how many points of similarity are necessary for a given level of confidence in the result. According to the NAS Report, “[a] fundamental problem with toolmark and firearms analysis is the lack of a precisely defined process.” Still, the NAS Report concluded that “[i]ndividual patterns from manufacture or from wear might, in some cases, be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable.”

On the *Daubert* factors, the court concluded that 1) the “AFTE methodology has been repeatedly tested”; 2) “The AFTE itself publishes within the field of toolmark and firearms identification.”; 3) “Studies have shown that the error rate among trained toolmark and firearms examiners is quite low” (citing studies finding error rates between 0.9% and 1.5%); 4) “the AFTE’s ‘sufficient agreement’ standard is the field’s established standard * * * but the fact that a standard exists does not necessarily bolster the AFTE methodology’s reliability or validity, as it remains a subjective inquiry”; and 5) the AFTE theory “has been widely accepted in the forensic science community.”

But the court was persuaded that given the subjectivity involved in ballistics feature-comparison, an instruction limiting the expert’s testimony was appropriate. “Given the extensive record presented in other cases, the court joins in precluding this expert witness from testifying

that he is ‘certain’ or ‘100%’ sure of his conclusions that certain items match. * * * [T]he court will limit LaCova to stating that his conclusions were reached to a ‘reasonable degree of ballistics certainty’ or a ‘reasonable degree of certainty in the ballistics field.’”

Comment: The court was influenced by the NAS report to put a limit on how the expert expressed his conclusion to the jury. But the court did not mention a separate NAS report that advocates abolition of the fake standard of “a reasonable degree of certainty.”

DOJ points out, by way of correction of this entry, that the “reasonable degree” testimony was required by the court and not chosen by the witness. That is not quite true. The court “limited” the expert to a conclusion of reasonable degree of certainty, but did not *require* that he testify to a reasonable degree of certainty. If the Department is taking the position that authorization to testify is an order to testify, there will be many cases in which the DOJ limitations will not be applicable.

Anyway, even if it is an order, it seems especially problematic for a court to require witnesses to testify to standards that have been so widely discredited in the scientific community and by DOJ itself. This is a good indication that the DOJ standards are not the complete answer to the problem of overstatement.

Ballistics: *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008): Judge Rakoff found that the field of ballistics is not scientific because its underlying premises have not been validated empirically, and the methodology is based on subjective assessments. But he found that the methodology was sufficiently reliable to be admissible under *Kumho*. However, because of the subjectivity inherent in the field, Judge Rakoff determined that he could not permit an expert to testify that he was “certain” of a match or that there was “no rate of error.” These iterations presented a risk of overstatement of the actual results. Judge Rakoff determined that the expert would be limited to testifying that the bullet “more likely than not” was fired from a particular gun. The *Glynn* opinion is discussed in many of the annotations on ballistics in this digest.

Ballistics: *United States v. Barnes*, 2008 WL 9359653 (S.D.N.Y.): The defendant challenged ballistics testimony, relying on the assertions in the NAS Report that ballistics methodology is subjective and has not been scientifically validated. The court rejected the defendant’s arguments and denied the motion for a *Daubert* hearing. It stated that “ballistics evidence has long been accepted as reliable and has consistently been admitted into evidence.” The court downplayed the critique in the Report, arguing that its purpose “was to assess the possibility of developing a national ballistics database and the feasibility of capturing by computer imaging technology the toolmarks left on discharged bullets and shell casings. The report was not aimed at assessing the procedures used in firearms identification or the degree to which firearms toolmarks are unique, and the report disclaims any motive to impact the question of ballistics evidence in courts. . . . This report, while no doubt useful for the commissioned purpose and not irrelevant to the issue of reliability and admissibility of firearms identification evidence, does not

identify any new evidence undermining the core premises upon which ballistics analysis is based.” The court was not asked to make a ruling on the confidence-level that the expert could testify to.

Ballistics: Testimony to a reasonable degree of ballistics certainty is allowed even though the court cites and quotes the DOJ limitations: *United States v. Hunt*, 2020 WL 2842844 (W.D.Okla): The court found that ballistics expert testimony was admissible, even though it was subjective. It found a sufficiently low rate of error, sufficient testing, and general acceptance. The defendants argued that the court should impose limits on potential overstatement of the ballistics expert’s conclusions. On the question of overstatement, the court had this to say:

In his penultimate argument, Defendant asks the Court to place limitations on the Government's firearm toolmark experts because the jury will be unduly swayed by the experts if not made aware of the limitations on their methodology. The Government responds that no limitation is necessary because Department of Justice guidance sufficiently limits a firearm examiner's testimony.

Some federal courts have imposed limitations on firearm and toolmark expert testimony. See, e.g., *Ashburn*, 88 F. Supp. 3d at 249. However, many courts have continued to allow unfettered testimony. See, e.g., *Romero-Lobato*, 379 F. Supp. 3d at 1117.

The general consensus is that firearm examiners should not testify that their conclusions are infallible or not subject to any rate of error, nor should they arbitrarily give a statistical probability for the accuracy of their conclusions. Several courts have also prohibited a firearm examiner from asserting that a particular bullet or shell casing could only have been discharged from a particular gun to the exclusion of all other guns in the world.

In accordance with recent guidance from the Department of Justice, the Government's firearm experts have already agreed to refrain from expressing their findings in terms of absolute certainty, and they will not state or imply that a particular bullet or shell casing could only have been discharged from a particular firearm to the exclusion of all other firearms in the world. The Government has also made clear that it will not elicit a statement that its experts' conclusions are held to a reasonable degree of scientific certainty.

The Court finds that the limitations mentioned above and prescribed by the Department of Justice are reasonable, and that the Government's experts should abide by those limitations. To that end, the Governments experts:

[S]hall not [1] assert that two toolmarks originated from the same source to the exclusion of all other sources.... [2] assert that examinations conducted in the forensic firearms/toolmarks discipline are infallible or have a zero error rate.... [3] provide a conclusion that includes a statistic or numerical degree of probability except when based on relevant and appropriate data.... [4] cite the number of examinations conducted in the forensic firearms/toolmarks discipline performed in his or her career as a direct measure for the accuracy of a proffered conclusion.....

[5] use the expressions ‘reasonable degree of scientific certainty,’ ‘reasonable scientific certainty,’ or similar assertions of reasonable certainty in either reports or testimony unless required to do so by [the Court] or applicable law.

As to the fifth limitation described above, *the Court will permit the Government's experts to testify that their conclusions were reached to a reasonable degree of ballistic certainty, a reasonable degree of certainty in the field of firearm toolmark identification, or any other version of that standard.*

Note: The court allows the expert to testify to a reasonable degree of certainty even though it is not permitted under the DOJ guidelines. The DOJ guidelines have an exception for when the expert is *required* to so testify. But that exception should not apply here --- the court permitted the expert to testify to a reasonable degree of certainty, but certainly did not require it. But in *Ashburn, supra*, the Department took the position that it was ordered to testify to a reasonable degree of certainty when the court “limited” the expert to that standard. That wasn’t an order to so testify, though. It appears that the “ordered to testify” exception to the DOJ standards is being expansively applied by the Department.

I have not been able to determine whether the expert in this case actually intends to testify in violation of the DOJ guidelines. But the fact that the court permitted such testimony in violation of the guidelines surely raises some question about the efficacy of the DOJ guidelines in controlling overstatement.

Ballistics: Not reliable under *Daubert* and therefore *no testimony of comparison allowed: United States v. Adams*, 2020 U.S. Dist. LEXIS 45125 (D. Ore.): The defendant was charged with felon gun possession. Mr. Gover, the expert for the government, proposed to testify that shell casings found at the crime scene “had been fired by” the gun found at the defendant’s residence. Gover employed the AFTE methodology to make the identification. The court found that the AFTE methodology was essentially subjective, and lacked “any scientific standard that would explain to an examiner like Mr. Gover how to interpret the data he sees in any kind of objective way.” As Judge Garaufis found in *Shipp, supra*, the court stated that the AFTE “sufficient agreement” standard “is a tautology that doesn’t mean anything.” The court asserted that “[n]ot only is the AFTE method not replicable for an outsider to the method, but it is not replicable between trained members of AFTE who are using the same means of testing.” The court therefore concluded that *no testimony* about a comparison could be admitted --- unlike other cases *supra* in which courts allowed some testimony about comparison but limited overstatement.

The court analyzed rate of error in the AFTE methodology as follows:

The Government initially asserted that the error rate for toolmark comparison testing is between .9 and 1.5 percent. But testing shows a range of outcomes, sometimes with an error rate as high as 2.2 percent. *United States v. Shipp*, 2019 WL 6329658 (E.D.N.Y.). If these all sound like low rates of error, whose differences could not possibly be material, it is helpful to consider them in terms of wrongful convictions, which is the

correct framework for an error rate that measures only false-positives—i.e. incorrectly identified matches. A .9 percent error rate would lead to about 1 in 111 wrongful convictions. A 1.5 percent error rate would mean that 1 in 67 convictions were wrong. And 2.2 percent would mean that 1 in 46 convictions were wrong. These are dramatically different rates of error when put into context.

What's more, the higher error rates tend to arise from the studies that most closely resemble the real-world conditions of toolmark testing. The lowest rates arise from the "closed-set" tests, which require the examinee to perform a matching exercise between two sets of bullets or shell casings. An examinee can "perform perfectly" if he simply matches each bullet to the standard that is closest. Each match narrows the field for further matches. The next highest error rates—about 2.1 percent—arise from partly closed sets. These tests also give the examinee a closed set of matches, but it also includes two bullets or shells that do not have a match in the set. The error rate from these tests is nearly 100-fold higher than from the closed-set tests. Finally, the "black box" studies yield the highest error rates, about 2.2 percent. (citing PCAST Report at 110-11). These tests presented each examinee with an unknown shell casing or bullet and three test fires from the same known firearm, which may or may not have been the source of the unknown casing or bullet. These tests most closely resemble real-world analysis—i.e. what Mr. Gover testified that he did in this case.

* * *

The incentive structure for the testing process is also concerning. It appears to be the case that the only way to do poorly on a test of the AFTE method is to record a false positive. There seems to be no real negative consequence for reaching an answer of inconclusive. Since the test takers know this, and know they are being tested, it at least incentivizes a rate of false positives that is lower than real world results. This may mean the error rate is lower from testing than in real world examinations.

It is hard to know exactly what to make of these results. It is possible that the error rate for toolmark testing is very low, but it is more likely that it is not. Assuming false positive test results lead to wrongful convictions, a wrongful conviction rate of 1 in 46 is far too high. The best test results would favor the government, but it is unlikely those tests reflect real-world error rates. The worst results favor Defendant. At most, then, this factor of the *Daubert* test is neutral as to both parties. In my opinion, it cuts somewhat in favor of Defendant.

The court also determined that the AFTE methodology has not been subject to peer review. This is because the methodology was published in the AFTE Journal, “a trade publication meant only for industry insiders, not the scientific community [...] whose purpose is not to review the methodology for flaws but to review studies for their adherence to the methodology.” Nor did the court find that the AFTE methodology generally accepted in the broader scientific community --- the fact that it is accepted by toolmark examiners was found essentially irrelevant, because of the inherent bias of those in the field.

The court concluded that the AFTE methodology failed “to yield reproducible results or a precisely defined process.” As a result of these deficiencies, the court granted in part and denied in part the defendant’s motion to exclude the government’s expert testimony. It set forth its limitations in this conclusion:

I want to be clear that my ruling, as expressed in the foregoing opinion, is limited by the testimony before me during the hearings held in this case. It is not an indictment of forensic evidence or toolmark comparison analysis writ large. It is clear that Mr. Gover and his colleagues are on to something. Even at its worst, comparison analysis has a very low rate of error and yields results that cannot be random. But it is not clear that those results are the product of a scientific inquiry. Nothing in Mr. Gover's testimony explains how or why he reached his conclusion in any quantifiable, replicable way. It is possible that the AFTE method could be expressed in scientific terms, but I have not seen it done in this case, nor elsewhere.

Therefore, for the reasons discussed above, Mr. Gover's expert testimony is limited to the following observational evidence: (1) the Taurus pistol recovered in the crawlspace of Mr. Adams's home is a 40 caliber, semi-automatic pistol with a hemispheric-tipped firing pin, barrel with six lands/grooves and right twist; (2) that the casings test fired from the Taurus showed 40 caliber, hemispheric firing pin impression; (3) the casings seized from outside the shooting scene were 40 caliber, with hemispheric firing pin impressions; and (4) the bullet recovered from gold Oldsmobile at the scene of the shooting were 40/10mm caliber, with six lands/grooves and a right twist.

No evidence relating to Mr. Gover's methodology or conclusions relating to whether the shell casings matched the Taurus will be admitted at trial.

Ballistics --- Overstatement --- 100% Certainty: *United States v. Casey*, 928 F. Supp. 2d 397 (D.P.R. 2013): The defendant requested that the court limit the testimony of the government’s firearm expert, relying on several district court opinions restricting ballistics evidence based upon the NAS report. The court denied the motion. The expert was prepared to testify that he was 100% certain of a match. The government presented a sworn statement from the Chair of the group that prepared the NAS report, stating that its purpose “was not to pass judgment on the admissibility of ballistics evidence in legal proceedings, but, rather, to assess the feasibility of creating a ballistics data base.” The court concluded that it would remain “faithful to the long-standing tradition of allowing the unfettered testimony of qualified ballistics experts.”

Comment: If it has been established by scientists that there is no such thing as an error-free methodology, how is it permissible for an expert to say they are 100% certain? There was also a long-standing tradition of “unfettered” testimony on bite-marks and probably on leeches before that. That doesn’t make it reliable.

Ballistics: Overstatement --- Reasonable degree of ballistics certainty: *United States v. Simmons*, 2018 U.S. Dist. LEXIS 18606 (E.D.Va.): The court held that ballistics was not a

science because the process of identification was based on subjective judgment. But the court also held that ballistics identification, when independently verified, satisfied the standards of Rule 702 as reliable technical testimony. The defendant argued that the expert was contaminated by confirmation bias---because she was told that numerous cases were connected, was congratulated by the prosecution for her work in other cases, had numerous detailed conversations with prosecutors and law enforcement agents about the status of the investigation, the nature of the crimes, and the need to link the various items of evidence to each other. But the court held that the bias of a witness was classically a question for the jury.

On the question of the meaning of an identification, the government proffered two possible conclusions:

The Government has suggested as appropriate such statements of certainty as "given her training, experience, and knowledge of the field, combined with the requirement that all identifications be verified by a second examiner, her opinion is that the likelihood that another tool could have produced an identified toolmark is so low as to be a practical, but not absolute, impossibility." Alternatively, the Government suggests that if asked, Ms. Moynihan would qualify the certainty of her conclusions with a phrase similar to "a reasonable degree of certainty in the ballistics field."

The court rejected the "almost impossible to be wrong" standard on the ground that "there is no meaningful distinction between a firearms examiner saying that 'the likelihood of another firearm having fired these cartridges is so remote as to be considered a practical impossibility' and saying that his identification is 'an absolute certainty.'" But the court found that the reasonable degree of certainty standard was just fine --- relying on precedent. The court summed up with an ode to precedent:

Defendants concede, as they must, that no court has ever *totally* rejected firearms and toolmark examination testimony. [Though this is no longer true, see *Adams, supra*] * * * This Court's survey of federal courts in our sister circuits indicates that firearms and toolmark examination has and continues to be routinely accepted by courts pursuant to Fed. R. Evid. 702, *Daubert*, and its progeny, albeit with some limitations regarding statements of certainty and the requirement that certain prerequisites be satisfied. See e.g., *United States v. Casey*, 928 F. Supp. 2d 397 (D.P.R. 2013) (declining to follow sister courts who have limited expert testimony based on the 2008 and 2009 NAS reports and finding that the Committee(s) who authored such reports specifically stated that the purpose of the reports was not to weigh in on admissibility of firearm toolmark evidence) and encouraging a return to the previous tradition of unfettered admissibility of a firearm examiner's expert testimony without qualification of the expert's degree of certainty); *United States v. Taylor*, 663 F. Supp. 2d 1170 (D.N.M. 2009) (holding that expert could testify, in his opinion, using pattern-based methodology, if such methodology was subject to peer review, that the bullet came from suspect rifle to within "reasonable degree of certainty in the firearms examination field"); *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008) (determining that although firearm toolmark examination is not a science, it is a field that is ripe for expert testimony because it is "technical" or "specialized" and the level of certainty could be expressed as "more likely than not" but nothing more); *United States v.*

Diaz, 2007 U.S. Dist. LEXIS 13152, 2007 WL 485967 (N.D. Cal. 2007) (permitting the firearms examiner to testify, but could only testify that a particular bullet or cartridge case was fired from a firearm to a "reasonable degree of certainty in the ballistics field"); *United States v. Monteiro*, 407 F.Supp.2d 351 (D. Mass. 2006) (stating that the appropriate standard is "reasonable degree of ballistic certainty"). For reasons detailed herein, the Court declines Defendants' invitation to depart from this long-standing tradition favoring admissibility

Comment: In dealing with the defendant's arguments about confirmation bias, the court relied on some of the many cases holding that the bias of a witness is a credibility question for the jury. But there is a difference between impeachment-bias and confirmation bias. Impeachment bias is that the witness has a motive to falsify testimony at trial. Confirmation bias is that the expert has information in advance of the testing so that she knows what the outcome of a test ought to be before doing it. That bias goes to application of the method, and should be considered an admissibility question.

Finally, this is another court that thought it did a good job of protecting the defendant from overstated conclusions. But the solution was allowing the expert to testify to a reasonable degree of ballistics certainty --- and that is a standard that has been flatly rejected by scientists, as being both meaningless and misleading.

Also note that this is a 2018 case and presumably the DOJ standards should have kept the expert from proffering an opinion based on a practical impossibility or a reasonable degree of certainty. And yet the expert was prepared to offer such an opinion.

Ballistics: Overstatement --- testimony of a match: *United States v. Wrensford*, 2014 WL 3715036 (D.V.I. July 28, 2014): The court allowed a ballistics expert to testify, noting that "although the comparison methodology and the sufficient agreement standard inherently involves the subjectivity of the examiner's judgment as to matching toolmarks, the AFTE theory is testable on the basis of achieving consistent and accurate results." The court relied heavily on precedent. It found that the method of comparison was peer reviewed by validation studies published in the journal of the Association of Firearm and Toolmark Examiners. The court found the method was generally accepted --- in the field of firearm and toolmark experts. It also relied on the fact that results must be confirmed by a second firearm examiner. The court also concluded, on the basis of the expert's assertion, that the rate of error was "close to zero." Finally the court rejected the argument that the subjectivity inherent in the process was sufficient grounds for excluding an expert's opinion:

Despite the subjectivity inherent in the AFTE standards, courts have nevertheless uniformly accepted the methodology as reliable, albeit sometimes with limitations. [Citing *Glynn*]. Although the AFTE identification theory involves subjectivity, its underlying foundation confirms that it does not involve the kind of subjective belief or unsupported

speculation that runs afoul of *Daubert*. In line with the weight of the case law, the Court finds that the subjectivity inherent in firearms examination is not a bar to its admissibility.

Ballistics --- limits on overstatement: *United States v. Davis*, 2019 WL 4306971 (W.D. Va.): In a gang prosecution, the government proposed three toolmark and firearms identification experts. The defendants challenged the admissibility of these experts' testimony and the court conducted a *Daubert* hearing. The defendants argued that toolmark identification is subjective and has been brought into doubt by the NSF and PCAST reports.

The court shared the defendants' skepticism after hearing two of the government's toolmark experts testify about the highly subjective comparative step of toolmark analysis and accounting for a supplemental 2017 PCAST report noting that experience and judgment alone can never establish reliability in the way that empirical testing can. The court held that the experts' testimony had to be limited "given the subjectivity of the field and the lack of any established methodology, error rate, or statistical foundation for firearm identification experts' conclusions[.]" In determining how to limit the testimony, the court sought guidance from Judge Grimm's opinion in *United States v. Medley*, 312 F. Supp. 3d 493 (D. Md. 2018). Judge Grimm noted the difficulty in balancing the subjective nature of the analysis with the helpfulness of the analysis to the jury. Judge Grimm's compromise was to allow the expert testimony with the limitation that the expert may not opine that a cartridge was an exact match or express any level of confidence in his opinion. Here, the court agreed with Judge Grimm and held that the experts could not testify that the marks indicate a "match" or that the cartridges have "signature toolmarks" that identify a single firearm. Further, the court precluded the experts from testifying to any degree of confidence given the lack of an empirical rate of error.

Bite mark (mis)identification: *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036 (N.D. Ill. 2015): The plaintiff was convicted of rape and assault. At his trial two bite mark experts testified that it was the defendant who bit the victim. He was eventually exonerated and brought a civil rights action against the dentists. The court granted summary judgment for the dentists. On the question of bite mark evidence, the court discussed the NAS report and other articles, and concluded that it is "doubtful that 'expert' bite mark analysis would pass muster under Federal Rule of Evidence 702 in a case tried in federal court." But the court noted that nonetheless "state courts have regularly accepted bite mark evidence—including in all three States in the Seventh Circuit." So the question was not whether bite mark evidence is now found to be unreliable, but whether it was, at the time of the criminal trial, so outrageous as to amount to a malicious use of unreliable evidence. The plaintiff argued that the dentist's opinions in this case were so far outside the norms of bite mark matching, such as they were in 1986, that their testimony violated due process. But the court determined that while the experts overstated their conclusions and made analytical errors, nothing they did rose to the level of a due process violation.

Blood spatter: *Camm v. Faith*, 2018 WL 587197 (S.D. Ind. Jan. 29, 2018): This was a civil action seeking damages after the plaintiff was tried and acquitted of murdering his spouse and two children. Among other things, the plaintiff challenged the reliability of high velocity

impact blood spatter evidence on the plaintiff's shirt, confirming that the plaintiff was close to the victims when they were murdered. The court granted summary judgment for the defendants, noting that "while [the plaintiff] contends that the field of blood spatter analysis is fraudulent, Indiana courts have consistently found blood spatter analysis to be an acceptable science."

Bullet-holes: *United States v. Robertson*, 2020 US Dist LEXIS 212456 (D.N.M. Nov. 13, 2020): In his motion *in limine*, the defendant asked the court to exclude any testimony from government witnesses "regarding the unsubstantiated matching of holes in the alleged t-shirt worn by the victim on the date of incident in this matter to a particular caliber of ammunition or type of firearm" on the basis that "[t]he Government has not provided any report or data that would suggest that testing had even been done to determine whether each hole in the t-shirt could be traced to a type of ammunition or if each of the holes occurred on the same date of this incident." The defendant argued that any such testimony would be prohibited under Rule 702. The government responded that "[t]he holes in the t-shirt are consistent with .45 ACP bullets, shell casings for which were found by police and recovered at the site of the shooting" and argued that the defendant's request that this evidence be excluded was unsupported by case law and was overly broad. In response, the defendant asserted that (i) he was not aware of any forensic testing of the t-shirt, like a gunshot residue test, which would establish that the holes were in fact caused by gunshots and (ii) other .44 and .45 caliber bullets could have caused the holes. The court deferred ruling on the issue as follows:

As the Court stated at the pretrial conference, it will neither exclude nor admit the evidence in question at this point. The government will bear the burden at trial of establishing a proper evidentiary foundation for the proposed testimony, and it must do so through a witness with personal knowledge about the t-shirt and the ammunition, as required by Rule 602 of the Federal Rules of Evidence. *See* Fed. R. Evid. 602. If the testimony will indeed be lay witness testimony under Rule 701, the government must also establish that it is not "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). Unless and until the government establishes a proper foundation, the Court will not permit it to elicit any evidence about the "matching of holes in the alleged t-shirt worn by the victim on the date of incident in this matter to a particular caliber of ammunition."

Cell-Site Location --- court-imposed limitation on overstatement: *United States v. Medley*, 312 F.Supp.3d 493 (D.Md. 2018) (Grimm, J.): The court held that historical cell site location information is sufficiently reliable to be admissible under *Daubert*. But the court recognized that there was a danger in expert testimony that would ascribe a level of precision to CSLI that is not actually supported by the methodology. Thus the court limited the expert's testimony to the opinion that the "general location" of the defendant's phone was "consistent with" the location of the crime. And the court held that this opinion could only be given after the expert has "fully explained during direct examination the inherent limitations of the accuracy of the location evidence --- namely, the phone can only be placed in the general area of the cell tower sector that it connected to near the time of the carjacking, and the it cannot be placed any more specifically within the sector."

Cell-Site Location --- admissible because the government accepted a limitation on overstatement: *United States v. Brown*, 2019 WL 3543253 (E.D. Mich.): The court held that the methodology of cell site location is reliable, but relied on *United States v. Hill*, 818 F.3d 289 (7th Cir. 2017), for the proposition that the court cannot “give the Government a blank check when it comes to the admission of historical cell-site analysis.” Specifically, an expert could not be allowed to testify that cell site location is more precise than the actual methodology could support. It concluded as follows:

Although the science and methods upon which historical cell-site analysis is based are understood and well-documented, they are only reliable to show that a cell phone was in a general area. The Government acknowledges this relative imprecision in its response to Brown’s motion. Thus, assuming that the Government lays a proper foundation and accurately represents historical cell-site analysis’s limits at trial, its expert testimony is reliable.

Cell-Site Location --- admissible because the government accepted a limitation on overstatement: *United States v. Frazier*, 2020 U.S. Dist. LEXIS 35417 (M.D. Tenn.): In a prosecution on charges of kidnaping and murder, the defendants moved to exclude expert testimony concerning cellphone location. The expert was an FBI Special Agent assigned to the Cellular Analysis Survey Team. He reviewed the cell phone data reports of the cellphones allegedly utilized by the defendants during the time frame when the victim was kidnapped, murdered, and buried. The court held that because historical cell-site analysis is only reliable to show that a cellphone was located within a general area, a *Daubert* hearing is not necessary and the expert testimony is reliable *so long as* the “[g]overnment lays a proper foundation and accurately represents historical cell-site analysis’s limits at trial.” The defendants raised “no unique arguments to the methodology employed” and instead claimed that the expert’s report “places certain cell phones in proximity to a cell tower without providing information about the cell tower’s range; fails to indicate the level of precision of location, and says nothing about the range of potential error.” The court concluded that the asserted flaws would go to the weight and not the admissibility of the evidence.

Even though the court denied the defendants’ motion to exclude the cell-site testimony, it deferred ruling on the admissibility of a slideshow put together by the cell-site expert that purported “to show the approximate location of cellphones based upon their cellular communications with towers at or around the time in question.” The court observed that the slide show contained “testimonial statements, inferences, and conclusions” and concluded that “[j]ust as the Government cannot oversell the methodology through testimony, it cannot oversell the methodology through the introduction of evidence.”

Cell-site location --- Limits on Overstatement: Cell-Site Location: *United States v. Blackmon*, 2020 US Dist LEXIS 218908 (M.D. Ala. Nov. 23, 2020): In his motion for a *Daubert* hearing, the defendant objected to the admission of records to historical cell-site information and to its expected testimony. The court acknowledged the possibility of overbroad testimony, but found no such issue in this case, as the government represented that the expert would testify to the general geographic area of the defendant’s cell phone during the time of the murder charged in the indictment.

Chemical traces --- limits on overstatement: *United States v. Zajac*, 749 F. Supp. 2d 1299 (D. Utah 2010): The defendant was charged with bombing a library, and he moved to exclude expert testimony regarding trace evidence --- the consistency between the adhesives on the bomb and those found at the defendant’s residence. The court noted that the 2009 NAS Report found problems with current forensic science standards in many areas, including paint examination. “While this case pertains to adhesives rather than paints, both are polymers that require microscopic examination, instrumental techniques and methods, and scientific knowledge for proper identification. Thus, the NAS Study is instructive here and lends support to the efficacy of [the expert’s] tests.” The court stated that *Daubert* did not require the expert to “conduct every conceivable test to determine consistency with absolute certainty. Instead, her tests had to be reliable rather than merely subjective and speculative.” The expert in this case used four different instruments to determine consistency, and while that did not go to the level of confidence specified that the defendant desired, “*Daubert* does not require a validation study on every single compound tested through these instruments.” The court noted that the instruments were designed to analyze many compounds and “there is no evidence before the court that Michaud misapplied techniques or methods when she conducted her analysis.” Ultimately the court concluded that the tests were sufficient for the expert to be able to opine on the visual, chemical, and elemental consistency between the adhesives on the bomb and those found at the defendant’s residence. *However, the court held that the expert could not testify to a conclusion that the adhesives came from the same source, as that would be overstating the results.*

Chromatography: *United States v. Tuzman*, 2017 WL 6527261 (S.D.N.Y.): In a securities fraud prosecution, the defendant sought to call a forensic chemist to testify that certain entries in a notebook were made after the fact --- in 2015 rather than between 2008-12. The expert performed (1) a physical examination of the notebook entries; (2) a Thin Layer Chromatography test of the ink used to make the entries, which is designed to determine whether the same ink was used to make the entries; and (3) a Solvent Loss Ratio Method (“SLRM”) analysis using Gas Chromatography/Mass Spectrometry (“GC/MS”) testing, which is designed to date the use of the ink. The government objected to the SLRM process used by the expert. The government conceded that the process could be used to date ink, but argued that the expert failed to reliably apply the method. The court agreed with the government:

The Court concludes that Dr. Lyter’s failure to use basic quality control protocols—including those required in the two papers he purportedly relies on—demonstrates that he lacks “good grounds” for his conclusions. *Amorgianos*, 303 F.3d at 267-69 (upholding trial court’s determination that proposed expert testimony was unreliable because expert witness “failed to apply his own methodology reliably”). * * *

Here, Dr. Lyter did not use a GC/MS machine dedicated exclusively to ink analysis, despite the clear instruction in one of the two articles on which he relies “that accurate quantitative results can only be obtained if the GC-MS system is devoted for ink analysis only.” He also did not test paper blanks, even though both papers on which he relies

underscore the importance of performing tests on paper blanks to rule out contamination. These departures from the methodology on which Dr. Lyter purportedly relies demonstrate that his analysis is not “reliable at every step.” *Amorgianos*, 303 F.3d at 267; *Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765, 773 (7th Cir. 2014) (“[A]n expert must do more than just state that he is applying a respected methodology; he must follow through with it.”).

Dr. Lyter has not provided any justification for these substantial deviations from the methodology he claims to have followed, other than his subjective belief that these quality control protocols are unnecessary. Precedent makes clear, however, that an expert is not free to deviate—without justification—from the requirements of a methodology he claims to have followed.

Comment: This is an excellent example of proper application of Rule 702(d). Reliable application is treated as a Rule 104(a) question. The court notes what should be the obvious point that unreliable application of reliable methodology leads to an unreliable conclusion.

DNA identification, mixed samples: *United States v. Hayes*, 2014 WL 5470496 (N.D. Cal.): The court rejected a challenge to PCR/STR DNA identification, as applied to mixed samples. The court stated that “the use of PCR/STR technology to analyze a mixed-source forensic sample is neither a new or novel technique or methodology. Hayes has not cited any legal or scientific authority to the contrary.”

Comment: The PCAST report constitutes “scientific authority to the contrary” regarding the subjectivity that is part of the process of extracting DNA from a mixed source. (Though it was published after this case.)

DNA – Mixtures, test found unreliable: *United States v. Williams*, 382 F.Supp.3d 928 (N.D. Cal. 2019): The court addressed the probabilistic genotype program Bullet, used by the Serological Research Institute (SERI) to analyze multiple source DNA mixtures that include up to four possible sources. The government expert, Hopper, analyzed the DNA under a four-person validation, despite a past analyst finding that the sample contained five possible sources. The expert proposed to testify that there is “very strong support” for the proposition that the defendant contributed DNA to the sample. The defendant moved to exclude the Bullet analysis on the ground that the program was not validated for five-source samples.

Judge Orrick provided this helpful background for the challenges to DNA identification of mixed samples:

DNA analysis for single-source and simple mixtures—those with DNA from just one or two individuals—is objective and reproducible in part because it requires the exercise of little if any human judgment. Katherine Kwong, *The Algorithm Says You Did It: The Use of Black Box Algorithms to Analyze Complex DNA Evidence*, 31 Harv. J.L. & Tech. 275, 277 (2017)) By contrast, human judgment is required to analyze complex

mixtures with three or more DNA profiles because “all of the individual DNA profiles [are] superimposed atop one another.” Id. at 278. An analyst must decide between “different interpretations that might be equally or similarly valid – and those decisions may have significant impacts on the ultimate results of the analysis.” Id.

It is frequently impossible to tell how many individuals' DNA is present within a complex mixture; a greater number of contributors only increases the rate of error, which usually comes in the form of an underestimate. For example, a 2005 study found that analysts mischaracterized known four-person mixtures as three-person mixtures at a rate of 70%. These errors likely occur because of allele sharing:

Some alleles at some loci are relatively common and therefore likely to overlap between contributors to a mixture. Thus, the more individuals present in a mixture, the more likely it is the mixture will hide identifications of subsequent individuals, as the relative proportion of present versus absent alleles at each locus increases with each new contributor. * * * [A] five-person sample can present very similarly to the way four-person mixtures do.

Advancements in amplification technology have improved analysts' ability to accurately determine the number of contributors because they amplify the alleles at more loci. For example, SERI previously relied on the Identifiler Plus kit, which amplifies the alleles at 15 loci. The newer GlobalFiler kit, which SERI validated in December 2016, amplifies the alleles present at 21 loci, and some of the additional loci are polymorphic. * * * GlobalFiler has improved the reliability of the conclusions regarding the number of contributors for known three-person mixtures. But known five-person mixtures were mischaracterized as originating from four or fewer individuals in approximately 61-75% of samples. When SERI validated GlobalFiler, it tested two-, three-, four-, and five-person mixtures. It experienced the same difficulties. In fact, it underestimated all of the known five-person mixtures tested:

In each five-person mixture tested, the electropherograms showed no indication of more than four contributors. This was not due to a shortcoming of GlobalFiler or the testing process, but rather because, by coincidence, the contributors used to create the test mixture shared alleles. Given the genotypes of the contributors, no more than eight alleles could appear at any one locus.

* * * SERI often uses DNA profiles of employees and friends during validation studies. A 2018 study found that analysts underestimated 64% of known five-person mixtures and 100% of known six-person mixtures—and characterized all of the mixtures as containing DNA from four individuals.

Even with the improvement in amplification technology, other factors present challenges to accurately identifying the number of contributors. The challenge of allele sharing is “frequently exacerbated by samples that have degraded or which originally contained only a small amount of DNA.” Kwong at 278. * * * [D]egradation occurs when DNA breaks off between the bases, which usually happens to larger pieces first. This

process occurs naturally over time, although freezing DNA can slow it down. Amplification kits are unable to copy DNA past the point where the breakage has occurred.

The court excluded the Bullet analysis by Hopper because Hopper could not reliably conclude that only four, and not five, individuals contributed to the DNA mixture. The court noted the following issues: (1) the error rate for mistaking five-person mixtures for four-person mixtures was “troubling” (and research showed that the error rate only increased with the number of sources present in the mixture – 64% of 5-person mixtures and 100% of 6-person mixtures were underestimated); (2) SERI itself was unable to distinguish between four and five-person mixtures in a study by GlobalFiler where it failed to make a correct five-person identification even once; (3) Hopper used less than the recommended amount of DNA to test; (4) more than six years elapsed between the first test detecting a 5-person mixture and the second test by Hopper showing a 4-person mixture; and (5) “there are two loci with seven alleles—and one of those loci has a below-threshold peak that could represent an eighth allele. If that is the case, the sample can be a four-person mixture *only if* no two contributors share alleles at that locus, no contributor is a homozygote at that locus, and no additional alleles have dropped out at that locus.”

The government argued that any flaws in the methodology and application to the DNA mixture could be raised on cross-examination. But the court disagreed, explaining as follows:

The government argues that exclusion of the testimony is not appropriate; instead, Elmore can challenge Hopper's analysis and conclusions during cross-examination. But the number of contributors is a foundational part of every calculation Bullet performs. If that input is in doubt, the reliability of the entire analysis is necessarily in doubt. To corroborate Hopper's conclusion about the number of contributors, the government put forth the results he obtained after running Bullet with a five-person mixture input. But Bullet was not validated to test five-person mixtures, and I will not rely on that result for any purpose.

DNA evidence can have a powerful effect on a jury's evaluation of a criminal case. See John W. Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability and Form*, 71 Or. L. Rev. 349, 367 n.81 (1992) (“There is virtual unanimity among courts and commentators that evidence perceived by jurors to be ‘scientific’ in nature will have particularly persuasive effect.”) (citing cases). If SERI could accurately identify five-person mixtures and if it had validated Bullet to analyze them, then it might have a reliable understanding of how underestimating a five-person mixture impacts the likelihood ratio. That understanding could improve the reliability of Hopper's conclusion on the number of contributors or make it appropriate to allow the government to present two likelihood ratios: one based on four contributors and a second based on five. Then the other problems identified in this Order, such as Harmor's changed testimony, the small testing sample, and the signs of degradation, would be ripe for cross-examination. But there are simply too many reasons to question the reliability of Hopper's conclusion on this foundational issue, which brings the entire analysis outside the parameters of Bullet's validation at SERI. This testimony is not reliable, and it is not admissible.

DNA Identification --- Low Copy Number: *United States v. Sleugh*, 2015 WL 3866270 (N.D. Cal. 2015): The court rejected the defendant’s motion to exclude an expert who would testify to a match based on Low Copy Number DNA sample. The court reasoned as follows:

The defendant argues that, as a matter of law, low copy number DNA samples produce inherently unreliable comparison results and, therefore, must be excluded from evidence or, in the alternative, warrant a *Daubert* hearing in all circumstances to determine whether the resulting findings were reliable. The defendant has not provided any binding authority—or, indeed, any legal authority—finding as a matter of law that a small sample size results in data that is inherently unreliable. At most, the defendant’s authority suggests there may be a correlation between sample size and the frequency of stochastic effects—randomized errors resulting from contamination that could potentially render a comparison unreliable. See *McCluskey*, 954 F.Supp.2d at 1277 (“LCN testing carries a greater potential for error due to difficulties in analysis and interpretation caused by four stochastic effects: allele drop-in, allele drop-out, stutter, and heterozygote peak height imbalance.”); see also *United States v. Morgan*, 53 F.Supp.3d 732, 743 (S.D.N.Y.2014) (“Although the presence of stochastic effects tends to correlate with DNA quantity, it is possible that a 14–pg sample may exhibit fewer stochastic effects than a 25–pg sample and therefore provide better results.”). However, as the defendant’s own authority explains, the critical inquiry remains whether there is evidence of unreliability (e.g., stochastic effects) in a particular case; there is no per se rule regarding sample size as called for by the defendant.

To rebut the defendant's reliability challenge on this basis, the government offered assurances that its serologist had not observed any stochastic effects. The defendant has had access to the serologist's report and hundreds of pages of underlying data for some time, and has not put forth a contrary proffer or evidence of unreliability in this specific case. Under such circumstances, and in light of the limited scope of the challenge and the general admissibility of DNA comparison testing, the Court finds no need to hold a *Daubert* hearing on this question on the present record.

DNA--- Low Copy Number and Combined Probability Index: *United States v. Williams*, 2017 WL 3498694 (N.D. Cal. 2017) (Orrick, J.): The court rejected the defendant’s motion to exclude DNA identification from mixed samples, derived from a Low Copy Number DNA sample. The court reasoned as follows:

Gordon urges me to apply the rationale of *United States v. McCluskey*, 954 F.Supp.2d 1224 (D.N.M. 2013), in which the court excluded DNA testing results derived from a low copy number (LCN) DNA sample. The *McCluskey* court excluded the LCN test results based on several factors, including the lab’s lack of certification and validation of its LCN testing. See also *United States v. Morgan*, 53 F.Supp.3d 732, 736 n.2 (S.D.N.Y. 2014) (discussing *McCluskey*’s reasoning in excluding the LCN data, and ultimately ruling LCN DNA test results admissible). * * * In deciding to exclude the LCN evidence, the court was careful to articulate its basis for exclusion—not merely the use of an LCN DNA sample, but rather, the lab’s methodology in interpreting that sample. * * * [T]he critical inquiry is whether the lab utilized reliable testing methods.

Gordon cannot point to any evidence that Kim failed to abide by established protocol. Instead, he challenges the assumptions underlying her interpretation of the data. Gordon has all the information he needs regarding Kim’s analysis to cross-examine her at trial. It would be improper to exclude such evidence from the purview of the jury when the lab utilized reliable methods that meet the standards under *Daubert*.”

But the court excluded other lab results using enhanced methods for DNA identification, where the lab used a Combined Probability Index (CPI) statistical model to enhance and interpret the samples. The court found three problems with this methodology:

First, [the] testing generated results below the stochastic threshold, which indicates the possibility of allelic dropout. * * * [T]he mere presence of results below the stochastic threshold indicates that some degree of randomness, and therefore questionable reliability, exists. Second, [the analyst] used two enhanced detection methods to account for the small amount of DNA available for testing. He testified that the lab protocol recommended using one or the other, but he chose to do both because he was “starting with low-template copy DNA.” The enhanced detection methods were individually validated, but he “[didn’t] recall” whether they were validated for use at the same time. * * * Third, SERI applied the CPI statistical model on complex mixed samples in an unreliable and untestable manner. Added to the other issues, this is an insurmountable problem. * * * SERI analysts failed to adhere to their own lab protocol or take any notes documenting their decision-making process. And they cannot point to any objective criteria guiding their methodology. [The analyst] repeatedly testified that his decisions were “very subjective” and based on his training and experience. “[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.” *Joiner*.

The court explicitly rejected the government’s arguments that the flaw, if any, was one of application and not methodology and so raised a question of weight and not admissibility:

I fail to see the practical distinction the government seeks to draw between a methodology and the application of that methodology when it comes to my role as gatekeeper. Rule 702 explicitly directs courts to consider whether “the expert has reliably *applied* the principles and methods to the facts of the case.” Fed. R. Evid. 702(d)(emphasis added). Proper application of the methods is a necessary component of ensuring the reliability of the opinion testimony. If SERI improperly employed accepted methodology then the results would lack a sound basis. That inquiry is appropriately included within the scope of a *Daubert* analysis. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (“*Daubert II*”), 43 F.3d 1311, 1316 (9th Cir. 1995)(“Our task, then, is to analyze not what the experts say, but what basis they have for saying it.”). The basis for an expert’s opinion must necessarily entail how he employed his methodology; that consideration is critical to a determination of whether the opinion “rests on a reliable foundation.” See *Daubert*, 509 U.S. at 597.

Comment: Low copy number DNA testing was purportedly a way of finding a match from infinitesimally small samples of DNA. It was a test developed and used in only one lab in the world --- the New York City Medical Examiner’s lab. It was supposedly supported by a validating test, but that test was never disclosed by the Medical Examiner. A lawsuit brought by a forensic examiner alleged that the test was never conducted and the Medical Examiner lied about it. That suit was settled for \$1,000,000. The Medical Examiner, in 2017, decided to abandon the Low Copy Number procedure. But courts have consistently admitted LCN results. See https://www.nytimes.com/2019/04/23/nyregion/dna-testing-nyc-medical-examiner.html?emc=edit_ur_20190424&nl=new-york-today&nid=6330531820190424&te=1

DNA identification --- PCR/STR: *Floyd v. Bondi*, 2018 WL 3422072 (S.D. Fla.): In a habeas challenge to convictions for kidnapping and sexual battery, the petitioner alleged ineffective assistance of counsel for failing to subject the government’s DNA evidence to meaningful adversarial testing. The court rejected this argument and denied the petition for writ of habeas corpus, concluding that PCR/STR DNA testing is generally accepted in the scientific community. It stated as follows:

The State’s expert testified that she did autosomal STR, PCR testing. She further testified that this testing technique is used worldwide, has been subject to peer review, and is generally accepted in the scientific community. She also said that it was used and accepted by laboratories everywhere and is supported by scientific literature. She sent the material to another lab for Y-STR testing, by which only the DNA on the male chromosome would be analyzed. She said that Y-STR testing is PCR testing. Y-STR testing eliminates the female DNA, is equally effective when it is only a mixture of two people, and can use a smaller amount of DNA. . . . DNA evidence is not new or novel and both are generally accepted in Florida so long as the testing procedures are properly conducted. * * * As a result, had counsel objected to the DNA expert, it is unlikely that the trial court would have sustained the objection.

DNA identification: *United States v. Jackson*, 2018 WL 3387461 (N.D. Ga.): In a robbery prosecution, the defendant moved to exclude DNA evidence implicating him. The DNA sample obtained from the defendant matched the DNA obtained from a black ski mask found at the scene of the robbery. The defendant argued that this evidence was not admissible because the government failed to show that the collection methods were proper or reasonably based on scientific principles. The court denied the defendant’s motion, and exercised its discretion to forego a *Daubert* hearing. The court stated that the defendant’s objections went to the weight of the evidence, not the “well-established reliability of the DNA testing methodology and process.” The court elaborated as follows:

Defendant has offered no reason to suspect that the mask was contaminated. * * * Defense counsel will have further opportunity to cast doubt on the evidence and testimony through cross-examination at trial. Though a court’s decision of whether to conduct a *Daubert* Hearing is discretionary, the Court does not view it necessary on this issue, as

the reliability of the [Georgia Bureau of Investigation’s (“GBI”)] DNA testing methods are “properly taken for granted.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S 137, 152 (1999). Here, the GBI forensic biologist’s specialized knowledge will help the trier of fact understand the evidence by explaining the DNA testing process; the testimony is based on the sufficient facts and data; the testimony is based on widely accepted DNA testing methods; and the lab report makes clear that the forensic biologist reliably applied the aforementioned accepted methods to specific facts here, that is the comparison of the mask and the cheek swabs. Under Rule 702, the Government’s forensic biologist may present expert testimony as to the DNA evidence.

Comment: The court talks about questions of weight but here it is pretty clearly in a Rule 104(a) sense. The court makes specific findings that the expert had sufficient facts and reliably applied the methodology. And the methodology and “process” are found so sound that no *Daubert* hearing need be held. All this looks like an application of Rule 104(a).

DNA Identification --- probability testimony, avoiding overstatement: *McCollum v. United States*, 2020 WL 5363302 (M.D. Ga. Sept. 8, 2020): The defendant in a bank robbery prosecution argued that his defense counsel should have moved to exclude the testimony of an FBI forensic examiner in a bank robbery trial. The expert testified that there was “moderately strong support” that McCollum was a contributor of the DNA on “item 2” from a Camaro that was used in the bank robbery that was at issue in the trial; it was 170 times more likely that this DNA came from Petitioner as opposed to a random person. The court held as follows:

If counsel had filed a motion to challenge the DNA expert's opinion that a likelihood ratio of 170 provides moderately strong support that Petitioner contributed the DNA on item 2, a hearing on that motion would have revealed something that the DNA expert stated in his report: based on the “standards published by the Association of Forensic Science Providers,” a likelihood ratio between 100 and 990 provides “moderately strong support” for inclusion. Since there is evidence that the relevant scientific community considers a likelihood ratio of 170 to be “moderately strong support” for inclusion, the evidence would not have been excluded under Rule 702.

DNA Identification: *United States v. Williams*, 2013 WL 4518215 (D. HI.): A forensic examiner’s report found the victim’s DNA on certain items in the defendant’s house. He moved to exclude the testimony on the ground that source attribution methodologies are unreliable and therefore run afoul of *Daubert*. The court denied the motion, relying on precedent.

The court agrees with those other decisions finding that the source attribution determination is based on methods of science that can be adequately explained, and that the jury should decide what weight to give this evidence based on these dueling expert opinions. See, e.g., *United States v. McCluskey*, — F.Supp.2d —, 2013 WL 3766686, at *44 (D. N.M. June 20, 2013) (determining that this ‘battle of experts’ regarding source attribution is for the jury to resolve); *United States v. Davis*, 602 F.Supp.2d 658, 683–84

(D.Md.2009) (determining that expert may opine that defendant was the source of the samples where the RMP calculation was sufficiently low to be considered unique) The court therefore rejects that *Daubert* prevents the government from providing testimony that to a reasonable degree of scientific certainty, several samples collected from Defendant's residence are from Talia.

DNA --- STR Mix Program: *United States v. Christensen*, 2019 WL 651500 (C.D. Ill. Feb. 15, 2019): In a kidnapping prosecution, the defendant moved to exclude DNA test results and requested a *Daubert* hearing on the reliability of the methods used. With regard to the DNA tests, law enforcement used the STRmix program to compare DNA samples taken from the defendant to samples from the alleged victim. The defendant challenged the reliability of the STRmix program, arguing that its use of allele length rather than more detailed sequencing analysis makes it unreliable. The court denied the defendant's motion, finding STRmix test to be a reliable methodology:

Defendant moved to exclude the DNA test results on the grounds that STRmix is unreliable. At the evidentiary hearing, the United States called Ms. Jerrilyn Conway, a forensic examiner for the FBI, who testified that STRmix has been validated internally by the FBI and also by numerous studies conducted by employees of the company that produced it. She noted that STRmix is used by at least 43 laboratories in the United States, including the U.S. Army. Defendant argues that the STRmix program, which utilizes a probabilistic genotyping algorithm based on allele length, is not as reliable as next-generation sequencing analyses. Ms. Conway agreed at the hearing that next-generation sequencing could be more precise. However, she testified that STRmix is nonetheless reliable, partly because it compares allele length at not just one locus (where sequencing would prevent false matches among alleles with identical lengths but different contents), but at 21 regions of the sample. She testified that the probability of two different individuals having matching allele lengths at one locus would be approximately 1 in 50, but that the probabilities STRmix generates are in the quintillions to octillions, due to the numerous loci compared. The evidence shows that STRmix has been repeatedly tested and widely accepted by the scientific community. Although there may be more precise tests available, such tests do not affect STRmix's reliability. Accordingly, Defendant's Motion to exclude the DNA evidence based on the alleged unreliability of STRmix is denied.

DNA Identification: *Andersen v. City of Chicago*, 2020 WL 3250679 (N.D.Ill.): Anderson was convicted of murder and rape, was eventually exonerated, and then sued the City of Chicago and certain law enforcement officials. The defendants moved to exclude DNA experts who would testify that Anderson's DNA could not be found on the murder weapon, and would also provide other exculpatory DNA results. The defendants argued that because these DNA tests were done decades after the crime, the risk of contamination over that time rendered the results unreliable. The defendants also argued that the DNA had degraded; that the experts relied on Low Copy Number methodology; and that the experts had not properly considered stochastic effects.

As to all these arguments, the court essentially held that they went to weight and not admissibility. Here are some excerpts from the court's opinion:

Defendants will be permitted to thoroughly cross-examine the experts about the potential for contamination and degradation and the possible impact on the results, as well as the fact that the source of the DNA is unknown. Defendants will have ample opportunity to argue to the jurors that the DNA on the evidence in 2014 does not reflect the DNA that may have been on the evidence in 1980, and that the jurors should therefore give little weight to the DNA testing results. [citations omitted] Cross-examination, rather than exclusion, is the appropriate course.

* * *

In their argument that it was improper to interpret the low-level DNA samples here, Defendants point generally to the proposition that low-level DNA can be “challenging to interpret” and that the “forensic DNA community needs to be vigilant” in interpreting such samples. But their arguments and the bases for them do not persuade the Court that such samples can *never* be reliably interpreted or that analysts should never attempt to do so.

Specifically, Defendants point to the fact that only partial DNA profiles were derived from the samples, including the sample taken from Trunko's bra which was used to develop her profile for comparison purposes. Andersen, on the other hand, points to the 2017 Interpretation Guidelines published by the Scientific Working Group on DNA Analysis Methods (“SWGDM”), which is “a group of scientists representing federal, state, and local forensic DNA laboratories in the United States and Canada.” These guidelines support the reliability of the methods used by the experts. As explained in the 2017 SWGDM guidelines, “DNA typing results may not be obtained at all loci for a given evidentiary sample (e.g., due to DNA degradation, inhibition of amplification and/or low-template quantity); a partial profile thus results.” Yet the guidelines still anticipate that laboratories will analyze such partial profiles. * * * [E]very forensic DNA laboratory constantly encounters and then interprets, partial profiles and * * * the wholesale dismissal of a partial profile because it is a partial profile is not part of forensic practice, is not warranted on analytical grounds, and would infer that autosomal STR loci are not genetically and analytically independent (which of course they are). Cellmark's SOPs allowed for interpretation of partial profiles and allowed for exclusions to be made based off of partial profiles. All of this points to the reliability of the methodology used here.

Defendants also point repeatedly to evidence of stochastic effects present in the testing results here, arguing that when present, such effects make interpretation and analysis unreliable. The 2017 SWGDM guidelines define stochastic effects as “the observation of intra-locus peak imbalance and/or allele drop-out resulting from random, disproportionate amplification of alleles in low-quantity template samples.” Yet, again, the 2017 SWGDM guidelines anticipate that results may still be interpreted where stochastic effects are present. Cellmark SOPs provide that for low-level DNA, the possibility of stochastic effects must be considered, and the data must be interpreted with caution, and [the plaintiff's expert] testified that when interpreting the samples, she followed this guidance.

Defendants additionally point to the fact that at least some of the evidence samples reflected “low copy number” (“LCN”) DNA, which again, they say, cannot be reliably interpreted. * * * Other district courts have concluded that interpreting LCN data is a generally accepted and reliable methodology. [citing cases]

In sum, the Court determines that it is a reliable science and generally accepted practice to interpret low-level and degraded DNA samples, as the experts did here. And, as evidenced in the reports and through testimony, the conclusions that the experts reached in their interpretations are supported by the profiles obtained from the DNA samples. In seeking to discount these conclusions, Defendants appear to forget that the Court’s gatekeeping function is to determine whether the methods used by an expert in reaching a conclusion are sound, not to judge whether the conclusion is correct.

DNA Identification: --- overstatement --- expert opinion excluded for concluding that partial DNA profiles with evidence of stochastic effects are always "inconclusive." --- *Andersen v. City of Chicago*, 2020 US Dist LEXIS 190305 (N.D. Ill. Oct. 14, 2020): Anderson was convicted of murder and rape, was eventually exonerated, and then sued the City of Chicago and certain law enforcement officials. Andersen moved to exclude the testimony of Dr. Dan E. Krane, the city’s DNA expert. The court granted Andersen’s motion to exclude Dr. Krane’s testimony, finding that his underlying methodology did not meet the requirements for reliability under Rule 702. Dr. Krane opined that DNA samples with evidence of stochastic effects should not be used to exclude or include anyone as a contributor, especially where the DNA is also low-level DNA. The court found this approach unreliable:

The court's understanding of Dr. Krane's methodology—that partial profiles with evidence of stochastic effects should be deemed inconclusive as a matter of course—is consistent. Defendants have not offered compelling evidence that the decision excluding Dr. Krane's testimony relies on a misunderstanding of his opinions or methodology.

Nor do Defendants submit evidence that Dr. Krane's methodology is generally accepted within his field. The sources proffered by Defendants merely affirm that partial profiles with stochastic effects *may* appropriately yield an inconclusive result, not that they *must*. Other than Dr. Krane himself, the court is unaware of any expert or authority in the field of DNA interpretation which automatically deems partial DNA profiles with evidence of stochastic effects "inconclusive."

Unlike the rest of the forensic DNA testing field, Dr. Krane categorically deems partial DNA profiles with evidence of stochastic effects "inconclusive." This amounts to a refusal to interpret such samples because the outcome is a foregone conclusion.

DNA Identification: *United States v. Davis*, 602 F. Supp. 2d 658 (D. Md. 2009): The defendant moved to exclude DNA test results and requested a *Daubert* hearing. He contended that

the expert used a method called low copy number (LCN) testing, and argued that identification from an LCN sample is not a validated scientific methodology. The court made a factual finding that the expert did not use LCN testing, but rather used the generally accepted PCR/STR analysis. So no *Daubert* hearing was necessary.

DNA --- statistical evidence: *United States v. Tucker*, 2019 WL 861215 (E.D. Mich): Following his conviction for armed bank robbery, the defendant moved to vacate his sentence, arguing that his trial counsel erred in failing to object to the DNA evidence that was offered against him. The court denied the defendant’s motion, finding that the Sixth Circuit has repeatedly upheld the reliability of statistical evidence related to DNA testing:

Defendant’s objection regarding the DNA evidence fails because the Sixth Circuit has consistently held that statistical evidence related to DNA testing is admissible. *See United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004) (“The use of nuclear DNA analysis as a forensic tool has been found to be scientifically reliable by the scientific community for more than a decade.”); *United States v. Bonds*, 12 F.3d 540, 568 (6th Cir. 1993) (“Thus, because the theory, methodology, and reasoning used by the FBI lab to declare matches of DNA samples and to estimate statistical probabilities are scientifically valid and helpful to the trier of fact, we affirm the district court’s conclusion that they are admissible under Rule 702.”). Accordingly, counsel was not deficient for failing to raise a meritless objection to the statistical DNA evidence presented.

DNA Analysis --- mixed sample --- expert opinion excluded where the sample identified was a minor contributor to the mix: *United States v. Gissantaner*, 2019 WL 5205464 (W.D. Mich.): In a felon-firearm prosecution, the major piece of evidence was a small amount of DNA found on the firearm during a search of defendant’s house. The gun was found in a chest belonging to another convicted felon, Patton. The DNA analysis was based on STRmix probabilistic genotyping software. The report from this analysis concluded that the defendant was a 7% minor contributor of the DNA and that it was at least 49 million times more likely that the DNA was that of the defendant and two unrelated, unknown individuals than that the DNA was from three unrelated, unknown contributors. The defendant challenged the use of the software under the circumstances of this case, in which his alleged DNA was a minor contributor to the mixed sample. He argued that many of the factors entered into the STRmix program are matters of judgment and thus are variable and affect the rate of error. One of these inputs is the number of contributors to a DNA mixture, which is determined by the analyst, but, empirically, is increasingly difficult to determine as the number of contributors increases.

The court noted there are no standards in the U.S. for the development and use of probabilistic genotyping software in forensic DNA analysis. There are guidelines, but those are not standards against which laboratories can be audited. The court relied on the PCAST report stating that while single-source DNA analysis is an objective method with precisely defined protocol complex mixtures with three or more contributors rely primarily on the interpretation of the DNA profile rather than on the laboratory processing --- and therefore are subject to error. The PCAST report specifically stated that STRmix methods “appear to be reliable for three-person

mixtures in which the minor contributor constitutes at least 20 percent of the intact DNA in the mixture and in which the DNA amount exceeds the minimum level required for the method.”

The court concluded that the government had not established adequate testing and validation of the STRmix under the conditions of DNA evidence in this case. Specifically, the court found that there were too many open and unanswered questions in the field about the testing and validation of STRmix in circumstances with low quantity, low level complex mixtures where the suspect’s DNA could only at most constitute 7% of the sample. It noted that many published recommendations advise “extreme caution” using probabilistic genotype software on low-template DNA samples. The court observed that while STRmix has been the subject of many peer-reviewed articles, nothing in those articles supported its application in cases involving complex mixtures of low-quantity, low level DNA. The court also noted that no rate of error has been established for the application of STRmix in cases like the instant one.

The court ultimately held that the STRmix DNA report in this case did not meet *Daubert* reliability standards for admissibility. The court emphasized that it was not criticizing the use of STRmix or probabilistic genotyping evidence in cases where the contributor’s percentage of the mix is higher.

DNA identification: *United States v. Williams*, 2010 WL 188233 (E.D. Mich.): The defendants moved to exclude the government expert’s proposed blood identification DNA testimony. The defendants argued that the expert employed a valid procedure to reach an unfounded conclusion. The court held that the testimony was admissible, because it is “well-settled that the principles and methodology underlying DNA testing are scientifically valid” and “DNA expert testimony has been widely approved by the courts as a valid procedure for making identification of blood samples.” The court held that the defendants’ attack on the expert’s conclusion did not raise a *Daubert* question, because *Daubert* held that the gatekeeper’s focus must be on the methodology and not the conclusion. In this case, “[e]ven if matching two out of thirteen loci does not provide conclusive evidence that the bloodstain at the house was that of the victim, it would seem to provide at least some evidence. The procedures from which this conclusion was drawn are scientifically sound; if Defendants want to challenge Hutchison’s conclusion, they are free to do so by cross-examining Hutchison or offering their own expert.”

Comment: It is true that the *Daubert* Court stated that the focus of the gatekeeper should be on methodology and not conclusion. But then in *Joiner*, the Court recognized that the gatekeeper must look at the conclusion as well --- and exclude if there is an “analytical gap” between methodology and conclusion. And Rule 702 (after 2000) *definitely* requires the court to scrutinize the expert’s conclusion --- in order to determine that a reliable methodology was *reliably applied*.

The court seems to treat the question of application (two out of thirteen loci) as a question of weight under Rule 104(b). How is the jury supposed to understand that?

DNA extraction --- STRmix: *United States v. Lewis*, 2020 U.S. Dist. LEXIS 36480 (D. Minn.): In a firearm prosecution, a forensic laboratory “analyzed three DNA swabs

from the gun using a probabilistic genotyping software program called STRmix.” The lab determined that the DNA on the gun was a mixture from four persons and that “the DNA mixture in each of the three swabs is greater than one billion times more likely if it originated from [the defendant] and three unknown unrelated individuals than if it originated from four unknown unrelated individuals.” In addition, the STRmix results excluded as contributors to the DNA mixture the landlord and the police officers involved in the scuffling. The court granted in part and denied in part the defendant’s motion to suppress the DNA evidence.

As to the validity of STRmix for extraction and identification, the defendant, relying on the PCAST report, argued that the range of reliability for STRmix does not extend to DNA mixtures of more than three contributors in which the minor contributor constitutes less than 20%. (The DNA mixtures in the case involved four contributors with the minor contributor constituting 6%). But the court noted that in response to the PCAST Report, a study was conducted and published by a STRmix co-developer that “show[s] persuasively that STRmix is capable of producing accurate results with extremely low error rates: STRmix not only works, it seems to work extremely well, at least when used in the manner it was used in these studies.”

The defendant argued that STRmix is unreliable because it does not have a known error rate, but the court concluded that the “error rate for false inclusion is known and is acceptably small.” The court admitted that the rate of error could not be numerically quantified, but stated that “*Daubert* does not require that an error rate be numerically identified for scientific evidence to be found sufficiently reliable. Rather, the known or potential error rate is one of several non-exclusive factors that courts consider when assessing the scientific validity of a theory or technique.”

While admitting the identification evidence, the court disallowed the “[DNA] evidence as to the exclusion of the relevant police officers and the landlord” for failing to meet the *Daubert* threshold of admissibility. The court concluded that while STRmix had been validated for extracting from DNA mixtures for *inclusion*, it has not been validated for extracting from DNA mixtures for *exclusion*.

DNA Extraction --- STRmix Admitted --- *United States v. Washington*, 2020 WL 3265142 (D. Neb. June 16, 2020): Law enforcement collected swabs for DNA testing from various objects to investigate a bank robbery. STRmix, a probabilistic genotyping software program, was used to test the swabs and ultimately linked the defendant’s DNA to the DNA collected from the handlebars, the bike seat, the helmet, and the handle of a bag based on a likelihood ratio. The defendant argued that “STRmix relies on subjective information and results can vary to an impermissible degree depending on the lab and the analyst involved.” Specifically, the defendant relied on the PCAST report, which concluded that the STRmix method “appear[s] to be reliable for three-person mixtures in which the minor contributor constitutes at least 20 percent of the intact DNA in the mixture.” But the court based its decision on a study conducted and published by a STRmix co-developer at the New Zealand’s Institute of Environmental Science and Research, which established that “when the [DNA] mixtures were compared with the DNA profiles of thousands of known contributors from non-contributors, STRmix was able to distinguish the contributors from non-contributors with a high level of accuracy [... and] extremely low error rates.” The court observed that “[t]hese studies, including the PCAST itself, suggest that questions

about STRmix’s reliability arise only when samples contain several different contributors and only a low-level contribution from the minor contributor. Recent studies demonstrate that STRmix has become increasingly reliable, even with DNA samples with more than three contributors.” Furthermore, the court emphasized that “STRmix is used in several federal laboratories, in more than forty states, and in at least thirteen other countries.” The court stated that only one federal court ruled that STRmix failed to satisfy Rule 702, and it was a case in which “the DNA mixture at issue was composed of three contributors, with only a seven-percent contribution associated with the defendant.” Because here the likelihood ratios linking the defendant to various items connected to the crime scene were “well above the 20% threshold at which the PCAST Report raised concern [...] any questions regarding STRmix’s reliability in this case go to the weight that should be given to STRmix statistics, not their admissibility.”

DNA Identification, including Low Copy Number testing: *United States v. McCluskey*, 954 F. Supp. 2d 1224 (D.N.M. 2013): The defendant moved to exclude DNA test results, challenging the reliability of PCR/STR and LCN (low copy number) testing. The motion was denied in part and granted in part. The court found that the PCR/STR method of DNA typing is reliable under Rule 702, but the government had not carried its burden of demonstrating the reliability of LCN testing.

As to PCR/STR Methodology, the court noted that this was the only forensic method found to be scientific in the NAS report. The court stated that “it is clear that the PCR/STR method can be and has been extensively tested, it has been subjected to peer review and publication, there is a low error rate according to NRC (2009), and there are controls and standards in place.” And it was also generally accepted.

As to low copy number (LCN) Testing --- which is a way of testing DNA that has become degraded or is only a small sample --- the court observed that “PCR/STR analysis of low-level DNA has been tested, and has been found to exhibit stochastic effects rendering the DNA profiles unreliable.” Moreover peer review and publications “have raised serious questions about the reliability of testing low amounts of DNA and accounting for stochastic effects.” And the reliability of LCN testing is not generally accepted in the relevant scientific community.

DNA --- Mixed sample: *United States v. Tucker*, 2020 WL 93951 (E.D.N.Y.): In an armed robbery case, the government offered a DNA identification from a mixed sample. The court noted that although there are gaps in understanding the full reliability of probabilistic genotyping, such as STRmix, issues generally arise only where the analysis involves multiple contributors and only a low-level contribution from the minor contributor. This case involved two DNA samples that were each two-person mixtures and in one sample, the “Male Donor,” alleged to be the defendant, was a 97 percent contributor. The PCAST report that criticizes STRmix did not challenge the reliability of STRmix in this context. The court found that STRmix is used in over forty states and has been peer-reviewed in over 90 articles. Further, its use is generally accepted in the relevant community and courts have “overwhelmingly admitted expert testimony based on STRmix results.”

DNA Identification ---- LCN testing: *United States v. Morgan*, 53 F. Supp. 3d 732 (S.D.N.Y. 2014): The defendant was charged with felon-firearm possession. He moved to exclude any evidence of low copy number (“LCN”) DNA test results of samples taken from the gun at issue. The court denied the motion, concluding that the methods of LCN DNA testing that the New York City Office of the Chief Medical Examiner (“OCME”) employed are sufficiently reliable to satisfy *Daubert*. The court stated that “[a]though the Court in *United States v. McCluskey* ruled LCN testing evidence from a New Mexico lab to be inadmissible, its finding rested, at least partially, on that lab’s lack of certification and validation of its LCN testing.” [In fact that was only a very small part of the *McCluskey* court’s reasoning.] The court held that the government “has clearly established that [the] validation studies are scientifically valid and bear a sufficient analytical relationship to their protocols. Thus, Morgan's objections go to the weight to be accorded to the evidence, not to its admissibility. * * * Although OCME could have conducted more validation studies with degraded or crime-stain mixture samples, under *Daubert*, scientific techniques need not be tested so extensively as to create an absolute certainty in their reliability. Thus, additional validation studies using crime-stain or degraded mixture samples might have bolstered the strength of OCME's conclusions, but are not prerequisites to a finding of reliability sufficient to satisfy the *Daubert* test.”

Comment: It should be noted that there are allegations that the LCN process was never properly validated by the Office of the Chief Medical Examiner. The process was been abandoned by OCME. See *DNA Under the Scope, and a Forensic Tool Under a Cloud*, *New York Times*, 2/27/16.

DNA --- Low Copy Number: *United States v. Wilbern*, 2019 WL 5204829 (W.D.N.Y.): The government sought to introduce forensic DNA evidence from swabs taken from an umbrella left by the perpetrators at the scene of the crime. Of the four swabs taken, only two, Swabs 8.2 and 8.4, contained DNA profiles able to be developed. The swabs were sent to OCME, which used Low Copy Number (“LCN”) testing. Upon testing, OCME determined that Swab 8.2 was a DNA mixture from at least two people, but that Swab 8.4 was a single-source sample from one person. OCME then determined that the source of Swab 8.4 was consistent with the major contributing source of Swab 8.2. OCME determined that Swab 8.2’s major contributor was the defendant, with a probability of finding the same DNA profile at 1 in 6.8 trillion people. OCME determine that Swab 8.4’s source was consistent with the defendant’s profile, with the probability of finding the same match at 1 in 138 million people. Swab 8.4 was lower quantity than 8.2.

Relying mostly on *Morgan, supra*, the court held that results obtained from LCN DNA testing “do not amount to ‘junk science,’ to which the courtroom should remain closed. Rather, in this case, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of testing what the Court finds to be admissible evidence.”

DNA Identification --- Admissibility of “Bluestar” method of identifying latent blood stains for DNA testing: *United States v. Frazier*, 2020 U.S. Dist. LEXIS 35417 (M.D. Tenn. Mar. 2, 2020): In a murder and kidnaping prosecution involving DNA evidence, the defendants sought to exclude the testimony of Esperança, a French forensic specialist in the morpho analysis of blood tracing and the use of Bluestar Forensic --- a reagent, according to the expert, that “can be used to identify latent bloodstains without altering the DNA, in order to allow subsequent DNA typing.” The government sought to admit this testimony to provide context for the DNA and blood testing they carried out to confirm the presence of the victim’s blood. Although Esperança has been qualified as an expert by the French Supreme Court and the International Criminal Court in the areas of forensic science and criminology, the court stated that it did not know “what it takes to qualify as an expert in other countries.” In addition, the court cast doubt on whether this testimony would be helpful to the jury as the methodology does not “conclusively identify blood, but [aids] investigators by identifying areas to swab or collect for further testing to determine if blood is present.” However, the court mentioned that the need for this testimony may become clear “if, for example, Defendants assert that the DNA or blood testing was somehow compromised by the use of Bluestar,” assuming that the expert is deemed qualified to testify on the matter.” For all these reasons, the court deferred ruling on the defendants’ motion *in limine* as to Esperança’s testimony.

DNA Identification: *United States v. Wrensford*, 2014 WL 1224657 (D.V.I. 2014): The court held that the PCR/STR method of DNA analysis is scientifically valid, and thus meets the standards of reliability established by *Daubert* and Rule 702.

Drug Identification --- Government had not established the reliability of the methodology: *United States v. Brown*, 2019 WL 3543253 (E.D. Mich.): The defendant challenged the testimony of a forensic expert on whether cocaine was found in a substance. The government argued that drug identification was basic and well established. It noted that the defendant provided no showing that the process of drug identification was unreliable. But the court stated that “it is the proponent of the testimony that must establish its admissibility by a preponderance of proof.” It concluded as follows:

The Government, as the proponent of Earles’s testimony, has not offered any explanation on how Earles performed her test or about the reliability of her methods, other than to note that forensic scientists are frequently qualified as experts. Thus, the Government still needs to establish the reliability of Earles’s methods.

Comment: The court is not at all saying that the methodology for drug identification is suspect. But it is absolutely right that if that methodology is challenged, the government must show its reliability by a preponderance of the evidence. That’s the importance of the Rule 104(a) standard.

Drug identification: *United States v. Reynoso*, 2019 WL 2868951 (D.N.M.): Testimony from lab analysts that substances obtained from the defendant contained methamphetamine was found to be admissible consistent with *Daubert*. The court stated:

In regard to the forensic scientist and chemists, as the Government points out, “there are no novel scientific principles at play.” Each of the proposed expert witnesses is employed in the field of forensic analysis and all are fully qualified to detect and analyze controlled substances. Thus, the Court rules that the proffered expert testimony of Mr. Chavez, Ms. Ponce, and Ms. Dewitt regarding the specific substances they personally analyzed have a reliable basis and will be admitted.

Fingerprints: *United States v. Cerna*, 2010 WL 3448528 (N.D. Cal.): The court held that the ACE–V method of latent fingerprint identification, “if properly applied, is sufficiently reliable under *Daubert*.” The court recognized that the NAS report “points out weaknesses in the ACE–V method” but stated that “these weaknesses do not automatically render the ACE–V theory unreliable under *Daubert*. Instead, the weaknesses highlighted by the NAS report—the lack of specificity of the ACE–V framework and its vulnerability to bias—speak more to an individual expert’s application of the ACE–V method, rather than the universal reliability of the method.”

Fingerprints: **Overstatement --- testimony of a match --- *United States v. Love*, 2011 WL 2173644 (S.D. Cal.):** The court denied a motion to exclude an expert’s conclusion that the defendant’s fingerprints “matched” fifteen latent prints. It recognized that “the NAS Report called for additional testing to determine the reliability of latent fingerprint analysis generally and of the ACE–V methodology in particular” and that the Report “questions the validity of the ACE–V method.” But the court concluded that “*Daubert*, *Kumho*, and Rule 702 do not require absolute certainty.” Instead, “they ask whether a methodology is testable and has been tested.” The court concluded that “latent fingerprint analysis can be tested and has been subject to at least a modest amount of testing—some of which, like the study published in May 2011, was apparently undertaken in direct response to the NAS’s concerns.” The court also noted that “the ACE–V methodology results in very few false positives” and that “despite the subjectivity of examiners’ conclusions, the FBI laboratory imposes numerous standards designed to ensure that those conclusions are sound.” Concluding on the NAS report, the court stated that “[i]nstead of a full-fledged attack on friction ridge analysis, the report is essentially a call for better documentation, more standards, and more research.”

Note: As DOJ points out, it was the court and not the witness who referred to the testimony as a match. As pointed out earlier, the fact that the court thinks that the testimony is matching testimony is a problem of its own.

Fingerprints ---PCAST Report: *United States v. Casaus*, 2017 WL 6729619 (D. Colo.): The defendant moved to exclude latent fingerprint identification evidence, challenging the

reliability of the ACE-V method. The court denied the motion. (The opinion does not mention the level of certainty that the expert proposed to testify to.) The defendant relied heavily on the PCAST report, but the court relied on precedent:

To support his contentions that the ACE-V method is per se unreliable, Defendant Casaus relies heavily on a 2016 report created by President Obama’s Council of Advisors on Science and Technology, wherein the Council criticized latent fingerprint examinations. This Court, however, is bound by established Tenth Circuit precedent concluding otherwise—that fingerprint comparison is a reliable method of identifying persons and one that courts have consistently upheld against a *Daubert* challenge. * * * Although the Court understands that further research and intellectual scrutiny into the reliability of fingerprint evidence would be all to the good, the Court agrees with the conclusion of the Tenth Circuit that to postpone present in-court utilization of this “bedrock forensic identifier” pending such research would be to make the best the enemy of the good.

Fingerprints: Overstatement --- testimony of a match --- *United States v. Shaw*, 2016 WL 5719303 (M.D. Fla.): In a felon-firearm possession prosecution, the government offered a fingerprint expert to analyze a latent fingerprint on a firearm, using the ACE-V method. The expert concluded that it matched the defendant’s known fingerprint. The court found the expert’s testimony to be admissible. The court relied on precedent:

[F]ederal courts have routinely upheld the admissibility of fingerprint evidence under *Daubert*. In this case, Maurice’s analysis followed ACE-V a formal and established fingerprint methodology that has been allowed by courts for over twenty years. Her work was reviewed by another crime scene/latent print analyst who verified Maurice’s conclusions. Although there does not appear to be a scientifically determined error rate for ACE-V methodology, courts have found that the ACE-V method is reliable and it is generally accepted in the fingerprint analysis community.

Fingerprints: Overstatement --- testimony of a match --- *United States v. Campbell*, 2012 WL 2373037 (N.D. Ga.): The court denied a motion to exclude expert testimony that the defendant’s fingerprint was a “match” to a latent print. The defendant cited the NAS critique on fingerprint methodology. The court relied on precedent:

[C]ourts have rejected this precise argument [that latent fingerprint analysis is unreliable] and have concluded that while there may be a need for further research into fingerprint analysis, this need does not require courts to take the “drastic step” of excluding a “long-accepted form of expert evidence” and “bedrock forensic identifier.” *Stone*, 2012 WL 219435, at *3 (quoting *United States v. Crisp*, 324 F.3d 261, 268, 270 (4th Cir.2003)); see also *United States v. Cerna*, 2010 WL 3448528 (N.D.Cal.) (noting that the “NAS report may be used for cross-examination or may offer guidance for fact-specific challenges,” and that the methodology “need not be perfect science to satisfy *Daubert* so long as it is sufficiently reliable”); *United States v. Rose*, 672 F.Supp.2d 723, 725–726 (D.Md.2009).

Note: DOJ says that the word “match” is supplied by the court, not by the witness. But the court used the term “match” after citing two government documents in support of the expert’s testimony. So the term “match” actually comes from the government --- which is the problem that an overstatement amendment is intended to address.

Fingerprints – Overstatement --- Testimony of a Match; PCAST and NAS Reports: *United States v. Kimble*, 2018 U.S. Dist. LEXIS 138988 (S.D. Ga.): In a prosecution for bank robbery, the defendant sought to exclude expert testimony that a latent fingerprint recovered from the getaway vehicle matched the defendant’s right middle fingerprint. The court denied the defendant’s request for a *Daubert* hearing. The defendant cited the PCAST and NAS Reports in challenging the reliability of fingerprint analysis, but the court relied on precedent and on an addendum to the PCAST Report, which speaks favorably about recent developments in latent fingerprinting. The court concluded that critiques of fingerprint analysis go to the weight of the evidence, not its admissibility.

The Government’s fingerprint expert used the Analysis, Comparison, Evaluation, and Verification (‘ACE-V’) methodology in comparing Kimble’s known fingerprints to the print lifted from the getaway vehicle. Numerous federal courts have held that that method of fingerprint comparison is widely recognized as reliable in both the scientific and judicial communities. *United States v. John*, 597 F.3d 263, 274-75 (5th Cir. 2010) (because fingerprint evidence is sufficiently reliable to satisfy Rule 702, a district court may dispense with a *Daubert* hearing); *United States v. Pena*, 586 F.3d 105, 111 (1st Cir. 2009) (district court did not err in declining to hold a *Daubert* hearing before admitting fingerprint evidence); *United States v. Crisp*, 324 F.3d 261 (4th Cir. 2003) (describing latent fingerprint methodology as a ‘long-accepted form of expert evidence’ and ‘bedrock forensic identifier’ relied upon by courts for the past century); *United States v. Abreu*, 406 F.3d 1304, 1307 (11th Cir. 2005); *United States v. Scott*, 403 F. App’x 392, 398 (11th Cir. 2010).

Kimble is challenging the application of fingerprint analysis science to the specific examinations conducted in this case. * * * [T]he scientific validity and reliability of the ACE-V methodology is so well established that it is not necessary for a district court to conduct a *Daubert* hearing prior to the admission of such expert evidence at trial. [citing a bunch of case law] He can expose any weaknesses in the Government expert’s application of ACE-V methodology on cross examination without the court having to expend its scarce judicial resources conducting a pretrial hearing.

Note: DOJ says that the term “match” comes from the court and that it is unknown what the witness actually testified to. But again, the point is that the court thinks that the testimony is “matching” testimony and admits it with that understanding --- how is a jury supposed to do a better job of distinguishing “match” from “identification”?

Fingerprints --- after PCAST --- Overstatement --- testimony to a match: *United States v. Bonds*, 2017 WL 4511061 (N.D. Ill.): The court upheld the use of latent fingerprint identification under the ACE-V method. The expert was allowed to testify to a match. The defendant argued that ACE-V is not a reproducible and consistent means of determining whether two prints have a common source and that ACE-V’s false positive rate is too high to justify reliance on it in a criminal trial. He relied on the PCAST report, which raises concerns about the subjective nature of fingerprint analysis and calls for efforts to validate the methodology through black box studies. But the court relied on precedent to reject the PCAST findings. It noted that the defendant’s arguments have been rejected by the Seventh Circuit in *Herrera, supra*, which noted that the “methodology requires recognizing and categorizing scores of distinctive features in the prints, and it is the distinctiveness of these features, rather than the ACE-V method itself, that enables expert fingerprint examiners to match fingerprints with a high degree of confidence.” The court stated that “[a]lthough the PCAST Report focuses on scientific validity, the Court agrees with *Herrera*’s broader reading of Rule 702’s reliability requirement.” The court also noted that the PCAST report was not completely negative on latent fingerprint analysis, as PCAST concluded that “latent fingerprint analysis is a foundationally valid subjective methodology—albeit with a false positive rate that is substantial and is likely to be higher than expected by many jurors based on longstanding claims about the infallibility of fingerprint analysis.” The court concluded that “[a]lthough the PCAST Report suggested that accurate information about limitations on the reliability of the evidence be provided, this information concerning false positive rates, in addition to the other concerns raised in the PCAST Report * * * goes to the weight of the fingerprint evidence, not its admissibility. Bonds will have adequate opportunity to explore these issues on cross-examination.”

Comment: Again, it is the court that uses the term “match” and we don’t know what the witness actually testified to. But the fact that the court is not following the ambiguous distinction between “match” and “identification” is problematic.

Fingerprints—Overstatement --- testimony to a match: *United States v. Rose*, 672 F. Supp. 2d 723 (D. Md. 2009): In a carjacking prosecution, the defendant challenged the admissibility of fingerprint evidence identifying him as the source of two latent prints recovered from the victim’s Mercedes and one latent print recovered from the murder scene. The court addressed the findings of the NAS report:

The [2009 NAS] Report identified a need for additional published peer-reviewed studies and the setting of national standards in various forensic evidence disciplines, including fingerprint identification. While the Report quoted a paper by Haber and Haber, the defendant’s proposed experts in this case, in which the Habers found no “available scientific evidence of the validity of the ACE-V method,” the Report itself did not conclude that fingerprint evidence was unreliable such as to render it inadmissible under Fed. R. Evid. 702. “[T]he Habers’ criticism of fingerprint methodology from their perspective as human factors consultants does not outweigh the contrary conclusions from experts within the field as evidenced by caselaw and the amicus brief in this case.”

Fingerprints: *United States v. Cruz-Mercedes*, 2019 WL 2124250 (D. Mass.): The court, during a *Daubert* hearing, compared the testimony of two experts who used the ACE-V method of fingerprint analysis. The government’s expert testified to the procedure he followed, where he went through all four stages of ACE-V methodology and documented his procedures according to MSP protocol. However, he failed to follow standards for documentation set by the Scientific Working Group on Friction Ridge Analysis Study and Technology (“SWGFAST”). The defendant’s expert did not find that the ACE-V method was unreliable, rather she found that none of the prints used by the government’s expert were suitable for comparison or clear enough for positive identification. She also found that the government expert’s failure to follow SWGFAST procedures opened the door to unconscious bias and prevented third party evaluation of his analysis. The court concluded as follows:

Based on the testimony presented during the evidentiary hearing, I could not find that Sgt. Costa's methodology was so unreliable that it should be kept from the jury. To be sure, Dr. Wilcox's testimony highlighted the importance of documentation to the scientific process, and I did not accept the Government's suggestion that documentation is irrelevant to a determination of reliability. The documentation here was not full and complete, and that affects the credibility of Sgt. Costa's conclusion, even if he properly used the ACE-V procedures.

While the SWGFAST standards for documentation represent the consensus view on what is appropriate, I was not convinced that Stg. Costa's failure to follow them renders his conclusions so unreliable that his opinion must be kept from the jury entirely. While that failure certainly raised concerns about confirmation bias and opens Stg. Costa's conclusions to robust challenge on cross-examination, the question whether to accept his comparison as accurate is properly left for the jury.

Comment: In finding the expert’s testimony to be not so unreliable as to be excluded, it can be argued that the court flipped the burden of persuasion from that imposed by *Daubert* and Rule 104(a): the proponent has the burden of showing reliability by a preponderance of the evidence. The court is essentially saying that defects in reliability are regulated by cross-examination, which is contrary to the presumption of *Daubert*.

Fingerprints: *United States v. Stone*, 848 F. Supp. 2d 714 (E.D. Mich. 2012): The court admitted expert testimony regarding fingerprints. The defendant raised the NAS report, but the court was “unpersuaded that the NAS Report provides a sufficient basis to exclude Mr. Wintz’s testimony.” The court relied on case law prior to the NAS Report. It noted that “in *United States v. Crisp*, the Fourth Circuit acknowledged the need for further research into fingerprint analysis, 324 F.3d at 270, but concluded that the need for more research does not require courts to take the ‘drastic step’ of excluding a ‘long-accepted form of expert evidence’ and ‘bedrock forensic identifier.’” The court stated that “[w]holesale objections to latent fingerprint identification evidence have been uniformly rejected by courts across the country.”

Fingerprints: Overstatement --- error rate of 30 out of a zillion --- *United States v. Gutierrez-Castro*, 805 F. Supp. 2d 1218 (D.N.M. 2011): The government sought to introduce an expert’s testimony about the methods and practices of inked fingerprint analysis. The expert compared several examples of fingerprints obtained from the defendant and would testify that all the fingerprints belong to the defendant. The court permitted the testimony, relying heavily on the Tenth Circuit’s decision in *United States v. Baines*, 573 F.3d 979 (10th Cir. 2009) (supra). The court stated that fingerprint analysis is used throughout the country and that “there have been over a hundred years of empirical validation to support fingerprint analysis, although it has not been scientifically established that fingerprints are unique to each individual.” The court acknowledged that the NAS Report calls into question ACE-V methodology, and concluded that its conclusions cut against admissibility under the *Daubert* peer review factor. The court found that the low rate of error weighed in favor of admissibility. The expert testified that error rates do exist, though it is hard to determine an error rate. He stated that there have been approximately thirty documented misidentifications in the last thirty or forty years out of millions of fingerprints. Finally, the court concluded that the *Daubert* factor of standards and controls was met because there are “standards that guide and limit the analyst in the exercise of subjective judgments.”

Comment: The expert’s testimony that the rate of error is 30/millions is wildly off, as shown in the PCAST report.

Fingerprints: *United States v. Mercado-Gracia*, 2018 WL 5924390 (D.N.M. Nov. 13, 2018): In an armed drug trafficking prosecution, the defendant sought to exclude the testimony of the government’s latent fingerprint expert, Lloyd. The court held a *Daubert* hearing on the reliability of the ACE-V method and denied the defendant’s request, applying the *Daubert* factors as follows:

1. Whether the Theory Can be Tested

Research on the persistence and uniqueness of fingerprints has occurred over hundreds of years. * * * Continued studies are ongoing in the fingerprint community. Numerous courts, including this one, have held that the ACE-V method can be tested. Given the record and authority, the first *Daubert* factor weighs in support of admissibility. * * *

2. Peer Review and Publication of the ACE-V Method

The record contains information on studies concerning the reliability of latent fingerprint analysis but contains less on the extent of peer review of the studies or the ACE-V method. This factor is thus neutral.

3. Known or Potential Error Rate

Defendant argues that fingerprint analysis is completely subjective and bias affects fingerprint analysis results, citing publications in support. Additionally, defense counsel highlighted at the hearing that Lloyd was unaware of population statistics regarding the

uniqueness of fingerprints. Lloyd acknowledged that latent print examinations involve subjectivity, and human error can occur, notably in the comparison step of the ACE-V method.

Nevertheless, the training and experience of latent print analysts is important in the field of fingerprint analysis. * * * In the Ulery study, 169 latent print examiners were given 100 prints, and the analysts made correct identifications 99.8% of the time. The Ulery study found a false negative rate of 7.5%. Numerous courts to have examined this issue have found that the error rate evidence in fingerprint identification weighs in favor of admissibility. * * * The recent bias studies cited by Defendant indicate that the error rate could be higher in real world settings where bias may be introduced; however, the very low error rate in the controlled Ulery study favors admissibility.

4. Existence and Maintenance of Standards

The Customs and Border Patrol (“CBP”) laboratory is certified by an outside agency, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (“ASCLD”). ASCLD promulgates its own standards that the ASCLD-certified laboratories must follow. Independent examiners from ASCLD analyze cases from the laboratory to make sure all laboratory analysts are following the same guidelines and the laboratory internal procedures and that the analysts all have the same training. ASCLD and the fingerprint analysis community use the ACE-V process for latent print comparison.

CBP latent print examiners throughout the world, including Douglas Lloyd, are certified by the International Association for Identification (“IAI”). Latent print examiners must pass a test issued by the IAI. The IAI requires re-testing every five years and training within the five years to stay continually certified. Failure to pass the IAI’s proficiency test will result in a six to twelve-month suspension, mandatory retraining, and re-testing.

Although the ACE-V system is a procedural standard relying on the subjective judgment of the examiner, there are accepted standards for following the ACE-V method, training on the system, and certification processes within the fingerprint examiner community to help ensure quality. This factor therefore weighs in favor of admissibility.

5. General Acceptance of Theory

The IAI, a worldwide standard, follows the ACE-V methodology. Despite the subjectivity inherent in the ACE-V method and some studies suggesting bias can affect results, federal courts of appeals have consistently concluded that ACE-V is an acceptable and reliable methodology. [citing a number of cases]. The general-acceptance-in-the-community factor favors admissibility.

The court concluded as follows:

Although not entirely scientific in nature, fingerprint analysis requires significant training and experience using a standard methodology. As *Kumho Tire* instructs, expert testimony on matters of a technical nature or related to specialized knowledge, albeit not scientific, can be admissible under Rule 702, so long as the testimony satisfies the Court’s

test of reliability and relevance. Fingerprint identification testimony is sufficiently reliable to be admitted into evidence at trial and Lloyd is qualified by his education, training, and experience to testify to matters in the field of fingerprint analysis and identification. The Court will therefore deny Defendant's motion to exclude Lloyd from testifying at trial.

Note: The government in this case provided notice that “Lloyd is expected to testify that he viewed the digital images photographed by Handley, compared them to Defendant’s fingerprint images, and identified fingerprints of value 4A and 5A as the right thumb and right index finger of Defendant.” So this is testimony of a match --- an overstatement, given that no testimony of a possible rate of error is contemplated. The testimony, however, is permitted under the DOJ protocol, where the word “identification” is interpreted as something other than a statement that there is a match.

Fingerprints – PCAST and NAS Reports --- prohibiting testimony of zero error rate but no discussion of an alternative : *United States v. Pitts*, 2018 WL 1116550 (E.D.N.Y. Feb. 26, 2018): In a prosecution for attempted bank robbery, the defendant moved to exclude expert testimony that latent fingerprints recovered from a withdrawal slip at the crime scene were a match to the defendant. The court denied the motion. With regard to latent fingerprint analysis, the court noted that the PCAST and NAS Reports raise a number of concerns:

First, error rates are much higher than jurors anticipate. PCAST Report at 9-10 (noting that error rates can be as high as one in eighteen); Jonathan J. Koehler, *Intuitive Error Rate Estimates for the Forensic Sciences*, 57 *Jurimetrics J.* 153, 162 (2017) (noting that jurors estimate the error rate to be one in 5.5 million)). Second, the NAS Report concluded that the ACE-V method lacks scientific credibility, stating that: “We have reviewed available scientific evidence of the validity of the ACE-V method and found none.” NAS Report at 143. Defendant also suggests that fingerprint analysts typically testify that the methodology has a zero or near zero error rate. *See* Mot. at 10 (citing *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir. 2004) (‘[S]ome latent fingerprint examiners insist that there is no error rate associated with their activities.... This would be out-of-place under Rule 702.’)). These analysts reason that errors are either human or methodological, and, in the absence of human error, the methodology of fingerprint analysis is 100% accurate. *See* Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 *J. Crim. L. & Criminology* 985, 1034-49 (2005) (‘More Than Zero’). Finally, Defendant contends that the critiques in the PCAST Report and NAS Report demonstrate that fingerprint analysis has not gained widespread acceptance among the relevant community.

As to these arguments the court first noted that the PCAST report eventually was more favorable to latent fingerprint analysis, given the empirical studies that have recently been done. The court stated that while the PCAST report “reinforced the need for empirical testing of fingerprint analysis and other forensic methods, noting that ‘experience and judgment alone—no matter how great—can *never* establish the validity or degree of reliability of any particular

method,’ it also ‘applaud[ed] the work of the friction-ridge discipline’ for steps it had taken to confirm the validity and reliability of its methods.”

Ultimately the court relied heavily on precedent:

Fingerprint analysis has long been admitted at trial without a *Daubert* hearing. *United States v. Stevens*, 219 Fed.Appx. 108, 109 (2d Cir. 2007) * * *; *United States v. Salameh*, 152 F.3d 88, 128-129 (2d Cir. 1998) (affirming admission of fingerprint evidence); *See also United States v. Avitia-Guillen*, 680 F.3d 1253, 1260 (10th Cir. 2012) (‘Fingerprint comparison is a well-established method of identifying persons, and one we have upheld against a *Daubert* challenge.’).

The Court finds the government’s citation to *United States v. Bonds*, 2017 WL 4511061 (N.D. Ill.) instructive. The court in *Bonds* reviewed the same arguments presented here: that the PCAST Report renders fingerprint analysis inadmissible.

Finally, the court addressed the possibility that the expert would overstate the meaning of the results. It noted that the government had averred that its fingerprint experts would not testify that fingerprint analysis has a zero or near zero error rate.

While the government concedes that experts at one time claimed that the error rate was zero, recent guidance instructs experts to have familiarity with error rates and the steps taken to reduce error rates, and “not [to] state that errors are inherently impossible or that a method inherently has a zero error rate.” (Nat’l Institute of Standards and Tech., *Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach* (2012), <http://www.nist.gov/oles/upload/latent.pdf> (last visited Feb. 26, 2017)). Thus, Defendant’s critiques appear to be misplaced.

The court emphasized, in conclusion, that it was not holding that fingerprint analysis is *per se* admissible.” It observed that the PCAST and NAS Reports “note a number of areas for improvement among the forensic sciences, and a number of courts have criticized forensic sciences as potentially lacking in the ‘science’ aspect.” However, the defendant, by simply relying on these reports, had not made a sufficient showing “that his critiques go to the admissibility of fingerprint analysis, rather than its weight.” [Which, given everything in the opinion, looks like an application of Rule 104(a).]

Comment: In discussing the question of overstatement, the court was happy that the experts were not going to testify to a zero rate of error. That is good, but there is no discussion in the opinion of what kind of confidence level and error rate the experts were going to testify to. If the expert just says it is a match --- or that the defendant’s fingerprint has been “identified” --- with no indication of the meaning of that conclusion, it is arguably not much better than testimony about a zero rate of error. Arguably, this is the kind of case where an amendment to Rule 702 that prohibits overstatement of results might focus the court on what the expert should be allowed to say.

Fingerprints – Defendant’s expert prohibited from testifying that experts exaggerate their results: *United States v. Pitts*, 2018 U.S. Dist. LEXIS 34552 (E.D.N.Y. Mar. 2, 2018): In a prosecution for attempted bank robbery, the government moved to exclude the testimony of the defendant’s fingerprint expert, Dr. Cole. The court granted the government’s motion, concluding that Dr. Cole’s testimony would not assist the trier of fact, and that excluding his testimony would not deprive the defendant of the right to use the PCAST and NAS Reports to cross-examine the government’s experts.

The Court is not convinced that Dr. Cole’s testimony would be helpful to the trier of fact. The only opinion Defendant seeks to introduce is that fingerprint examiners “exaggerate” their results and exclude the possibility of error. However, the government has indicated that its experts will not testify to absolutely certain identification nor that the identification was to the exclusion of all others. Thus, Defendant seeks to admit Dr. Cole’s testimony for the sole purpose of rebutting testimony the government does not seek to elicit. Accordingly, Dr. Cole’s testimony will not assist the trier of fact to understand the evidence or determine a fact in issue.

The court argued further that a defense expert was not necessary, because there was literature about error rates on which the defense could rely – most importantly, the PCAST report. The court stated that the defendant “identifies no additional information or expertise that Dr. Cole’s testimony provides beyond what is in these articles and does not explain why cross-examination of the government’s experts using these reports would be insufficient.”

Comment: This result shows the importance of having an admissibility requirement that specifically prohibits overstatement of results. The court was essentially treating the possibility of overstatement as a question of weight that could be dealt with on cross-examination.

As stated above, the fact that the experts were not going to testify to a zero rate of error is insufficient to guard against the risk of overstatement. The court seems to think that the problem is solved by any language other than zero rate of error.

Next, it is difficult to accept the court’s assumption that cross-examination with reports will be as effective as an expert witness for the defense. And it seems unfortunate that prosecution forensic experts are admitted and defense experts are excluded in the same case.

Fingerprints – Question of application of the method: *United States v. Lundi*, 2018 WL 3369665 (E.D.N.Y.): In a robbery prosecution, the defendant moved to exclude expert testimony that the defendant was the source of latent fingerprints recovered at the crime scene, and the government moved to preclude the defendant’s fingerprint expert from testifying. The defendant, relying on the PCAST Report, did not argue that the ACE-V method itself is flawed, but instead argued that the government’s expert failed to use the ACE-V method and therefore should be precluded from testifying. The court denied the defendant’s motion, concluding that the government sufficiently established that the method was used, and therefore that the defendant’s challenges go to the weight of the evidence, not admissibility.

The court --- the judge that issued the opinions in *Pitts, supra* --- evaluated the government’s expert as follows:

Defendant argues that the government’s expert testimony as to fingerprint analysis should be excluded in this case because the government has not shown that the multistep ACE-V method for analyzing fingerprints was used by its proposed expert, Detective Skelly. However, the government points to concrete indicators of how the ACE-V method actually was followed by Detective Skelly. Defendant does not argue that the method itself is flawed. Indeed, Defendant relies upon the addendum to the *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016) report of the President’s Council of Advisors on Science and Technology, which recognizes the ACE-V method as scientifically valid and reliable. * * * This Court is not persuaded that Defendant’s challenges go to the admissibility of the government’s fingerprint evidence, rather than to the weight accorded to it. Moreover, as this Court noted in *Pitts*, fingerprint analysis has long been admitted at trial without a *Daubert* hearing. The Court sees no reason to preclude such evidence here.

The defendant’s expert was the same witness that the court excluded in *Pitts, supra*. As in *Pitts*, the court found that the expert could not testify to overstatement, because, once again, the government witnesses were not going to testify to a zero rate of error. Unlike in *Pitts*, however, the defense expert in this case proposed to testify to the reliability of fingerprint examinations and the “best practices” to be followed when conducting such examinations. But once again the court found the PCAST and other reports to be sufficient fodder for cross-examination of the government’s experts, and so concluded that the expert’s testimony would not be helpful.

Comment: At least on the admissibility/weight question, the court seems correct. While questions of application go to admissibility, and the defendant argued that the expert did not apply the ACE-V method, the government countered with evidence that he actually did apply the method. Thus, any questions of proper application are in the nature of a swearing match, and so are matters of weight.

Again it seems problematic for the court to hold: 1) that a promise not to testify to zero rate of error completely solves the problem of overstatement; and 2) that an expert in the defendant’s case is not helpful because the defendant can use reports cross-examine experts in the government’s case.

Fingerprints: PCAST report; and some limit on overstatement: *United States v. Cantoni*, 2019 WL 1259630 (E.D.N.Y.): The defendant moved to exclude expert testimony by the NYPD Latent Print Section (“LPS”). The NYPD LPS uses the ACE-V approach for fingerprint analysis. The defendant relied on the PCAST report, which expressed doubts about the reliability of fingerprint identification and proposed a five-step process for to correct for bias. The PCAST recommendations are that latent print examiners (1) have undergone proficiency testing, (2) disclose whether they have analyzed the latent print before comparing it to the known print, (3) document their comparison of the prints' features, (4) disclose the existence of other facts that could have influenced their conclusion, and (5) verify that the latent print is comparable in quality to those prints used in certain foundational studies of latent print analysis. The defendant argued

that aside from the NYPD experts undergoing proficiency testing, there was no evidence to suggest that they followed the remaining guidelines.

The court assumed, without deciding, that the defendant was correct that the NYPD experts had not satisfied the PCAST protocol. But the court concluded that “the analysis makes clear that LPS followed the ACE-V procedure, a procedure that the PCAST report deemed scientifically valid and reliable. Indeed, an addendum to the PCAST report concluded that ‘there was clear empirical evidence’ that ‘latent fingerprint analysis [...] method[ology] met the threshold requirements of scientific validity and reliability under the Federal Rules of Evidence.’” (citations and internal quotations omitted). The court concluded as follows:

Although NYPD’s methods may have been imperfect and may not have delivered scientifically certain results, there is no indication that they were so fundamentally unreliable as to preclude the testimony of the experts. At best, Cantoni’s submission shows certain ways in which cognitive bias may have affected the NYPD examiners’ analysis but does not show that it actually did so or that any cognitive bias was so significant as to produce an erroneous conclusion. Defendant’s concerns are fodder for cross-examination rather than grounds to exclude the latent print evidence entirely. This is the approach that has been adopted each time courts in this district have considered similar motions.

The defendant alternatively sought relief from possible overstatement in the expert’s opinions. He moved to preclude the government experts from testifying that their conclusion is certain, that latent print analysis has a zero error rate, or that their analysis could exclude all other persons who might have left the print. In response, the government acknowledged that “the language and claims that are of concern to defense counsel are disfavored in the latent print discipline,” and that “absolutely certain opinions” and identifications “to the exclusion of all others” are “not approved for latent print examination testimony.” The court granted the defendant’s motion to exclude such claims “without opposition.” [Nonetheless, the experts were presumably allowed to testify to a source identification.]

Finally, the defendant sought to call an expert, Dr. Cole, who would testify to the rate of error in fingerprint identification, and challenges to its reliability. This was the same expert that the defendants proffered in *Pitts, supra*. Like the court in *Pitts*, the court here found that an expert would not be helpful, because the issues that would be addressed by the expert could be raised on cross-examination of the government experts.

Fingerprints: Overstatement --- testimony to a match--- *United States v. Myers*, 2012 WL 6152922 (N.D. Okla.): The court allowed an expert to testify to a fingerprint match, using the ACE-V method. The court relied heavily on *Baines, supra*. The court ticked off the *Daubert* factors:

1. *Testing*: “Gorges has undergone demanding training culminating in proficiency examinations, followed by further proficiency examinations at regular intervals during her career. Thus, Gorges’ testing is commensurate with the training undergone by fingerprint

analysts employed by the FBI and other law enforcement agencies all over the world, and is sufficient to weight the first *Daubert* factor in favor of admissibility.”

2. *Peer Review and Publication*: The court cited a report of the Office of the Inspector General (OIG), which is an updated analysis of the FBI’s fingerprint identification procedures. “Although the peer review contained in the report is not strictly scientific peer review of the ACE–V methodology contemplated by independent peer review of true science, it is sufficient to lend credibility to the methodology. Gorges also testified that, pursuant to TPD protocol, both positive and negative identifications are subject to verification. Again, although review by a secondary examiner is not the independent peer review of true science, it again lends credibility to the ACE–V methodology, especially where the review is sometimes blindly done.”

3. *Error Rates*: “Gorges stated that a trained, competent examiner using the ACE–V method properly should not make a misidentification. Therefore, this factor also weighs slightly in favor of admissibility.”

4. *Standards and Controls*: “As Gorges testified, several steps of the analysis require subjective judgments. Although subjectivity does not, in itself, preclude a finding of reliability, the reliance on subjective judgments may weigh against admissibility. However, Gorges also testified that the extensive training and testing that she undergoes makes the subjective analysis more exacting. When defendant asked whether two examiners might view the print differently or examine a print differently in the analysis step, Gorges stated that, while two examiners might notice different areas of the print, an examiner following the standard operating procedures, or the ACE–V method in the TPD, would not have a lot of leeway. Therefore, the fourth factor weighs both for and against admissibility.”

5. *General Acceptance*: “Gorges testified that ACE–V is currently utilized by the FBI. She also stated that it is the most reliable standard or protocol. Because fingerprint analysis has achieved overwhelming acceptance by experts in Gorges’ field, and because ACE–V is accepted as the most reliable methodology, this final factor weighs in favor of admissibility.”

Comment: There are many challengeable assertions in the court’s application of the *Daubert* factors. To take what is probably the most important: the *Daubert* Court’s reference to testing goes to whether the *method* can be verified empirically. That methodology-based focus is different from whether the *expert* is trained.

Fingerprints: --- No need to conduct a *Daubert* hearing before admitting latent fingerprint identification testimony based on the "ACE-V" method: *United States v. Reyes-Ballista*, 2020 U.S. Dist. LEXIS 218249 (D.P.R. Nov. 20, 2020): The defendant asserted that the evidence sought to be introduced by the fingerprint expert was not sufficiently reliable. The defendant challenged the validity and accuracy of the “ACE-V” method based on the NAS and

PCAST Reports, however failed to raise any specific, case-related challenges. The defendant's motion to exclude the government's fingertip expert testimony was denied.

In regard to the *Daubert* factors, the court found that the defendant's generic claims regarding the unreliability of the "ACE-V" method "dissipate in the face of the overwhelming case law standing for the proposition that fingerprint evidence is reliable enough for jury trials as a helpful form of identification testimony". Relying on *United States v. Crisp*, 324 F.3d 261 (3rd Cir. 2004), the court concluded that the method meets the *Daubert* requirements as "the reliability of the technique has been tested in the adversarial system for over a century and has been routinely subject to peer review. Moreover, as a number of courts have noted, the error rate of fingerprint identification is low." The court further held that absent any novel challenges raised, the district court does not abuse its discretion in declining to hold a *Daubert* hearing before admitting latent fingerprint identification testimony based on the ACE-V method. Finally, the court noted that "defendant will have ample opportunity to conduct vigorous cross-examination of the government's expert witnesses and present contrary evidence, defendant is not without means of attacking the evidence he now claims to be based on methods that run afoul of the profession's parameters and accepted methods." [Which sounds a lot like a Rule 104(b) standard.]

Fingerprints: Overstatement --- testimony to a match: *United States v. Aman*, 748 F. Supp. 2d 531 (E.D. Va. 2010): In an arson prosecution, the defendant moved to exclude the expert's testimony that the latent fingerprints and palmprints from the crime scene matched the defendant's known prints. He attacked the validity of the expert's Analysis-Comparison-Evaluation-Verification ("ACE-V") method for fingerprint identification. The court rejected the motion. It provided a helpful analysis of the reliability concerns attendant to fingerprint identification methodology. But ultimately it found that these concerns, about subjectivity and the lack of validation with empirical evidence, were questions of weight and not admissibility:

The ACE-V method is not without criticism. Although fingerprint examination has been conducted for a century, the process still involves a measure of art as well as science. . . . The NRC Report [Strengthening Forensic Science in the United States: A Path Forward (2009)] devotes significant attention to friction ridge analysis, noting the "subjective" and "interpret[ive]" nature of such examination. Additionally, the examiner does not know, *a priori*, which areas of the print will be most relevant to the given analysis, and small twists or smudges in prints can significantly alter the points of comparison. This unpredictability can make it difficult to establish a clear framework with objective criteria for fingerprint examiners. And unlike DNA analysis, which has been subjected to population studies to demonstrate its precision, studies on friction ridge analysis to date have not yielded accurate population statistics. In other words, while some may assert that no two fingerprints are alike, the proposition is not easily susceptible to scientific validation.

Furthermore, while fingerprint experts sometimes use terms like "absolute" and "positive" to describe the confidence of their matches, the NRC has recognized that a zero-percent error rate is "not scientifically plausible."

The absence of a known error rate, the lack of population studies, and the involvement of examiner judgment all raise important questions about the rigor of friction ridge analysis. To be sure, further testing and study would likely enhance the precision and reviewability of fingerprint examiners' work, the issues defendant raises concerning the ACE-V method are appropriate topics for cross-examination, not grounds for exclusion. [T]he fact that ACE-V involves judgment does not render the method unreliable for *Daubert* purposes.

Fingerprints (Palmprints): Overstatement --- testimony to a match --- *United States v. Council*, 777 F. Supp. 2d 1006 (E.D. Va. 2011): The defendant moved to exclude an expert's testimony that known palm prints collected from the defendant matched a latent palmprint on a handgun. He relied on the NAS report that critiqued fingerprint methodology as subjective and lacking a scientific basis. The court rejected the defendant's arguments, concluding the "friction ridge analysis has gained [acceptance] from numerous forensic experts and law enforcement officials across the country. See *Crisp*, 324 F.3d at 269 (holding a district court was 'within its discretion in accepting at face value the consensus of expert and judicial communities that the fingerprint identification technique is reliable')." The court stated that the NAS report has "usefully pointed out areas in which standards governing friction ridge analysis should continue to develop" but that its critique was "insufficiently penetrating to warrant the exclusion of Dwyer's testimony."

Comment: It is hard to believe that dispositive weight should be given to general acceptance by members of the field, and law enforcement officials. That is like voting for yourself in an election, and you get the dispositive vote.

Fingerprints—PCAST report --- defense rebuttal expert rejected: *United States v. Hendrix*, 2020 WL 30342 (W.D. Wash.): The expert testified to a fingerprint identification, having used the ACE-V methodology. On cross-examination, she could not recall the error rates from the studies she relied on. At the *Daubert* hearing, the defendant offered testimony from Professor Cole, who is not a fingerprint examiner, to testify mainly on rates of error for fingerprint analysis based on the PCAST report. The court denied the defendant's motion to exclude the fingerprint identification, finding it to be relevant and reliable. The defendant sought at trial call Professor Cole as a rebuttal witness to testify to the following: (1) scientific probability; (2) error rates in specific fingerprinting studies; and (3) whether the government's expert's testimony was "scientifically acceptable."

First, the court found that Professor Cole's broad-sweeping conclusions about probability, that "all evidence and all science is probabilistic in nature" was outside his expertise and not relevant to this case. Next, the court concluded that Professor Cole could not offer opinions on error rate in fingerprint analysis because he is a social scientist and not a fingerprint examiner. It reasoned that Cole's testimony would serve, not as expertise, but as a conduit for hearsay contained in the PCAST report and other studies. Finally, the court found that Professor Cole could not testify as to what was "accepted within the latent print discipline" because he is not a member of that discipline. Thus, the court excluded the entirety of Professor Cole's proposed testimony.

Footprint identification: *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to footprint analysis, relying mainly on precedent:

Footprint analysis is not a new concept and expert testimony on footwear comparisons has been admitted in courts in the United States. [The footprint expert] established that the theory and technique of footwear comparisons have been tested; that the techniques for shoe-print identification are generally accepted in the forensic community, and that the science of footwear analysis has by now been generally accepted. The expert shoe print testimony was based on specialized knowledge and would aid the jury in making comparisons between the soles of shoes found on or with the Defendant and the imprints of soles found on surfaces at the crime scene.

Gunshot residue: *United States v. North*, 2017 WL 5508138 (N.D. Ga.): The defendant moved to exclude expert testimony on gunshot residue. The court denied the motion. The court noted that the defendant “does not cite any authorities or other information that the GSR analysis is unreliable, non-scientific, or that it does not have broad acceptance in the forensic community.” The defendant cited the NAS and PCAST reports but the court observed that nothing in any of those reports cast doubt on the largely mechanical process of determining gunshot residue. The court also relied on the fact that other courts “have admitted expert testimony regarding GSR testing similar to that which it intends to be offered at this trial in this case.” The court concluded that to the extent the defendant sought to attack the credibility and accuracy of the results of the GSR analysis, “these matters can be the subject of vigorous cross examination, presentation of contrary evidence, and careful instructions on the burden of proof.”

Gunshot residue: *Sanford v. Russell*, 2019 WL 2169911 (E.D. Mich.): This was a section 1983 action alleging that the defendants prosecuted the plaintiff after coercing his confession and generating false forensic evidence. The defendants challenged the plaintiff’s expert testimony that the presence of primer residue on the plaintiff’s pants did not mean that he had recently fired a gun. The defendants argued that the expert’s opinions about the primer gunshot residue test were fatally uninformed because he admitted that he never even performed such a test. But the court was persuaded by the expert’s explanation that he never performed the test *because it was deemed unreliable and too likely to produce misleading results*. Here is the expert’s explanation:

During my twenty years at the Michigan State Police Northville Forensic Laboratory, I never performed primer residue testing. To my knowledge, the Michigan State Police has never performed this type of test because the test can generate the false and misleading impression that someone has recently fired a gun when, in fact, it establishes nothing of the kind. In fact, there is no test today, nor has there ever been, that definitively determines whether a person did or did not fire a weapon.

The court stated that “the fact that an expert witness refuses to employ a method that is regarded in his field as unreliable certainly does not justify *excluding* his testimony; in fact, it suggests that his opinions are *more* reliable rather than less.”

Comment: *Sanford* is a topsy-turvy case because it is essentially law enforcement challenging a (former) criminal defendant’s expert testimony that a gunshot residue test is unreliable. It’s interesting that the court agrees with the expert that the test is unreliable, given the fact that there is a good deal of precedent (cited in the *North* case, immediately above) that finds gunshot residue tests to be reliable.

Handwriting: *United States v. Yass*, 2008 WL 5377827 (D. Kan.): The defendant argued that handwriting analysis must be excluded under Rule 702 because it is not based on a reliable methodology reliably applied. The court found the evidence admissible, relying almost exclusively on precedent:

Federal appellate courts have been unanimous in approving expert testimony in the field of handwriting analysis. Rather than to exclude handwriting analysis as “junk science,” as urged by defendant, the Court finds the process of handwriting analysis sufficiently reliable to satisfy *Daubert* and the Federal Rules of Evidence and declines to depart from the clear majority of courts weighing in on the issue. Moreover, despite the uneven treatment of handwriting experts by district courts, every appellate court to have considered the issue of handwriting testimony has held that the expert’s ultimate opinion was admissible.

Handwriting: *Boomj.com v. Pursglove*, 2011 WL 2174966 (D. Nev.): The court rejected a challenge to testimony of a handwriting expert that certain handwriting was not the defendant’s. It relied heavily on the fact that “[t]he Ninth Circuit and six other circuits have already addressed the admissibility of handwriting expert testimony and determined that handwriting expert testimony can satisfy the reliability threshold.” It concluded that “handwriting analysis is a tested theory, it has been subject to peer review and publication, there is a known potential rate of error and there are standards controlling the technique’s operation, and it enjoys general acceptance within the relevant scientific community.”

Comment: That conclusion appears to be an overstatement in several respects. Handwriting analysis is not even close to being scientific, so it can’t really enjoy general acceptance within a relevant scientific community; the data on rate of error on handwriting is that it is that experts are not much more accurate than laypeople; and there are no consistent standards and controls in the field. Nor is there an empirical basis for the premise that each person’s handwriting is unique.

Handwriting: Overstatement – testimony to a match --- *United States v. Brooks*, 2010 WL 291769 (E.D.N.Y.): The court rejected a *Daubert* challenge to handwriting identification, relying exclusively on precedent:

Even though the district court in *United States v. Oskowitz*, 294 F.Supp.2d 379, 383–384 (E.D.N.Y.2003) partially limited a handwriting expert's testimony, the Second Circuit has “never held that a handwriting expert may not offer an opinion on the ultimate question of authorship.” *A.V. by Versace, Inc.*, 2006 U.S. Dist. LEXIS 62193 at *269 fn. 14. In fact, no Second Circuit district court has wholly excluded “the testimony of a handwriting expert based on a finding that forensic document examination does not pass the *Daubert* standard.” *Id.* And, the Second Circuit itself has routinely alluded to expert handwriting analysis without expressing any discomfort as to its admissibility. *See, e.g., United States v. Tin Yat Chin*, 371 F.3d 31, 39 (2d Cir.2004) (referring to defendant's proffer of a handwriting expert); *United States v. Badmus*, 325 F.3d 133, 138 (2d Cir.2003) (discussing government's use of expert testimony to identify defendant's handwriting on series of documents).

Handwriting --- excluded: *Almeciga v. Center for Investigative Reporting*, 2016 WL 2621131 (S.D.N.Y.): Judge Rakoff rejected the opinion of a handwriting expert that a signature on a release was forged. His analysis is extensive. He noted that while courts were originally skeptical of allowing handwriting experts to testify, the practice became prevalent after the Lindbergh case. But he also noted that in the last few years some courts have become more skeptical, because “even if handwriting expertise were always admitted in the past (which it was not), it was not until *Daubert* that the scientific validity of such expertise was subject to any serious scrutiny.” Judge Rakoff observed that in the Second Circuit, “the issue of the admissibility and reliability of handwriting analysis is an open one. *See United States v. Adeyi*, 165 Fed.Appx. 944, 945 (2d Cir.2006) (“Our circuit has not authoritatively decided whether a handwriting expert may offer his opinion as to the authorship of a handwriting sample, based on a comparison with a known sample.”) As such, the Court is free to consider how well handwriting analysis fares under *Daubert* and whether Carlson's testimony is admissible, either as ‘science’ or otherwise.”

Judge Rakoff found that the ACE-V process of handwriting identification was not even close to being a scientific methodology. He applied the *Daubert* factors:

Testing: To this Court's knowledge, no studies have evaluated the reliability or relevance of the specific techniques, methods, and markers used by forensic document examiners to determine authorship * * *. For example, there are no studies that have evaluated the extent to which the angle at which one writes or the curvature of one's loops distinguish one person's handwriting from the next. Precisely what degree of variation falls within or outside an expected range of natural variation in one's handwriting—such that an examiner could distinguish in an objective way between variations that indicate different authorship and variations that do not—appears to be completely unknown and untested. Ditto the extent to which such a range is affected by the use of different writing instruments or the intentional disguise of one's natural hand or the passage of time. Such things could be tested and studied, but they have not been; and this by itself renders the field unscientific

in nature. * * * Until the forensic document examination community refines its methodology, it is virtually untestable, rendering it an unscientific endeavor.

Peer Review and Publication: Of course, the key question here is what constitutes a “peer,” because, just as astrologers will attest to the reliability of astrology, defining “peer” in terms of those who make their living through handwriting analysis would render this *Daubert* factor a charade. While some journals exist to serve the community of those who make their living through forensic document examination, numerous courts have found that the field of handwriting comparison suffers from a lack of meaningful peer review by anyone remotely disinterested.

Rate of Error: There is little known about the error rates of forensic document examiners. * * * Certain studies conducted by Dr. Moshe Kam, a computer scientist commissioned by the FBI to research handwriting expertise, have suggested that forensic document examiners are moderately better at handwriting identification than laypeople. For example, in one such study, the forensic document examiners correctly identified forgeries as forgeries 96% of the time and only incorrectly identified forgeries as genuine .5% of the time, while laypeople correctly identified forgeries as forgeries 92% of the time and incorrectly identified forgeries as genuine 6.5% of the time. * * * Although such studies may seem to suggest that trained forensic document examiners in the aggregate do have an advantage over laypeople in performing particular tasks, not all of these results appear to be statistically significant and the methodology of the Kam studies has been the subject of significant criticism. * * * [I]n a 2001 study in which forensic document examiners were asked to compare (among other things) the “known” signature of an individual in his natural hand to the “questioned” signature of the same individual in a disguised hand, examiners were only able to identify the association 30% of the time. Twenty-four percent of the time they were wrong, and 46% of the time they were unable to reach a result.

Standards and Controls: The field of handwriting comparison appears to be entirely lacking in controlling standards, as is well illustrated by Carlson's own amorphous, subjective approach to conducting her analysis here. At her deposition, for example, when asked “what amount of difference in curvature is enough to identify different authorship,” Carlson vaguely responded, “[y]ou know, that's just a part of all of the features to take into context, so I wouldn't rely on a specific stroke to determine authorship.” Similarly, when asked at the *Daubert* hearing how many exemplars she requires to conduct a handwriting comparison, Carlson testified:

You know, that's really—that has been up for debate for a long time. I know that a lot of document examiners, myself included, I would prefer—I ask for a half a dozen to a dozen. That at least gives me a decent sampling. Others request 25 or more. I feel like if you get too many signatures you have got so much information it is overwhelming and you tend to get lost in it.

Nor is there any agreement as to how many similarities it takes to declare a match. * * * And because there are no recognized standards, it is impossible to compare the

opinion reached by an examiner with a standard protocol subject to validity testing. Furthermore, there is no standardization of training enforced either by any licensing agency or by professional tradition, nor a single accepted professional certifying body of forensic document examiners. Rather, training is by apprenticeship, which in Carlson's case, took the form of a two-year, part-time internet course, involving about five to ten hours of work per week under the tutelage of a mentor she met with personally when they were “able to connect.”

General Acceptance: [H]andwriting experts certainly find general acceptance within their own community, but this community is devoid of financially disinterested parties. * * * A more objective measure of acceptance is the National Academy of Sciences' 2009 Report, which struck a cautious note, finding that while “there may be some value in handwriting analysis,” “[t]he scientific basis for handwriting comparisons needs to be strengthened.” The Report also noted that “there may be a scientific basis for handwriting comparison, at least in the absence of intentional obfuscation or forgery”—a highly relevant caveat for present purposes [because the contention in this case was that the defendant was *trying* to make a signature look forged]. This is far from general acceptance.

Judge Rakoff concluded that “[f]or decades, the forensic document examiner community has essentially said to courts, ‘Trust us.’ And many courts have. But that does not make what the examiners do science.”

Judge Rakoff then considered whether the testimony could be qualified as “technical knowledge” that would assist the jury under *Kumho*. But he found that “the subjectivity and vagueness that characterizes Carlson's analysis severely diminishes the reliability of Carlson's methodology.” He concluded as follows:

Several courts that have found themselves dubious of the reliability of forensic document examination have adopted a compromise approach of admitting a handwriting expert's testimony as to similarities and differences between writings, while precluding any opinion as to authorship. See, e.g., *Rutherford*, 104 F.Supp.2d at 1192–94. That Solomonic solution might be justified in some circumstances, but it cannot be here where the Court finds the proffered expert's methodology fundamentally unreliable and critically flawed in so many respects. * * * It would be an abdication of this Court's gatekeeping role under Rule 702 to admit Carlson's testimony in light of its deficiencies and unreliability. Accordingly, Carlson's testimony must be excluded in its entirety.

Handwriting – PCAST and NAS Reports --- Overstatement---- testimony to a match: *United States v. Pitts*, 2018 WL 1116550 (E.D.N.Y. Feb. 26, 2018): In a prosecution for attempted bank robbery, the defendant moved to exclude expert testimony that handwriting on a withdrawal slip at the crime scene was a match to the defendant’s. The court denied the motion. The defendant relied heavily on Judge Rakoff’s decision in *Almeciga*, *supra*, but the court relied on other precedent and determined that *Almeciga* was factually distinguishable. The court noted that *Almeciga* involved analysis of a forgery, “which is a more difficult handwriting analysis with

a higher error rate.” The court also noted that the expert in *Almeciga* “performed her initial analysis without any independent knowledge of whether the ‘known’ handwriting samples used for comparison belonged to the plaintiff.” Third, “the expert conflictingly claimed that her analysis was based on her ‘experience’ as a handwriting analyst, but then claimed in her expert report that her conclusions were based on her ‘scientific examination’ of the handwriting samples.” Given these differences, the court found *Almeciga* “inapposite and unpersuasive.”

The court then went to other precedent in which the ACE-V method of latent fingerprint analysis had been admitted:

The Second Circuit Court of Appeals has not addressed directly the admissibility of handwriting analysis. * * * Courts in this district, however, routinely admit handwriting evidence. *See, e.g., United States v. Tarantino*, 2011 WL 1113504, at *7-8 (E.D.N.Y. Mar. 23, 2011) (“Subject to *voir dire* of the analyst’s expert qualifications, the Court will permit the analyst to describe for the jury the similarities and differences between the Defendant’s exemplar and the handwritten notes.”); *United States v. Brooks*, 2010 WL 291769, at *3 (E.D.N.Y. Jan. 11, 2010) (“[H]andwriting analysis is sufficiently reliable under *Daubert* and [Rule 702].”); *United States v. Jabali*, 2003 WL 22170595, at *2 (E.D.N.Y. Sept. 12, 2003) (citation omitted) (“Blanket exclusion [of handwriting analysis] is not favored, as any questions concerning reliability should be directed to weight given to testimony, not its admissibility.”).

The court noted that the defendant had not demonstrated any flaws in the government expert’s analysis. Rather, the defendant’s push was for wholesale exclusion, which the court found not viable given all the precedent:

As the Second Circuit has recognized, handwriting analysis is one area in which a juror, in some, but not all cases, may be as adept as an expert at comparing handwriting samples. *See United States v. Tarricone*, 21 F.3d 474, 476 (2d Cir. 1993) (“[The] jury could, on its own, recognize that the handwriting on the throughput agreement was not Barberio’s.”). Therefore, there is little reason to be concerned that a jury will place undue weight on the expert’s ultimate opinion without carefully scrutinizing the basis for his conclusion. Given the liberal standard under *Daubert* and Rule 702 and the numerous cases in this district and circuit admitting expert opinion testimony regarding handwriting analysis, preclusion is neither appropriate nor warranted.

Comment: It is notable that in its argument for admissibility, the government relied in its brief on the citation to a handwriting case in the Committee Note to the 2000 amendment to Rule 702. According to the government, the Committee Note provides that “experience is a basis for qualifying an expert” --- which it surely does so provide --- and “specifically reference[s] handwriting experts as an example of experts qualified based on experience.” The court did not rely on this citation specifically, but did note it in its opinion. It can be argued that the government made too much of a single citation, written 9 years before the NAS report and 15 years before the PCAST report.

Handwriting: *DRFP L.L.C. v. Republica Bouvariana De Venezuela*, 2016 WL 3996719 (S.D. Ohio 2016): In a suit on promissory notes, with an allegation of forgery, the defendants offered the testimony of a handwriting expert, testifying to a match. The court rejected the plaintiff's motion to exclude the expert.

Skye argues that Browne's methodology is inherently subjective and empirically unreliable. Skye points to Browne's own testimony that handwriting analysis is not scientific, it is not capable of empirical testing, all persons vary their signatures from one time to the next, no data can establish the frequency with which stylistic details recur in a person's signature, and it is impossible for Browne to determine his own error rate. Each of these critiques focuses on handwriting evidence in general, rather than on Browne's credentials or his specific methodology. The Sixth Circuit, however, has squarely ruled that handwriting analysis falls into the 'technical, or other specialized knowledge' component of Federal Rule of Evidence 702. *U.S. v. Jones*, 107 F.3d 1147, 1157-59 (6th Cir. 1997).

As in *Jones*, Browne's specific testimony in this case outlined the procedure that he uses when comparing a questioned signature with a known one. He then focused on enlargements of the signatures at issue in this case and described to the finder of fact, in some detail, how he reached his ultimate conclusions. His testimony enabled the factfinder to observe firsthand the parts of the various signatures on which he focused. As a result, the Court credits Browne's expert testimony as well as his conclusions that: there is definite evidence that Puigbó's signatures on the Notes are forgeries; there is a strong probability that the Fontana' signatures on the Notes are forgeries; and it is probable that Cordero's signatures on the Notes are forgeries.

Handwriting --- handprinting, excluded: *United States v. Johnsted*, 30 F. Supp. 3d 814 (W.D. Wis. 2013): The defendant moved to exclude the report and expert testimony of the government's handwriting analyst, who would opine that the hand printing on the communications at issue belonged to the defendant. The court granted the motion (!) ruling that "the science or art underlying handwriting analysis falls well short of a reliability threshold when applied to hand printing analysis." The court concluded that the government's showing "indicates only that current standards of analysis are the same for handwriting and hand printing, not that they should be. The absence of such evidence might be less important if a consensus existed that hand printing and handwriting can reliably be analyzed in the same way, but that is not the case." It stated that "the limited testing that exists is inconclusive as to the reliability of hand printing analysis. Thus, while the government appears to be technically correct that standards exist controlling the technique's operations * * * that fact does not tend to establish reliability without some evidence that those standards are actually appropriate in the hand printing context." The court also noted that peer review and publication regarding hand printing was limited. The court concluded as follows:

The proffered expert testimony here . . . does not even qualify as the ‘shaky but admissible’ variety. It is testimony based on two fundamental principles, one of which has not been tested or proven, and neither of which have been proven sufficiently reliable to assist a lay jury beyond its own ability to assess the similarity and differences in the hand printing in this case.

Comment: While the court’s exclusion was specific to hand *printing*, it was no fan of handwriting comparison either. The court argued that there are two fundamental premises of handwriting identification that have not been validated. The court explained as follows:

The government cites to a number of studies as demonstrating that handwriting is unique, including some showing that twins's writings were individualistic and others demonstrating computer software's ability to measure selected handwriting features. Defendant contends that these studies are problematic, and that even one of the government's own studies states that “the individuality of writing in handwritten notes and documents has not been established with scientific rigor.” * * *

Even accepting that studies have adequately tested the first principle—that all handwriting is unique—the government does not dispute the troubling lack of evidence testing or supporting the second fundamental premise of handwriting analysis. Even more troubling is an apparent lack of double blind studies demonstrating the ability of certified experts to distinguish between individual's handwriting or identify forgeries to any reliable degree of certainty. This lack of testing has serious repercussions on a practical level: because the entire premise of interpersonal individuality and intrapersonal variations of handwriting remains untested in reliable, double blind studies, the task of distinguishing a minor intrapersonal variation from a significant interpersonal difference—which is necessary for making an identification or exclusion—cannot be said to rest on scientifically valid principles. The lack of testing also calls into question the reliability of analysts's highly discretionary decisions as to whether some aspect of a questioned writing constitutes a difference or merely a variation; without any proof indicating that the distinction between the two is valid, those decisions do not appear based on a reliable methodology. With its underlying principles at best half-tested, handwriting analysis itself would appear to rest on a shaky foundation. See *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 509 (7th Cir.2003) (noting that among courts, “there appears to be some divergence of opinion as to the soundness of handwriting analysis”).

Paint Identification: *United States v. Pugh*, 2009 WL 2928757 (S.D. Miss.): The court rejected a challenge to an expert’s forensic paint analysis. It stated: “The Standard Guide for Forensic Paint Analysis and Comparison of the American Society for Testing and Materials [ASTM], which [the paint expert] relied on in her testing, is widely accepted by engineers and other professionals in the field of materials testing. [Her] testimony is sufficiently reliable and

relevant and may assist the trier of fact in understanding the evidence or determining a fact in issue, as required by Rule 702.”

Serology tests: *United States v. Christensen*, 2019 WL 651500 (C.D. Ill.): In a kidnapping prosecution, the defendant moved to exclude serology test results and requested a *Daubert* hearing on the reliability of the methods used. The defendant challenged the reliability of the Takayama hemochromogen test used to confirm the presence of blood. The court denied the defendant’s motion, finding the Takayama test to be reliable:

Defendant moves for a *Daubert* hearing on the reliability of the Takayama hemochromogen test and the methods of the law enforcement official who performed that test. The United States responds that such a hearing is unnecessary because the test has been the standard confirmatory test for blood for over 100 years, and the law enforcement official's application of this reliable method is a subject appropriate for cross-examination at trial, not a pre-trial hearing. The Court held an evidentiary hearing on this matter on February 11, 2019, effectively granting this aspect of Defendant's Motion.

At that hearing, Ms. Conway testified that the Takayama hemochromogen test is the prevailing confirmatory blood test in the field. She stated that multiple studies have confirmed that the Takayama test does not react to substances other than blood, and that the FBI has control testing protocols to avoid errors. Ms. Conway further testified that standard procedure in conducting the Takayama hemochromogen test does not involve photographic or descriptive records other than documenting whether the analyst determined that it was positive or negative. According to Ms. Conway, a second examiner always checks positive results to ensure accuracy. The Court finds that the Takayama test is well-known, widely used, not prone to errors, subject to peer review, and applied reliably in this case. Thus, Defendant's Motion to exclude the test results on reliability grounds is denied.

Shooting reconstruction: *Merritt v. Arizona*, 2019 WL 2549696 (D. Ariz.) (Campbell, J.): This action was a product of the I-10 freeway shootings in Phoenix, AZ. The plaintiff brought section 1983 claims relating to his prosecution for the shootings. The Arizona Department of Public Safety identified plaintiff’s weapon, a 9mm handgun, as the source for four freeway shootings. The plaintiff contended that he pawned the gun more than four hours before the shooting of a tire occurred. He proffered experts in shooting reconstruction to testify about the timing of the shooting. The State of Arizona offered rebuttal experts Noedel and Grant to testify about the possibility that the tire in question was shot before the gun was pawned, but retained air pressure for a time after the gun was pawned. The plaintiff moved to exclude these experts under Rule 702 and *Daubert*.

Noedel, an expert in reconstructing shooting incidents, would testify on the question whether the tire at issue could hold air pressure after being struck by a ricocheted bullet. The purpose of his opinion was to attack the plaintiff’s experts’ testimony that the tire must have lost

pressure immediately after being shot, which would make it impossible for the shooting to be caused by the defendant's pawned gun. Noedel concluded that "there are several unknown variables that make it impossible to say, based on analysis of the tire alone, where and when [the] tire was struck, and whether it retained air after being struck. Among the possibilities, none of which can be determined with any degree of certainty, is that the tire retained air after being shot." The court found that Noedel could testify to flaws in the plaintiff's experts' opinions and the variables that make it difficult to replicate the exact damage to the tire. However, the court found no basis for Noedel to go past rebuttal and offer testimony suggesting affirmatively that the tire could have retained pressure after the shooting. Noedel only conducted one test, and in that test the tire lost air immediately. Nothing else he relied on supported his opinion that the tire could retain air after being shot with a ricocheted bullet. The court stated that "when an expert's testimony is not based on independent research or publications, he must present some "other objective, verifiable evidence that the testimony is based on 'scientifically valid principles.'" Here, the court found too great of an analytical gap between the data and the opinion.

Grant was offered as an expert in forensic tire analysis. He offered four conclusions: (1) based on the small size of the puncture, the angle of the puncture, and the loose flaps of rubber inside the puncture, the tire may only have lost minimal air at the time it was shot; (2) it is well known in the tire industry that small punctures do not always leak immediately; (3) it is impossible to determine when the tire was shot to any degree of engineering certainty because of the sporadic air loss the tire experienced while driving; and (4) plaintiff's expert (who tested the BMW tire in question after the shooting, after it had been driven, and after chemical analysis) had inaccurate results because he did not test the tire at the time it was shot. The Court found this expert's testimony to be reliable because of Grant's extensive experience with tires and shooting reconstruction. The court found that Grant's opinion on scientific principles of tires air pressure was necessary for rebuttal because the plaintiff's experts' testimony is "the kind of testimony whose reliability depends heavily on the knowledge and the experience of the expert, rather than the methodology or theory behind it."

Comment: This is a good example of expert opinion that avoided overstatement. If anything, it was the plaintiffs' experts who might have overstated their conclusions, and the defendant's reconstruction expert was basically explaining the overstatement.

Shooting reconstruction--- methodology used to determine positions while shooting based on shell casings found unreliable: *Haegele v. Judd*, 2020 US Dist LEXIS 218456 (M.D. Fla. Nov. 23, 2020): The action was brought by Haegele for the wrongful death of her son who was shot and killed by two police officers. The defendants moved to exclude Haegele's expert, Boswell, who in his report presented a crime scene reconstruction based on the placement of shell casings at the crime scene. The defendants challenged Boswell's methodology in "reconstructing" the crime scene and evaluating the reliability of the crime scene diagram prepared by the Sheriff's Office's forensics technician. The court found Boswell's testimony regarding the shell casings and the supposed meaning of their placement unreliable:

Boswell did not test Hicks and Green's firearms — or even the same type of firearms — to determine the distance shell casings are typically ejected from those weapons. Nor has Boswell referred to any literature regarding the reliability of the testing

of shell casing ejection patterns. See *United States v. Fultz*, 18 F. Supp. 3d 748, 757-58 (E.D. Va. 2014) (excluding firearms and shooting scene reconstruction expert's testimony because the expert "did not indicate at trial whether a method for determining the origin of a gunshot from the location of spent casings has been (or can be) tested, nor did he indicate whether such a method has been subjected to peer review and publication," failed to identify "any literature supporting the theory that one could determine the origin of a shot based on the location of shell casings at a crime scene," and failed to address "the known or potential error rate of [his] chosen method of determining shooter location"). Furthermore, there is no information regarding Boswell's methodology in determining Hicks and Green's supposed movement while shooting based on the shell casings.

Toolmarks --- Expert unqualified: *United States v. Smallwood*, 2010 WL 4168823 (W.D. Ky.): The defendant moved to exclude the government's expert testimony that the knife found by law enforcement was the knife that slashed the tires of a vandalized vehicle. The court granted the motion, finding that the witness was unqualified --- the witness was a firearms expert, not a toolmarks expert. The court provided some helpful background:

According to The Association of Firearm and Tool Mark Examiners ('AFTE'), a match is determined if a "specific set of [tool marks] demonstrates sufficient agreement in the pattern of two sets of marks." See National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (hereinafter "Strengthening"). AFTE standards acknowledge that these decisions involve subjective qualitative judgments and that the accuracy of examiners' assessments is "highly dependent on their skill and training." * * * Even with new technology, "the decision of the [tool mark] examiner remains a subjective decision based on unarticulated standards."

By AFTE's own standard, there is no reliability in the instant case. While Gerber is most likely an expert in firearm identification, that expertise cannot be transferred to other marks. * * * Given the subjective nature of firearm and tool mark identification, the relative frequency of firearm cases compared to tool mark cases—and knife cases in particular—necessarily makes a tool mark identification less reliable than a firearm identification. This goes directly to the "skill and experience an examiner is expected to draw on." *Strengthening*, pg. 155.

Similar to polygraphs, it is important for this Court to thoroughly examine the underlying reliability of a tool mark identification before allowing expert testimony at trial. * * * A thorough examination of the facts and science present in this case must lead to a finding of unreliability and exclusion.

Toolmarks: Court Order Limiting Overstatement Consistently with DOJ Uniform Standards: *United States v. Haig*, 2019 WL 3683584 (D. Nev.): Haig was charged in connection with the October 2017 Las Vegas music festival mass shooting. Boxes of ammunition were found in the shooter’s room addressed from the defendant. Haig admitted that he sold the shooter ammunition, but claimed that he did not manufacture the ammunition. He claimed the ammunition from the Las Vegas crime scene would not have the toolmarks of his manufactured ammunition. The government’s toolmark expert intended to testify on the process of reloading ammunition, identifying ammunition, identifying toolmarks, and his conclusions in this case. The court rejected the defendant’s argument that the methodology of toolmark identification was unreliable, stating that the Ninth Circuit “has consistently affirmed the admission of toolmark identification evidence and expert testimony of that evidence. See, e.g., *United States v. Cazares*, 788 F.3d 956, 988 (9th Cir. 2015); see also, e.g., *United States v. Felix*, 727 Fed. App’x 921, 924–925 (9th Cir. 2018). Smith’s anticipated testimony falls well-within the type of evidence which the Ninth Circuit has previously considered. Thus, Smith’s methods are reliable and his testimony is admissible.”

The court noted, however, that “scientific certainty” is an improper characterization of expert conclusions based on toolmark identification methods --- because the conclusions are based on subjective judgment and have not been validated as science. But the court also emphasized that “[t]he government concedes this point and represents that Smith will not provide such testimony as it would violate the Department of Justice’s uniform standards for testimonies and reports.”

While recognizing the importance of the DOJ standards, the court stated:

Nevertheless, the court will exercise caution and exclude Smith from testifying that he reached his conclusions with scientific certainty or other similar standards of reasonable certainty.

Voice identification: *United States v. Felix*, 2019 WL 2744621 (S.D. Ohio): The defendant was indicted for armed bank robbery and sought to introduce expert testimony to rebut the voice identification procedures conducted by the government. The expert would opine that (1) the earwitness procedure used for voice identification was untested and unreliable, (2) Felix’s voice did not have any anomalies that would draw attention to his voice, (3) memory research is relevant to police investigators’ results, and (4) the audio from the recorded traffic stop was poor quality, the signal was enhanced for analysis, and the hearing of listeners could be a factor.

The government did not dispute the expert’s qualifications, but the court conducted an independent analysis of the expert’s qualifications anyway. The court noted that the expert had a Ph.D. in Psychoacoustics, was a Professor of Speech and Hearing Sciences, and published and presented extensively on speech and voice analysis. The court concluded that the expert could opine on the science of voice analysis and audiology as well as how people recognize vocal patterns, but he could not testify as to whether police practices of voice identification were appropriate or the credibility of victims’ voice identifications.

To analyze reliability, the court cited to the *Daubert* factors (testability, peer-reviewed, rate of error, standards and controls, general acceptance). The government argued that the expert's opinion was based on decades-old research and that voice identification or "earwitness" research is less developed and is usually not accepted by courts. The government also cited to Rule 901's advisory notes that state "voice identification is not a subject of expert testimony." However, the court mentions that the advisory notes were from 1972 and relied on cases from 1935-1952, also decades old, as the government claimed of the expert's research. However, the defense provided an updated supplemental research list relied upon by the expert which were significantly more recent. The court found that based on the updated research *and* the expert's background, education, and experience in the relevant areas, there was a sufficiently reliable foundation to support his area of expertise, but once again, not enough to reliably support his opinions on law enforcement procedures or victim credibility.

TAB 2C



March 12, 2021

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
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Re: Proposed Rulemaking on Federal Rule of Evidence 702

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice (“AAJ”) submits this comment regarding the Advisory Committee on Rules of Evidence’s consideration of rulemaking related to Federal Rule of Evidence 702 (“Rule 702”). AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world’s largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly use the federal rules, including Rule 702, in their practice.

As the Committee has continued its consideration of whether to modify Rule 702, two suggestions have emerged: whether to add a “preponderance of the evidence” standard to the rule itself and whether the rule should address what have been labeled “overstatements” by expert witnesses. While AAJ members remain concerned about this rulemaking in general, and recommend no amendments to Rule 702, for the purposes of this comment it is the latter suggestion on which AAJ now focuses, specifically whether a new subdivision (e) should be added to the rule to prohibit overstatements by experts.¹ It is AAJ’s position that the proposed amendment should be rejected as it needlessly divides the bar, would not work for the variety of cases that use the rule, and has numerous likely unintended consequences—including judicial misapplication of the rule.

¹ See Standing Committee Agenda Book, 444 (Jan. 5, 2021), https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf (“At its November meeting, the Committee considered a proposal to add a new subdivision (e) to Rule 702 that would essentially prohibit any expert from drawing a conclusion overstating what could actually be concluded from a reliable application of a reliable methodology. In a provisional vote, a majority of the members decided that the amendment was not necessary, because Rule 702(d) already requires that the expert’s opinion be a reliable application of a reliable methodology.”).

The Proposed Amendments are Far-Reaching and Controversial

This rulemaking commenced in an attempt to respond to issues specifically surrounding forensic expert evidence. The Committee has indicated that it is interested in amending the rule to focus on “one important aspect of forensic testimony,” overstatements, and consulted extensively with DOJ on the issue.² Forensic experts have continued to be the focus of the rulemaking, despite the fact that such a rule change would impact far more than just forensic experts and criminal cases. That is, the rulemaking has naturally expanded in a way that would impact virtually all cases. The expansion has also resulted in disagreements between different factions of the bar and a clear division between how these proposed amendments would impact criminal and civil cases.

1. Rule 702 Must Work for All Parties

Instead of working for all different types of practitioners, this rulemaking pits prosecutors against criminal defense lawyers, with the former declaring that Rule 702 as currently written is working as intended and the latter indicating concerns that without a rule change, criminal defendants will be wrongfully convicted based on improper expert testimony. AAJ takes no position on the use or misuse of Rule 702 in criminal cases at this juncture and instead focuses on the application of the rule and proposed changes in civil cases. However, the proposed rulemaking has aligned the plaintiff’s bar, normally naturally aligned with the criminal defense bar, with prosecutors. That is, AAJ members generally agree that Rule 702 as currently written has been able to address any concerns about overstatements.

There is also strong disagreement between the civil plaintiff bar and civil defense bar. The civil defense bar has made it clear that it believes Rule 702 to be vastly misunderstood and misapplied by the courts, commenting that the rule must be changed in order to clarify the law.³ In contrast, the civil plaintiff bar has grave concerns about the impact of such an unnecessary rule change—on an issue that is already able to be addressed by the rule itself (along with the existing Note, which provides sufficient guidance)—which is sure to lead to confusion, delay, and erroneous restrictions on testimony.

While it is to be expected that proposals to change rules will lead to divergent views on opposite sides of the bar, where a proposal to change a Rule of Evidence sounds sirens of deep division in both the criminal and civil bar, it strongly suggests that the rule change is likely to create greater controversy and less clarity. Reaching a consensus amidst these and other diverging viewpoints is a challenge and indicative that the proposed rule will vastly differ in the way that it impacts attorneys and their clients.

² *Id.* (“But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony --- the problem of overstating results (for example, by stating an opinion as having a “zero error rate”, where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the important efforts it is now employing to regulate the testimony of its forensic experts, and to limit possible overstatement.”).

³ See, e.g., Lawyers for Civil Justice Comment (Oct. 20, 2020), <https://www.uscourts.gov/rules-policies/archives/suggestions/lawyers-civil-justice-20-ev-y>.

2. Rule 702 Must Work for All Cases

The consensus of the Committee thus far has been that the proposed rule will apply broadly and not be limited to a specific kind of case (i.e. not limited to criminal cases and/or forensic experts). Central to the Federal Rules of Evidence is its application to *all* kinds of cases and different types of witnesses. There are many cases that use Rule 702 in addition to those most frequently discussed by this Committee, namely criminal cases and pharmaceutical drug and medical device-based MDLs. However, the Committee has not fully considered the impact of an overstatement amendment to these cases.

A quick look at the wide variety of cases that use Rule 702 and would be impacted by a subdivision (e) demonstrates that the proposed changes are untenable in each and every such case. Examples of such scenarios include: 1) forensic accounting for white collar crime, commercial business and insurance litigation; 2) building and structural engineers for ADA cases; 3) auto and trucking accident reconstruction experts; 4) aviation experts, including aeronautical engineers; and 5) business experts, such as specialists in forensic economics, business valuation, and lost business/earnings evaluations. This list is certainly not exhaustive, but illustrates the breadth of litigation that is likely to apply Rule 702. The type of testimony elicited from each such expert witness is sure to vary greatly in each instance, as is the potential for alleged overstatements.

Further, the rule amendment would increase expert witness expenses, and unnecessarily burden the Court, in relatively low-dollar/limited damage cases, hindering the ability of injured plaintiffs to pursue relief in a “just, speedy and inexpensive” determination of their cases, as Fed. R. Civ. P. 1 dictates. In such cases, if there is a new layer of challenges to experts, case management and case costs will increase disproportionately in comparison to high-dollar value cases where there is already a commitment to substantial sums being spent on both sides. That is, the smaller cases will be unnecessarily “punished” by this rule change and that impact will disproportionately affect plaintiffs pursuing certain civil claims, including state claims removed to federal court due to diversity jurisdiction that just barely meet the amount in controversy threshold of \$75,000.00.

3. AAJ Recommends Against Moving Forward with Rule 702(e)

In order to reach consensus—and not send to formal rulemaking a rule that hopelessly divides the bar—AAJ recommends against moving forward with proposed Rule 702(e). At best, this rule change will not change current practice. At worst, the rule change will lead to increased motion practice, will clog the courts’ dockets without tangible benefits, will cause confusion, and will further delay. These harms do not outweigh any benefit of a proposed rule change that adds language to deal with a potential problem that can already be covered and considered by Rule 702 as it is currently written.

Moreover, as indicated in its November 6, 2020 letter, DOJ has proposed that this rulemaking be paused in order to determine whether DOJ’s Uniform Language for Testimony and Reports (“ULTR”) initiatives are working.⁴ And thus far, it appears that these recommendations

⁴ Department of Justice Letter, 952 (Nov. 6, 2020), https://www.uscourts.gov/sites/default/files/agenda_book_for_evidence_rules_committee_meeting_november_13_2020final.pdf (“The Department’s Forensic Science webpage currently contains 16 ULTRs, many updated this past

are being followed to properly limit the scope of forensic expert testimony. As the DOJ’s letter expresses, steps are being taken to address the issues and perceived problems with overstatements and Rule 702. This process should be allowed to continue in order to determine how overall implementation is working for cases, especially since the rulemaking commenced as a result of those types of cases that the ULTR initiatives are affecting. To properly determine whether a rule change is actually needed, the process must be given a sufficient amount of time to play out.

There is a real risk of unintended consequences as a result of amendments to Rule 702 that apply to all experts. First, related appellate litigation will undoubtedly proliferate as a result, adding years to the lifetime of each affected case, when judges themselves do not believe there is a real problem with the rule. Unnecessary delay and related costs of appeal do not benefit the parties or the courts. Second, many courts were already backlogged prior to the pandemic, which has created further delays for parties.⁵ The proposed amendment would compound this problem. Third, confusion will inevitably arise over interpretation of the amendment—specifically, what, if any, substantive differences exist between the existing Rule 702 and the amended version? Instead of providing clarity, the addition of 702(e) will lead to uncertainty. For example, as one Committee member posited at the October 2020 Evidence Rules Committee meeting, an unintended consequence to the addition of 702(e) may be that practitioners and courts see a rule change and believe that they now need to do something differently under Rule 702, even when nothing has really changed. There is broad agreement that Rule 702 is equipped to deal with overstatements as it is currently written; what message is being sent by a rule change or addition of this language to the Committee Note?

With criminal issues resolving themselves, the need for an amendment diminishes while the risk of the unintended consequences as a result of Rule 702(e) remains.

Specific Problems with Proposed Rule: FRE 702(e)

1. There is a risk for judicial misapplication of this rule.

Some courts will not understand that “overstatement” has limited application. And, improper limits by a court on an expert due to confusion surrounding overstating conclusions will result in restrictions on otherwise reliable expert testimony. Even non-forensic experts sometimes may be questioned about the principles or methods used to reach an opinion. Is this actually an overstatement problem? This potential rule change opens a Pandora’s Box of potential time-consuming issues that the courts will have to manage. For example, in a construction defect case, besides evaluating the testimony of experts in the fields of engineering and architecture (the heart of such a case), the court must decide tangential issues that under a Rule 702(e) become the subject

summer to further address important qualifications and limitations of expert testimony in various forensic disciplines”).

⁵ See, e.g., Melissa Chan, ‘I Want This Over.’ For Victims and the Accused, Justice Is Delayed as COVID-19 Snarls Courts, TIME (Feb. 22, 2021), <https://time.com/5939482/covid-19-criminal-cases-backlog/>; ABA, *Pandemic disrupts justice system, courts* (Mar. 16, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/coronavirus-affecting-justice-system/>; Deborah Becker, *Mass. Court Case Backlog Doubles During The Pandemic*, WBUR News (Dec. 5, 2020), <https://www.wbur.org/news/2020/12/25/mass-court-case-backlog-covid>; Jeff Amy, *Georgia judges: Pandemic could backlog jury trials for years*, AP News (Jan. 20, 2021), <https://apnews.com/article/pandemictrialsgeorgiacoronaviruspandemiccourtsd1682648277dd4d3bfc918fee31777e5>

of additional expert testimony on insurance or reinsurance policies covering a general contractor or builder. Or, in a case involving construction defects, if an expert testifies that they have never before observed such a serious defect, could that expert's testimony technically be considered an overstatement, even if true? Indeed, is there a risk that expert opinions in cases featuring novel claims could be susceptible to issues of overstatement generally? And is each foundational aspect of an expert's opinion subject to an "overstatement" challenge?

2. Examples of how "overstatement" by experts can be misconstrued.

The term "overstatement" alone will lead to confusion and avoidable challenges for the courts. How is the term defined? What guidelines does a judge have to determine what opinions amount to an overstatement? How many appeals result from the revised rule? The very fact that the term does not lend itself to a uniform understanding runs counter to the stylistic focus the Federal Rules of Evidence place on "easily understood terminology."

Additionally, there may be experts that provide both a scientific and a professional opinion. For example, an engineer providing an opinion about shoddy construction may apply his or her engineering degree to testify about the wrong type of support beam installed or cement poured in a building, which resulted in a building collapse. This expert may also testify, based on experience, about the size and scope of the problem. Are all parts of this expert's opinion now subject to additional scrutiny and will this disproportionately negatively affect plaintiff-side experts? There is a reason that corporate defense interests heavily favor this rule change.

Indeed, there are many experts who combine quantitative and qualitative results, or are necessary to provide testimony that is in part scientific and in part unempirical or experience-based. It seems as if these common civil litigation fact patterns have not been fully reviewed, yet these are the types of questions and situations that courts will need to grapple with should Rule 702(e) be added, fueled by additional challenges by parties seeking to exclude expert testimony.

Below are just two examples to illustrate how an "overstatement" rule could be misconstrued:

- a) **Automobile Products Defect Cases.** In litigation that involves seatback failures, the injuries occur when a car is rear ended, causing the driver or passenger front seat to collapse backward. The driver falls backwards, often sustaining a head injury, and in some instances colliding with their own child who is seated in a car seat behind them. The injuries can be catastrophic. Experts provide complicated information relating to accident reconstruction, biomedical experts, and design experts, many of whom are running tests on the failed part of car to show structural and design defects, and could include the following:
 - i. Accident Reconstruction Experts. These are engineers, most often mechanical engineers, who evaluate the damage done to the car and the speeds involved in the crash, and who sometimes perform crash tests to determine the speed and severity of the crash, which can be compared against crash test data run by the manufacturers.

- ii. Biomechanical Engineers or Doctors. Such experts would explain how the specific injuries suffered by the plaintiff are related to the failed part of the car and not just related to the impact of the crash itself. Testimony would show how the defective design resulted in a specific type of injury.
- iii. Design Engineer. This expert is often someone who previously worked for a manufacturer or who is an engineer with a degree in mechanical engineering. They will offer opinions about how the seat or the fuel tank could have been designed differently, the cost of an alternative design, and the technical feasibility of such a design. In the seatback cases, there are some seat designs that are much stronger and more rigid than others. Those are usually the designs that a plaintiff's expert will testify about. (There is also an emerging type of case in which the issues deal with algorithms used to determine when a seat belt pretensioner or airbag should deploy, which require an engineer who has training in developing computer algorithms.)

Defendants already make regular motions to exclude these experts, even though they have engineering and medical backgrounds and often years of familiarity with the product defect alleged. A proposed rule change on overstatement would lead to additional arguments regarding the expert's qualifications and scope of testimony.

b) **Civil Rights Cases.** Cases involving qualified immunity and police misconduct for civil rights violations are certainly not new; however, they have gained more attention in the past year. Recent examples include: a deputy sheriff who ordered 6 children at gunpoint to lie on the ground and shot one of them, a 10-year-old, while attempting to shoot a pet dog; a police dog being unleashed on a suspect who was sitting with his hands in the air; an inmate held in appallingly inhumane conditions.⁶ The types of experts that may be necessary for these types of cases are seemingly endless and include experts commonly used in criminal cases, such as toxicologists and forensic pathologists.

- i. Toxicologists. These experts generally have an M.D. or B.S. in Chemistry/Biology/Toxicology paired with experience in a forensic lab. They may be necessary to discuss the application of claimed intoxication or "excited delirium." Toxicologists draw data on whether an amount is "toxic" or "lethal" from literature published in the field, and it may be perplexing for a court to determine whether the expert is overstating the weight they give to the studies to support their opinion despite the expert's proper use of an accepted scientific methodology.
- ii. Biomechanical Engineers. These experts are necessary to analyze the physical evidence to determine if injuries are consistent or inconsistent with certain factual scenarios. They are particularly important in asphyxiation cases. They typically have a Ph.D. in fields such as engineering, biomechanics, or

⁶ *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S.Ct. 110 (Mem) (2020); *Baxter v. Bracey*, 751 Fed.Appx. 869 (6th Cir. 2018), *cert. denied*, 140 S.Ct. 1862 (2020); *Taylor v. Riojas*, 141 S.Ct. 52 (2020).

ergonomics. Application of a biomechanical engineer expert testimony to a police force incident may require nuanced application of methodologies that will require courts to determine whether the new application is still “scientific.”

- iii. Forensic Pathologists. These experts are necessary to connect the use of force with an injury and/or cause of death. They can be of particular importance in asphyxiation cases. Courts may find it more difficult to assess whether opinions regarding bullet path, entry/exit wound identification, and observable injuries such as stippling in the skin from a burn are “scientific” or “medical” opinions as opposed to general observations from experience.
- iv. Sociologists. These experts are used to discuss implicit bias, racial bias, and biased policing. As their opinions are typically based on sociological studies and statistics, under Rule 702(e) the court may find it difficult to separate out their testimony to determine to which parts the overstatement rule applies.

All of these experts can apply “scientific principles and methodology,” yet are susceptible to overstatement challenges, particularly when their testimony is more subjective in nature.

The sheer number of potential scenarios provides just a small sample of how an amendment on overstatements could delay litigation and backlog dockets. Confusion by courts would be multiplied if the Committee wrote a note overturning certain case law. Such situations must be avoided by the Committee as it considers how this rulemaking should move forward.⁷

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AAJ thanks the Committee for its continued work on this rulemaking and respectfully requests that the Committee remove from consideration the addition of a subdivision (e) to Rule 702. It is an unnecessary rule change that would only lead to confusion and misapplication of a rule that is already working as it should. Please direct any questions regarding these comments to Susan Steinman, AAJ Senior Director of Policy and Senior Counsel, at susan.steinman@justice.org or (202) 944-2885.

Respectfully submitted,



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⁷ A suggestion to specifically overturn case law in the Rule 702 Committee Note was recently suggested by Lawyers for Civil Justice (Feb. 8, 2021), https://www.uscourts.gov/sites/default/files/21-ev-a_suggestion_from_lcj_rule_702_0.pdf. Specific rejection of established case law precedent would not only lead to confusion, it would lead to a substantial increase in appellate review, causing further delay.



**COMMENT
to the
ADVISORY COMMITTEE ON EVIDENCE RULES
and its
RULE 702 SUBCOMMITTEE**

**A NOTE ABOUT THE NOTE: SPECIFIC REJECTION OF ERRANT CASE LAW IS
NECESSARY FOR THE SUCCESS OF AN AMENDMENT CLARIFYING RULE 702'S
ADMISSIBILITY REQUIREMENTS**

February 8, 2021

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Comment to the Advisory Committee on Evidence Rules (“Committee”) and its Rule 702 Subcommittee (“Subcommittee”).

INTRODUCTION

As the Subcommittee prepares its draft Rule 702 amendments for Committee consideration in April, the language of the proposed Note is critical. Because the contemplated textual change to the Rule is modest, the Note will likely determine whether the draft amendment package will achieve the Committee’s purpose of focusing courts on the Rule’s admissibility standards in contrast to certain caselaw statements that are inconsistent with the Rule. The only unambiguous way for the Note to convey the intent of the amendment is to reject the specific offending caselaw by name.

I. THE NOTE SHOULD SPECIFICALLY REJECT THE THREE MOST FREQUENTLY CITED CASES THAT ARE INCOMPATIBLE WITH RULE 702

The central problem that the amendment aims to cure—courts’ incorrect determinations that an expert’s factual basis and application of methodology are matters of weight rather than

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

admissibility²—exists largely because courts rely on statements originating from older decisions that were not interpreting Rule 702’s requirements.³ Three cases in particular, *Loudermill v. Dow Chem. Co.*,⁴ *Viterbo v. Dow Chem. Co.*,⁵ and *Smith v. Ford Motor Co.*,⁶ are frequent sources of incorrect statements about Rule 702’s standards. Research shows that, between January 1, 2015, and September 14, 2020:

- 212 federal cases recited the following statement: “As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.”⁷
- 152 federal cases recited this statement: “[Q]uestions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.”⁸

² Hon. Patrick J. Shiltz, Report of the Advisory Committee on Evidence Rules (Dec. 1, 2020) at 5, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JANUARY 2021 AGENDA BOOK 441 (2021), https://www.uscourts.gov/sites/default/files/2021-01_standing_agenda_book.pdf (“The Committee has determined that in a fair number of cases, the courts have found expert testimony admissible even though the proponent has not satisfied the Rule 702(b) and (d) requirements by a preponderance of the evidence. . . . [A]t the November meeting, there was general agreement that adding the preponderance of the evidence standard to the text of Rule 702 would be a substantial improvement that would address an important conflict among the courts.”).

³ See, e.g., *Zamora v. Hays Consol. Indep. Sch. Dist.*, No. 1:19-CV-1087-SH, 2020 WL 6528077, at *1 (W.D. Tex. Nov. 5, 2020) (“The Court finds that all of Defendant’s objections to Garza’s testimony can be addressed at trial. ‘As a general rule, questions relating to the bases and sources of an expert’s opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the [trier of fact’s] consideration.’ *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987).”). See also Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 NOTRE DAME L. REV. 2039, 2045 (2020) (discussing failure of First Circuit to apply Rule 702(b) in *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11 (1st Cir. 2011) and noting that the “court of appeals’s error may have resulted in part from the fact that it cited cases decided before the 2000 amendment to Rule 702, a problem not unique to this case.”).

⁴ 863 F.2d 566 (8th Cir. 1988).

⁵ 826 F.2d 420 (5th Cir. 1987).

⁶ 215 F.3d 713 (7th Cir. 2000).

⁷ *Loudermill*, 863 F.2d at 570. Bayer’s recent comment identified 212 federal cases issued in the period Jan 1, 2015 through Sept. 14, 2020 that recite this statement. See Bayer Corp., *Amending Federal Rule of Evidence 702* at 1 & n.1, 20-EV-O Suggestion from Bayer – Rule 702 (Sept. 30, 2020). In the period following Bayer’s search, the *Loudermill* language has appeared in an additional 20 rulings. See, e.g., *NuTech Orchard Removal, LLC, v. DuraTech Indus. Int’l, Inc.*, No. 3:18-CV-00256, 2020 WL 6994246, at *5 (D.N.D. Oct. 14, 2020) (“It is well settled that ‘the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility.’ In the Court’s view, the differences between the 5064T and 5064 models can be adequately addressed during cross-examination and are not a basis for excluding [the expert’s] opinions.”)(quoting *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 450 (8th Cir. 2008), which takes the quoted passage from *Triton Corp. v. Hardrives, Inc.*, 85 F.3d 343, 347 (8th Cir.1996), which in turn draws the language from *Loudermill*).

⁸ *Viterbo*, 826 F.2d at 422. Bayer found 152 federal cases decided between Jan 1, 2015 and Sept. 14, 2020 incorporating this assertion. See Bayer Corp., *Amending Federal Rule of Evidence 702* at 1 & n.2, 20-EV-O Suggestion from Bayer – Rule 702 (Sept. 30, 2020). Since then, 18 more rulings have relied on the *Viterbo*

- 79 cases incorporated the following statement: “Soundness of the factual underpinnings of the expert’s analysis and the correctness of the expert’s conclusions based on that analysis are factual matters to be determined by the trier of fact[.]”⁹

The reliance on these archaic cases is so pervasive that courts in every federal circuit have cited them in analyzing challenges to the admissibility of opinion testimony within the last few years.¹⁰ A cure will not automatically follow from the (appropriately) modest textual

language. *See, e.g., Trevelyn Enterprises, L.L.C. v. SeaBrook Marine, L.L.C.*, No. CV 18-11375, 2021 WL 65689, at *2 (E.D. La. Jan. 7, 2021) (“With respect to defendants’ argument that Boulon’s testimony is based upon unsupported factual and legal conclusions and speculation, this challenge goes to the bases for Boulon’s opinion. ‘[Q]uestions relating to the bases and sources of an expert’s opinion[,] affect the weight to be assigned that opinion rather than its admissibility and should be left for the [fact-finder’s] consideration.’”) (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996), which itself quotes *Viterbo*).

⁹ *Smith*, 215 F.3d at 719 (7th Cir. 2000). Since January 2015, 79 federal rulings have incorporated or closely paraphrased this statement from *Smith*. *See, e.g., Stapleton v. Union Pac. R.R. Co.*, No. 16-CV-00889, 2020 WL 2796707, at *6 (N.D. Ill. May 29, 2020) (“these and Stapleton’s other factual criticisms go to the weight of Mathias’s opinions, not their admissibility. *See Smith*, 215 F.3d at 718 (‘The soundness of the factual underpinnings of the expert’s analysis and the correctness of the expert’s conclusions based on that analysis are factual matters to be determined by the trier of fact.’)”). Courts also repeat a similar statement from *Hurst v. United States*, 882 F.2d 306, 311(8th Cir. 1989): “Any weaknesses in the factual underpinnings of [the expert’s] opinion go to the weight and credibility of his testimony, not to its admissibility.” *See, e.g., Acevedo v. NCL (Bahamas) Ltd.*, 317 F. Supp. 3d 1188, 1197 (S.D. Fla. 2017) (“Based upon a review of the report and Mr. Camuccio’s observations which provide the basis for his conclusions, the report and testimony on the issues contained therein are admissible. As the Court of Appeals for the Eleventh Circuit has stated, ‘[a]ny weaknesses in the factual underpinnings of [the expert’s] opinion go to the weight and credibility of his testimony, not to its admissibility.’ *Sorreles*, 796 F.3d at 1285 (quoting *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989).”).

¹⁰ **First Circuit:** *See, e.g., Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 22 (1st Cir. 2011)(quoting *Smith*); *Coffin v. AMETEK, Inc.*, No. 2:18-CV-472-NT, 2020 WL 5552113, at *2 (D. Me. Sept. 16, 2020) (reiterating *Loudermill* language); *Irish v. Fowler*, No. 1:15-CV-00503-JAW, 2019 WL 1179392, at *8 (D. Me. Mar. 13, 2019)(same). **Second Circuit:** *See, e.g., Feliciano v. CoreLogic Saferent, LLC*, No. 17 CIV. 5507 (AKH), 2020 WL 6205689, at *3 (S.D.N.Y. June 11, 2020)(referencing *Loudermill* pronouncement); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 246 (S.D.N.Y. 2019)(same); *Clark v. Travelers Companies, Inc.*, No. 216CV02503ADSSIL, 2020 WL 473616, at *5 (E.D.N.Y. Jan. 29, 2020)(same). **Third Circuit:** *See, e.g., First Union Nat. Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005) (quoting language that originated in *Loudermill*); *United States v. Kraynak*, No. 4:17-CR-00403, 2020 WL 6561897, at *7 (M.D. Pa. Nov. 9, 2020)(same); *UPMC v. CBIZ, Inc.*, No. 3:16-CV-204, 2020 WL 2736691, at *5 (W.D. Pa. May 26, 2020)(paraphrasing *Loudermill* statement). **Fourth Circuit:** *See, e.g., Patenaude v. Dick’s Sporting Goods, Inc.*, Case No. 9:18-CV-3151-RMG, 2019 WL 5288077, at *2 (D.S.C. Oct. 18, 2019) (referencing language that originated in *Loudermill*); *Ward v. Autozoners, LLC*, Case No. 7:15-CV-164-FL, 2018 WL 10322906, at *3 (E.D. N.C. Apr. 16, 2018) (*Viterbo* statement); *Krakauer v. Dish Network, L.L.C.*, No. 1:14-CV-333, 2015 WL 5227693, at *11 (M.D.N.C. Sept. 8, 2015)(quoting *Smith*). **Fifth Circuit:** *See, e.g., Hale v. Denton Cty.*, No. 4:19-CV-00337, 2020 WL 4431860, at 4 (E.D. Tex. July 31, 2020)(quoting *Viterbo*); *Trevelyn Enterprises, L.L.C. v. SeaBrook Marine, L.L.C.*, No. CV 18-11375, 2020 WL 6822555, at *2 (E.D. La. Nov. 20, 2020)(quoting statement that originated in *Viterbo*); *Fogleman v. O’Daniels*, No. 1:16-CV-210-JCG, 2017 WL 11319287, at *2 (S.D. Miss. Dec. 5, 2017)(quoting *Viterbo*). **Sixth Circuit:** *See, e.g., Cent. Transp., LLC v. Thermofluid Techs., Inc.*, No. 3:18-CV-80-TWP-DCP, 2020 WL 50393, at *8 (E.D. Tenn. Jan. 3, 2020)(referencing statement that originated in *Loudermill*); *Wischermann Partners, Inc. v. Nashville Hosp. Capital LLC*, No. 3:17-CV-00849, 2019 WL 3802121, at *1, *3 (M.D. Tenn. Aug. 13, 2019)(quoting language that originated in *Loudermill*). **Seventh Circuit:** *See, e.g., Hostetler v. Johnson Controls, Inc.*, No. 3:15-CV-226 JD, 2020 WL 5959811, at *4 (N.D. Ind. Oct. 8, 2020)(quoting *Smith*); *Stapleton v. Union Pac. R.R. Co.*, No. 16-CV-00889, 2020 WL 2796707, at *6 (N.D. Ill. May 29, 2020) (same); *Bakov v. Consol. World Travel, Inc.*, No. 15 C 2980,

amendment the Subcommittee is expected to propose *unless* that purpose is specifically explained in the Note. Such an approach has proven successful in similar amendment packages, including the Note to the 2015 amendment of Federal Rule of Civil Procedure 37(e), which explicitly rejected prior caselaw that was inconsistent with the amendment’s intent.¹¹ As with that rule amendment, the only clear way to communicate the purpose of the expected Rule 702 amendment proposal is to state that certain cases—here, *Loudermill*, *Viterbo*, *Smith*, and their progeny—are rejected as incompatible with the rule. Express reference to rejected cases is even more important here than in FRCP 37(e) because the purpose of the expected Rule 702 proposal is to clarify rather than re-write the rule; it is easy to foresee that judges and litigants will not perceive the addition of the familiar “preponderance of the evidence” phrase as displacing these all-too-well-established precedents. A number of recent rulings show that even when courts correctly recite the preponderance standard, they nevertheless confuse it with inconsistent language from prior cases. Examples include:

- “The proponent of the expert testimony bears the burden of showing by a preponderance of the evidence that the testimony is admissible. Rejection of expert testimony is the exception rather than the rule, and expert testimony should be admitted if it advances the

2019 WL 1294659, at *12 (N.D. Ill. Mar. 21, 2019)(same). Eighth Circuit: See, e.g., *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1014 (8th Cir. 2012)(quoting statement that originated in *Loudermill*); *Nebraska Plastics, Inc. v. Holland Colors Am., Inc.*, 408 F.3d 410, 416 (8th Cir.2005) (same); *Owen v. Union Pac. R.R. Co.*, No. 8:19CV462, 2020 WL 6684504, at *4 (D. Neb. Nov. 12, 2020) (quoting *Loudermill*); *Jayne v. City of Sioux Falls*, No. 4:18-CV-04088-KES, 2020 WL 2129599, at *7 (D.S.D. May 5, 2020)(same). Ninth Circuit: See, e.g., *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 at n.14 (9th Cir. 2004) (referencing statement that originated in *Loudermill*); *A.B. v. Cty. of San Diego*, Case No.: 18cv1541-MMA-LL, 2020 WL 4431982, at *9 (S.D. Cal. July 31, 2020)(same); *In re Crash of Aircraft N93PC on July 7, 2013 at Soldotna, Alaska*, No. 3:15-cv-0112-HRH, 2020 WL 1956823, at *6 (D. Alaska Apr. 22, 2020)(same). Tenth Circuit: See, e.g., *Beebe v. Colorado*, No. 18-CV-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019)(quoting statement that originated in *Loudermill*); *Thompson v. APS of Oklahoma, LLC*, No. CIV-16-1257-R, 2018 WL 4608505, at *5 n.15 (W.D. Okla. Sept. 25, 2018)(same). Eleventh Circuit: See, e.g., *Ocasio v. C.R. Bard, Inc.*, No. 8:13-CV-1962-T-36AEP, 2020 WL 7586930, at *7 (M.D. Fla. Dec. 22, 2020) (referencing statement that originated in *Loudermill*); *Banks v. McIntosh Cty.*, No. 2:16-CV-53, 2020 WL 6873607, at *6 (S.D. Ga. Nov. 23, 2020)(quoting *Viterbo*); *Garcia v. Scottsdale Ins. Co.*, No. CV 18-20509-CIV, 2019 WL 1318090, at *2 (S.D. Fla. Mar. 22, 2019)(same); *Ward v. Carnival Corp.*, No. 17-24628-CV, 2019 WL 1228063, at *11 (S.D. Fla. Mar. 14, 2019)(quoting *Smith*). D.C. Circuit: See, e.g., *Sherrod v. McHugh*, 334 F. Supp. 3d 219, 261 (D.D.C. 2018)(quoting *Viterbo*). Federal Circuit: *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1320 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015)(quoting *Smith*).

¹¹ See, e.g., Notes of Advisory Committee on 2015 Amendment to Federal Rule of Civil Procedure 37:

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information’s use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence. (emphasis added)

trier of fact's understanding to any degree."¹²

- “The proponent of expert testimony bears the burden of establishing by a preponderance of the evidence that the admissibility requirements are met. Although there is a presumption of admissibility, the trial court is obliged to act as a ‘gatekeeper’ with regard to the admission of expert scientific testimony under Rule 702.”¹³
- “The party seeking to introduce the expert testimony bears the burden of establishing by a preponderance of the evidence that the proffered testimony is admissible. There is a presumption that expert testimony is admissible[.]”¹⁴

To ensure that courts and lawyers understand that the draft amendment’s purpose in articulating the preponderance standard within Rule 702 is to end reliance on errant caselaw, the Note should explicitly identify and reject the most-cited rulings. Exhibit A suggests edits that would accomplish that goal.

II. THE NOTE SHOULD REJECT CASES PURPORTING TO IMBUE RULE 702 WITH A POLICY PREFERENCE IN FAVOR OF ADMITTING OPINION TESTIMONY

Separately from substantive misstatements declaring that an expert’s basis and application are not subject to the burden of production, some courts have incorrectly re-framed the admissibility criteria by speculating about the policy purpose of Rule 702—specifically, stating that Rule 702 reflects a policy choice in favor of admitting opinion testimony. Examples are rampant, including:

- “Rule 702 is a rule of admissibility rather than exclusion.”¹⁵
- “Rule 702 should be applied with a ‘liberal thrust’ favoring admission[.]”¹⁶

¹² *Trice v. Napoli Shkolnik PLLC*, No. CV 18-3367 ADM/KMM, 2020 WL 4816377, at *10 - *11 (D. Minn. Aug. 19, 2020)(quotation and citations omitted)(emphasis added).

¹³ *Cyntec Co., Ltd. v. Chilisin Elecs. Corp.*, No. 18-CV-00939-PJH, 2020 WL 5366319, at *3 (N.D. Cal. Sept. 8, 2020)(citations omitted)(emphasis added).

¹⁴ *S.E.C. v. Yorkville Advisors, LLC*, 305 F. Supp. 3d 486, 503-04 (S.D.N.Y. 2018)(emphasis added).

¹⁵ *Lampton v. C. R. Bard, Inc.*, No. 4:19-CV-00734-NKL, 2020 WL 7081107, at *2 (W.D. Mo. Dec. 3, 2020)(quoting *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001)); *Metro Sales, Inc. v. Core Consulting Grp., LLC*, 275 F. Supp. 3d 1023, 1062 (D. Minn. 2017)(same).

¹⁶ *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017)(quoting *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014)); *Parks v. Ethicon, Inc.*, No. 20-CV-989 TWR (RBB), 2020 WL 6118774, at *2 (S.D. Cal. Oct. 16, 2020)(quoting *Wendall*); *McMorrow v. Mondelez Int'l, Inc.*, No. 17-CV-2327-BAS-JLB, 2020 WL 1237150, at *4 (S.D. Cal. Mar. 13, 2020)(quoting *Messick*). See also *Fed. Energy Regulatory Comm'n v. Silkman*, No. 1:16-CV-00205-JAW, 2019 WL 6467811, at *5 (D. Me. Dec. 2, 2019)(When the “adequacy of the foundation for the expert testimony is at issue, the law favors vigorous cross-examination over exclusion.”)(citation omitted); *Hogland v. Town & Country Grocer of Fredericktown Missouri, Inc.*, No. 3:14CV00273 JTR, 2015 WL

- “The standards governing admissibility under Rule 702 have been described as ‘liberal and flexible,’ embracing a general presumption of admissibility, pursuant to which rejection of expert testimony is the exception rather than the rule[.]”¹⁷
- Courts should exclude opinion testimony only when an expert’s opinion “is so fundamentally unsupported that it can offer no assistance to the jury.”¹⁸
- “There is a presumption that expert testimony is admissible, and the rejection of such testimony is the exception rather than the rule.”¹⁹

These statements are not only incorrect, but also improper. It is the Note’s job, not the courts’, to explain the Committee’s intent in promulgating a rule. If the Note fails to do so, courts are more likely to make inaccurate statements about the amendment’s purpose. This is more than a semantic point; the purpose of the anticipated Rule 702 amendment will likely be lost if courts continue to opine that Rule 702 reflects a policy judgment favoring admission. Unless specifically rejected, erroneous statements of an outcome preference will undermine the clarity and effectiveness of the Rule 702 amendment under contemplation. Exhibit A suggests edits that would accomplish that goal.

3843674, at *1 n.4 (E.D. Ark. June 22, 2015)(“Rule 702 favors admissibility if the testimony will assist the trier of fact, and doubts regarding whether an expert’s testimony will be useful should generally be resolved in favor of admissibility.”)(citation omitted).

¹⁷ *Zsa Zsa Jewels, Inc. v. BMW of N. Am., LLC*, 419 F. Supp. 3d 490, 511-12 (E.D.N.Y. 2019)(quotations and citations omitted)(emphasis added).

¹⁸ See, e.g., *Owen*, 2020 WL 6684504, at *4 -*5 (quoting *Loudermill*, 863 F.2d at 570); *Kraynak*, 2020 WL 6561897, at *7 (quoting *First Union Nat. Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005)); *Coffin*, 2020 WL 5552113, at *2 (quoting *Brown v. Wal-Mart Stores, Inc.*, 402 F. Supp. 2d 303, 309 (D. Me. 2005)); *Cent. Transp., LLC v. Thermofluid Techs., Inc.*, No. 3:18-CV-80-TWP-DCP, 2020 WL 50393, at *8 (E.D. Tenn. Jan. 3, 2020)(quoting *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002)); *Beebe v. Colorado*, No. 18-CV-01357-CMA-KMT, 2019 WL 6044742, at *6 (D. Colo. Nov. 15, 2019)(quoting with emphasis *First Union Nat. Bank*, 423 F.3d at 862).

¹⁹ *Cates v. Trustees of Columbia Univ.*, 16 Civ. 6524 (GBD)(SDA), 2020 WL 1528124, at *6 (S.D.N.Y. Mar. 30, 2020)(citing *Borawick v. Shay*, 68 F.3d 597, 610 (2d Cir. 1995)). See also *Rella v. Westchester BMW, Inc.*, No. 7:16-CV-916 (JCH), 2019 WL 10270223, at *5 (D. Conn. Sept. 30, 2019)(“This gatekeeping function ‘is tempered by the liberal thrust of the Federal Rules of Evidence and the ‘presumption of admissibility.’”)(quoting *Bunt v. Altec Indus., Inc.*, 962 F. Supp. 313, 317 (N.D.N.Y. 1997) and *Borawick*, 68 F.3d at 610); *Price v. General Motors, LLC*, No. CIV-17-156-R, 2018 WL 8333415, at *1 (W.D. Okla. Oct. 3, 2018)(“[T]here is a presumption under the Rules that expert testimony is admissible.”)(quotation omitted); *Chapman v. Tristar Prods., Inc.*, No. 1:16-CV-1114, 2017 WL 1718423, at *1 (N.D. Ohio Apr. 28, 2017)(“Under this liberal approach, expert testimony is presumptively admissible.”); *Advanced Fiber Techs. Tr. v. J & L Fiber Servs., Inc.*, No. 1:07-CV-1191 LEK/DEP, 2015 WL 1472015, at *20 (N.D.N.Y. Mar. 31, 2015) (“In assuming this [gatekeeper] role, the Court applies a ‘presumption of admissibility.’”)(quoting *Borawick*, 68 F.3d at 610); *Martinez v. Porta*, 598 F. Supp. 2d 807, 812 (N.D. Tex. 2009)(“Expert testimony is presumed admissible”).

CONCLUSION

The Note to the anticipated Rule 702 amendment proposal will bear an unusually high burden in communicating the Committee's purpose. That burden is complicated by the very phenomenon motivating the amendment: widespread misunderstanding in the case law. It is therefore critical for the Note to leave no doubt that the amendment rejects specific case law inconsistent with Rule, including the three most widely cited cases that are perpetuating an erroneous weight-versus-admissibility standard as well as cases that purport to give Rule 702 a policy preference in favor of admission. Absent such clarity, the Note will invite the "Rulemakers' Lament"²⁰ of noncompliance as readers who see only a rule clarification will fail to connect the dots that the amendment displaces some widely followed case law. The promise of the expected amendment is to articulate the admissibility standards in a single place rather than requiring readers to consult several sources; *a fortiori*, the Note explaining the amendment should be the unambiguous authority on its meaning.

²⁰ Richard Marcus, *The Rulemakers' Laments*, 81 Fordham L. Rev. 1639, 1643 (2013) ("The rulemakers may endorse one view and disapprove another; for a judge who embraced the disapproved view, there may be a tendency to resist the rule, or at least not to embrace its full impact.").

Exhibit A

Draft Committee Note (from Nov. 13, 2020, Agenda Book, at 157-58) With Suggested Edits in Redline

Rule 702 has been amended in ~~two~~ three respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. ~~See Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. See *Bourjaily v. United States*, 483 U.S. 171 (1987). But unfortunately~~ Unfortunately, many courts have ~~held~~ misstated that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology to the facts of the case, are generally questions of weight and not admissibility. ~~These rulings~~ Such statements are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment, including in *Loudermill v. Dow Chem. Co.*, 863 F.2d 566, 570 (8th Cir. 1988) (“As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.”); *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987) “[Q]uestions relating to the bases and source of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility.”; and *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000) (“Soundness of the factual underpinnings of the expert’s analysis . . . are factual matters to be determined by the trier of fact[.]”).

Second, the amendment is intended to clarify that Rule 702 is to be applied neutrally and sets forth the complete admissibility standard applicable to proposed opinion testimony, rejecting cases that project a policy preference onto the rule such as *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1232 (9th Cir. 2017) (“Rule 702 should be applied with a ‘liberal thrust’ favoring admission”) and *Martinez v. Porta*, 598 F. Supp. 2d 807, 812 (N.D. Tex. 2009) (“Expert testimony is presumed admissible”), and cases that would add standards that are inconsistent with rule’s requirements such as *Hose v. Chicago Nw. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (“Only if an expert's opinion is ‘so fundamentally unsupported that it can offer no assistance to the jury’ must such testimony be excluded.”).

Although the clarifying amendment emphasizes the application of the preponderance standard to the requirements of sufficiency of basis and application of the expert's methodology where some courts have failed to apply it, the Rule 104(a) preponderance standard continues to govern a trial judge's determination of the expert's qualifications as well. Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. See *Bourjaily v. United States*, 483 U.S. 171 (1987). ~~Likewise~~ There is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules by clarifying the standard with respect to Rule 702. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying that Rule.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis *generally* go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

Third, Rule 702 has also been amended to provide [The "overstatement" section of the draft Note is omitted here as LCJ does not have suggestions on that portion at this time.]



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November 10, 2020

Rebecca A. Womeldorf, Secretary
 Committee on Rules of Practice and Procedure
 Administrative Office of the United States Courts
 One Columbus Circle, NE
 Washington, D.C. 20544

Re: Advisory Committee on Evidence Rules Consideration of Amendments to Federal Rule of Evidence 702

Dear Ms. Womeldorf:

We are writing to offer brief comments that we hope might be of value to the Advisory Committee on Evidence Rules as it weighs possible amendments to Federal Rule of Evidence 702. The Committee has already received many submissions, some of which are lengthy and cover multiple issues. Accordingly, we are keeping these comments brief and limiting our focus to a trend that we observe in our practice, which we suggest highlights the importance of the issue.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that the district court plays the role of a gatekeeper to assess whether an expert witness's testimony should be presented to the jury. The Court established a multi-part test for the district court to use in making that determination. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that the district court's gatekeeping role extends to all experts, not only to those who are scientists.

Federal Rule of Evidence 702, as currently written, reflects changes made in response to *Daubert* and its progeny. See Advisory Committee Note to 2000 Amendment to Rule 702. The text of Rule 702 appears to make the district judge's gatekeeping role plain:

A witness **who is qualified** as an expert may testify in the form of an opinion or otherwise **if**:

Rebecca A. Womeldorf, Secretary

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- (a) the expert’s ... knowledge **will help the trier of fact ...**;
- (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 ...** .

The district court’s role is to determine whether the witness proffered as an expert satisfies the test. Implicit in the role is the notion that the proponent of the expert has the burden of demonstrating to the judge that the proffered expert testimony satisfies the requirements of Rule 702.

The Advisory Committee attempted to resolve any doubt about the meaning and intent of Rule 702 at the time of the 2000 Amendment of the Rule. The Committee Notes state in pertinent part: “The amendment affirms the trial court’s role as gatekeeper and provides some general standards that the trial court **must** use to assess the reliability and helpfulness of proffered expert testimony. ... [T]he proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.” *Advisory Committee Note to 2000 Amendment to Rule 702* (emphasis added).

Notwithstanding the seeming clarity of the Rule and the Advisory Committee’s effort to affirm its requirements, as others submitting comments and writers in other contexts have pointed out, circuit courts and district courts have sometimes failed properly to apply Rule 702. *See, e.g., Wendell v. GlaxoSmithKline LLC*, 858 F. 3d 1227, 1237-38 (9th Cir. 2017), *cert denied sub. nom.*; *Teva Pharms. USA, Inc. v. Wendell*, 138 S. Ct. 1283 (2018); *Sappington v. Skyjack, Inc.*, 512 F. 3d 440, 448 (8th Cir 2008); Memorandum from Daniel J. Capra, Reporter, *Advisory Committee on Evidence Rules to Advisory Committee on Evidence Rules, Forensic Evidence, Daubert and Rule 702* (April 1, 2018) at 50.

Our practices, and those of many of our colleagues, focus on environmental litigation and related toxic tort cases. Those are areas of litigation where expert testimony is of critical importance. It involves many disciplines, including toxicology, epidemiology, medicine, genetics, botany, ecology, chemistry, geology, engineering, air modeling, property valuation and economics. One fairly recent, but significant, development that we have seen is the expanded use in litigation of citizen science in some of these complex disciplines.

Today, members of the public are able to collect data related to air emissions and water quality using inexpensive and readily available devices. Public interest and advocacy groups can utilize such data when attempting to influence regulatory processes. Sometimes the data is of value. Sometimes, however, it is of low quality and lacking a basis in a scientific methodology, and as a result can be misleading.

Rebecca A. Womeldorf, Secretary

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Plaintiffs are now using citizen collected data in litigation, and attempting to introduce it through experts. Those experts will use the data as support for proffered opinions on issues of causation. A good example might be the collection of air quality data via hand held devices by the plaintiffs in a toxic tort case alleging airborne exposures. Depending on the circumstances, there can be questions about whether the devices have been properly calibrated or recalibrated, let alone whether the citizens have utilized the devices correctly, and whether they have logged all of the data properly. The expert witness will not have been present to observe the collection of data. He or she may not even have vetted the methodology of collection in the particular case.

One would think that the opinions of an expert – be it an air quality expert or a toxicologist utilizing the citizen collected data – would not be admissible in the face of such questions because of the reliability of the data on which the opinions are based. However, what would the result be in the Ninth Circuit? In *Messick, supra*, 747 F. 3d at 1198-99, that court held that the district court erred when it rejected expert medical testimony as unreliable because “medicine partakes of art as well as science.” Would such testimony be admissible in the Eighth Circuit given its holdings that the district court should reject expert testimony “only if it is so fundamentally unsupported that it can offer no assistance to the jury?” *Sappington*, 512 F. 3d at 448.


To be sure, we are presenting a hypothetical for the Committee’s consideration. However, it is a hypothetical based on developments we see in our practice and tomorrow’s cases follow from yesterday’s decisions. The Eighth Circuit’s holdings are inconsistent with *Daubert*. The Ninth Circuit’s decisions are as well. Both fail to adhere to the meaning of Rule 702 and the accompanying Advisory Committee note. As other commenters have pointed out, there are district courts in other circuits that have also failed to follow the Rule.

We respectfully suggest that the Advisory Committee should propose an amendment that confirms the existing requirements and purpose of Rule 702 and makes plain the district court’s important gatekeeping function.

Very truly yours,


Bina R. Reddy

Very truly yours,


John S. Guttman



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November 9, 2020

Via Email: Rules Committee Secretary@ao.uscourts.gov

Rebecca A. Womeldorf, Secretary
 Committee on Rules of Practice and Procedure
 Administrative Office of the United States Courts
 One Columbus Circle, N.E.
 Washington, D.C. 20544

Re: Amending Federal Rule of Evidence 702

Dear Ms. Womeldorf:

The U.S. Chamber Institute for Legal Reform appreciates the opportunity to submit this Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee. We support the Advisory Committee's efforts to explore possible amendments to Federal Rule of Evidence 702. The use of sound science and reliable expert testimony is essential to a wide range of stakeholders, both in the civil and criminal justice systems.

Over two decades have passed since the U.S. Supreme Court deputized trial courts as gatekeepers over the reliability of expert testimony and, through the *Daubert* trilogy, provided guidance to judges on how to perform that critical function. Two decades have also elapsed since the Advisory Committee substantively addressed, through amending the text of Rule 702 and the Committee Notes that accompany it, the Rule's proper application.

Meanwhile, mass tort litigation has exploded. In recent years, multidistrict litigation (MDL) cases have constituted roughly one-half of the entire federal civil docket (excluding most prisoner and social security cases).¹ In fact, since Rule 702's 2000 amendment, the number of pending cases in MDLs has increased 650%.² About 90% of cases in MDLs are product liability

¹ MDL cases were nearly 52% and 47% of the entire federal civil docket (excluding most prisoner and social security cases) in 2018 and 2019, respectively, including 134,462 cases in 194 MDLs in 2019. *See* Lawyers for Civil Justice, [Resources](#), Rules4.MDLs.com (providing MDL infographics and statistics).

² At the close of FY 2000, there were almost 40,000 cases pending in MDLs. *See* Judicial Panel on Multidistrict Litigation, [Statistical Analysis of Multidistrict Litigation](#) (FY 2000). There are now some 262,228 actions pending in 181 MDLs. *See* Judicial Panel on Multidistrict Litigation, [MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending](#) (Aug. 17, 2020). Even excluding 142,527 earplug product liability cases in an MDL established in April 2019, the number of pending cases in MDLs has more than tripled since 2000. *See* (cont'd)

claims. A ruling on the admissibility of expert testimony addressing causation in one of these litigations may mean the difference between ending thousands of claims that are contrary to the prevailing scientific consensus or allowing the suits to advance to trial, placing substantial pressure on defendants to settle and potentially remove safe and beneficial products from the market.

The amount of class action litigation in federal courts since 2000 has also grown significantly.³ Class action litigation is often reliant on expert testimony offering dubious theories to create a common injury where there is none. The Class Action Fairness Act of 2005, which expanded federal court jurisdiction over multi-state class actions, increases the importance of applying consistent expert testimony standards in these high-stakes cases that may involve thousands or even millions of members.

These significant civil developments are in addition to developments in the criminal justice system, where unreliable expert testimony influences proceedings with life and liberty at stake, and both warrant the Advisory Committee’s careful consideration.

The Admission of Expert Evidence Should Not Vary by Jurisdiction

According to the 2000 Notes to Rule 702, questions of the admissibility of expert evidence should be decided by a preponderance of the available evidence.⁴ The Committee drew this standard from Rule 104(a) as well as United States Supreme Court precedent.⁵ Nonetheless, various courts misunderstand or misinterpret this standard, instead invoking other fragments from the Notes and case law to hold that the standard for expert evidence should have a “liberal thrust” favoring admission of evidence.⁶

The Eighth Circuit, for example, misreads Rule 702 to favor the admission of opinion evidence wherever possible.⁷ As a result, the court has consistently held—adhering to a pre-2000 Amendment perspective—that an expert’s opinion should be excluded “only if it is so fundamentally unsupported that it can offer no assistance to the jury,” not when the proffering

Judicial Panel on Multidistrict Litigation, [Statistical Analysis of Multidistrict Litigation](#) (FY 2019) (indicating 156,511 and 134,462 pending cases in MDLs at the close of FY 2018 and FY 2019, respectively).

³ See Emery G. Lee III & Thomas E. Willging, [The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules](#) 1 (Fed. Jud. Ctr. Apr. 2008) (finding a 72% increase in class action activity when comparing the period of July through December 2001 to January through June 2007, including a “dramatic increase” in class action filings after CAFA’s effective date, primarily alleging consumer protection, contracts, and torts-property damage claims).

⁴ Fed. R. Evid. 702, Committee Note on Rules—2000 Amendment.

⁵ See *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987).

⁶ See *Daubert v. Merrell Dow Pharm. Co.*, 509 U.S. 579, 588 (1993).

⁷ See, e.g., *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 448 (8th Cir. 2008); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001); see also Thomas D. Schroeder, *Toward a More Apparent Approach to Considering the Admission of Expert Testimony*, 95 Notre Dame L. Rev. 2039, 2046-49 (2020) (detailing Eighth Circuit opinions deviating from Rule 702 standard).

party fails to establish by a preponderance of available evidence that Rule 702's requirements are met.⁸

This incorrect approach means that, in complex tort cases, courts admit expert evidence that cannot meet the rigors of the scientific method. For example, in *Berg v. Johnson & Johnson*,⁹ the case that touched off the nationwide talcum powder litigation, the plaintiff sued Johnson & Johnson, alleging that its talc products had caused her ovarian cancer. Before moving for summary judgment, Johnson & Johnson challenged the admissibility of the testimony of Ms. Berg's experts, including an epidemiologist who had conducted a prior study of ovarian cancer, but whose methodology was clearly problematic. Among other flaws, the epidemiologist had not ruled out any alternative causes of ovarian cancer, his testimony conflicted with the existing peer-reviewed literature, his data was "'cherry-picked' ... solely for purposes of litigation," and his conclusions conflicted with his non-litigation research.¹⁰ Despite conceding the existence of these problems, the trial court relied on the Eighth Circuit's misunderstanding of Rule 702's requirements to admit the expert's testimony.¹¹ Following this decision, plaintiffs across the country filed nearly identical talc lawsuits against Johnson & Johnson and other talc defendants.

Far from resting on available scientific evidence, these lawsuits flew in the face of established scientific consensus. Most recently, in January 2020, the *Journal of the American Medical Association* published the results of an original investigation in which it announced that, after examining four cohort populations involving more than 250,000 women, "there was not a statistically significant association between use of [talcum] powder in the genital area and ovarian cancer."¹² Nevertheless, the federal court overseeing thousands of talc cases ruled in April 2020 that plaintiffs' experts could testify that minute traces of asbestos in talc could cause cancer.¹³ Shortly thereafter, Johnson & Johnson announced it was discontinuing North American sales of its talcum-based baby powder.¹⁴ A leading supplier of talc to Johnson & Johnson and others filed for bankruptcy in 2019.¹⁵

⁸ *Wood v. Minn. Mining & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997).

⁹ 940 F. Supp. 2d 983 (D. S.D. 2013).

¹⁰ *Id.* at 991-92.

¹¹ *Id.*

¹² Katie M. O'Brien, *et al.*, [Association of Powder Use in the Genital Area with Risk of Ovarian Cancer](#), 323 JAMA 49, 49-59 (2020).

¹³ *In re: Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices and Prods. Litig.*, MDL No. 2738 (D. N.J. Apr. 27, 2020).

¹⁴ See Amanda Bronstad, [Expert Ruling Was 'Tipping Point' for J&J's Talc Withdrawal, Lawyers Say](#), Law.com, May 22, 2020.

¹⁵ Jeff Feeley, *et al.*, [Imerys Talc Units File Bankruptcy as Cancer-Suit Risk Soars](#), Bloomberg.com, Feb. 13, 2019.

Similarly, the Ninth Circuit has departed from Rule 702’s meaning.¹⁶ Much of this occurred in a series of cases in which various panels allowed the admission of questionable expert evidence, citing the “interests of justice” over those of accuracy.¹⁷

These cases guided the trial court involved in the starkest example of intuitive “justice” over accuracy: the Roundup litigation. The Roundup cases began with a statement by the International Agency for Research on Cancer (IARC) that glyphosate— a broad-spectrum herbicide used as an ingredient in weed killers—had the potential to be carcinogenic.¹⁸ Unlike other international agencies, the IARC’s job is to make preliminary findings with a large degree of speculative freedom, in the hopes of identifying possible threats very early in the process that might require further research.¹⁹ In other words, the finding that spurred mass litigation over the dangers posed by Roundup was based on a tentative finding by an agency tasked with speculating about possible dangers. Nonetheless, that preliminary finding spurred an entire MDL full of lawsuits.

Those lawsuits would be subject to dismissal without admissible expert testimony to back up the IARC’s preliminary statement. As a result, the trial court found itself evaluating the testimony of an epidemiologist who testified that a causal relationship existed between exposure to glyphosate and non-Hodgkin’s lymphoma. Despite noting the “valid” critique that the proposed expert had not adjusted her data to account for the use of other pesticides²⁰—which it found “calls her objectivity and credibility into question”²¹—the court admitted her testimony because it did “not rise to the level of an ‘unreliable nonsense opinion.’”²² The trial court made no reference to any available evidence about the reliability of the opinion, as required by Rule 104(a). Instead, it conceded that this result was compelled by the Ninth Circuit’s permissive approach to gatekeeping,

¹⁶ See Schroeder, *Admission of Expert Testimony*, 95 Notre Dame L. Rev. at 2050 (“Ninth Circuit caselaw appears to interpret *Daubert* as liberalizing the admission of expert testimony, which may explain decisions from that circuit that set it apart from most others.”).

¹⁷ See *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237-38 (9th Cir. 2017), *cert. denied sub nom. Teva Pharms. USA, Inc. v. Wendell*, 138 S. Ct. 1283 (2018) (reversing exclusion of expert evidence, finding the “interests of justice favor leaving difficult issues in the hands of the jury”); *Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1198-99 (9th Cir. 2014) (reversing summary judgment, finding the trial court erred in excluding expert testimony as scientifically unreliable); *Alaska Rent-a-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (reversing exclusion of expert, stating “[b]asically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable”).

¹⁸ *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102, 1114 (N.D. Cal. 2018).

¹⁹ *Id.*

²⁰ *Id.* at 1140.

²¹ *Id.* at 1109.

²² *Id.* at 1113 (quoting *Alaska Rent-a-Car, Inc.*, 738 F.3d at 969); see also *In re Roundup Prods. Liab. Litig.*, 358 F. Supp. 3d 956, 957 (N.D. Cal. 2019) (admitting testimony but noting that plaintiffs’ experts “barely inched over the line”).

which results in more “deference to experts in close cases than might be appropriate in other circuits.”²³

Like the talc litigation, the science admitted in the Roundup courtroom did not match the clear scientific consensus in the real world. For example, in January 2020, EPA publicly reiterated that the agency had “thoroughly evaluated potential human health risk associated with exposure to glyphosate and determined that there are no risks to human health from the current registered uses of glyphosate and that glyphosate is not likely to be carcinogenic to humans.”²⁴ Similarly, in June of 2020, a California federal district court enjoined the state from requiring a “Proposition 65” cancer warning on glyphosate-based herbicides because “the great weight of evidence indicates that glyphosate is not known to cause cancer.”²⁵

These cases show that misunderstanding the Rule 702 standard has real-world effects, driving products off shelves, putting companies into bankruptcy, and transforming tentative agency findings into nationwide litigation.

Expert Gatekeeping Should Not Be More Permissive for Class Certification

Another area of specific concern is the class certification hearing. A plain-text reading of the law indicates that class certification should be governed by the same standard as other hearings before a court, meaning any evidence submitted should be *admissible* evidence, subject to the Federal Rules of Evidence, including Rule 702.²⁶ Federal Rule of Evidence 1101 carves out exceptions for Rule 104(a) questions, grand jury proceedings, and a list of “miscellaneous” proceedings: “extradition or rendition; issuing an arrest warrant, criminal summons, or search warrant; a preliminary examination in a criminal case; sentencing; granting or revoking probation or supervised release; and considering whether to release on bail or otherwise.”²⁷ The Rule does not mention class certification hearings.

Nonetheless, the Eighth Circuit has decided that, because of the “preliminary nature” of class certification hearings, these hearings do not require expert evidence to be admissible in court in order to be considered; instead the evidence submitted is subjected to a more relaxed “tailored *aubert* analysis.”²⁸ Similarly, the Ninth Circuit has held that evidence submitted in support of class certification need not meet the admissibility requirements of Rule 702.²⁹

²³ *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d at 1113.

²⁴ U.S. Env’t Prot. Agency, [Glyphosate Interim Registration Review Decision](#), Case No. 0178, at 10 (Jan. 2020).

²⁵ *See Nat’l Ass’n of Wheat Growers v. Becerra*, No. 2:17-cv-2401, 2020 WL 3412732, at *8 (E.D. Cal. Jun. 22, 2020), *appeal filed* (9th Cir. Sept. 11, 2020).

²⁶ *See* Fed. R. Evid. 1101 (rules of evidence apply to all proceedings before district court).

²⁷ Fed. R. Evid. 1101(d).

²⁸ *Cox v. Zurn Pex, Inc.*, 644 F.3d 604, 613-14 (8th Cir. 2011).

²⁹ *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1104-06 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1651 (2019).

These rulings contradict the text of Rule 702 and ignore clear direction from the Supreme Court.³⁰ The rulings also ignore the reality of class actions. Both the Eighth and Ninth Circuits justify their deviations by pointing to the “preliminary nature” of the class certification hearing.³¹ The truth is that class certification is often the single most important hearing in the life of a class action.³² In fact, the decision is important enough to justify its own rule allowing interlocutory review.³³

The end result is that trial courts in these jurisdictions certify class actions based on evidence that would not be admissible at summary judgment or an actual trial, including expert evidence that has not passed the scrutiny required by Rule 702.

For example, the Northern District of California certified a class of cereal purchasers alleging that health representations on certain cereal boxes were misleading.³⁴ The court did so despite conceding that the defendants had raised “a number of valid critiques about the expert’s survey methodology,” because the Ninth Circuit had held—in a case predating Rule 702—that “challenges to survey methodology go to the weight given the survey, not its admissibility.”³⁵ This was not a single error; the court repeatedly conceded that the defendant had raised valid questions about the reliability of the expert’s testimony, but said that the Ninth Circuit’s holdings required it to ignore these concerns.³⁶ It did not make any inquiry into the evidence supporting those challenges, as would have been required under Rule 104(a). The end result was that the court certified a class, despite the fact that doing so required relying on faulty expert testimony.³⁷

Similarly, the Western District of Missouri admitted opinion testimony supporting certification even though it conceded that the “corridor damage theory” the expert offered in support of certification likely lacked adequate support in the industry, and that the expert’s calculations might not be reliable.³⁸ Such an unsupported opinion would not have passed the

³⁰ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011) (“The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . .”) (internal citation omitted).

³¹ *Zurn Pex*, 644 F.3d at 613; *Sali*, 889 F.3d at 631.

³² See *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012) (“As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs’ counsel.”); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000) (granting certification may “raise [] the cost and stakes of the litigation so substantially that a rational defendant would feel irresistible pressure to settle”).

³³ See Fed. R. Civ. P. 23(f).

³⁴ *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1090 (N.D. Cal. 2019).

³⁵ *Id.* at 1107 (citing *Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997), which predates the 2000 Amendments to Rule 702).

³⁶ *Id.* at 1108-10.

³⁷ *Id.* at 1121.

³⁸ *Barfield v. Sho-Me Power Elec. Coop.*, No. 11-cv-04521-NLL, 2013 WL 12145824, at *3 (W.D. Mo. July 8, 2013).

inquiry into supporting evidence required by Rule 104(a). The trial court went on to rely on this opinion testimony when it certified a class later that month.³⁹

Other federal appellate courts do not cast aside Rule 702 when deciding whether to certify class actions. The Third, Fifth, and Seventh Circuits have required trial courts to decide admissibility questions at the class certification stage, at least in cases in which expert testimony is central to certification.⁴⁰ This is the proper approach.

Proposed Amendment and Note

A change is needed to clarify the requirements of Rule 702 and to achieve more uniformity in its application across both civil and criminal cases. The necessary clarification may be accomplished by a minor amendment to the text of Rule 702:

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, after findings consistent with Rule 104, the court determines:

In addition, the Notes to any amendment should make clear that:

Consistent with Rule 1101, the preponderance standard applies to all proceedings governed by the Rules of Evidence, including class certification hearings.

These modifications do not change the substance of Rule 702. The 2000 Committee Notes state that, consistent with Rule 104(a) “the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.”⁴¹ As discussed throughout this Comment, most rulings admitting questionable evidence rely on misapplied legal standards or intuitions about “weight” and “admissibility,” not on an inquiry into whether available evidence supports the ruling. Promoting this language from the Notes to the Rule itself should prevent courts from misunderstanding how to apply the preponderance standard to Rule 702. The amendment would encourage both sides to brief the issues in terms of the preponderance of available evidence and stimulate courts to make findings on each factor of Rule 702, which should aid any appellate review. In addition, coupled with the proposed note text, the amendment should make clear that the preponderance standard governing Rule 702 does not change in class certification proceedings, regardless of how “preliminary” the court considers the hearing. Finally, promoting the language to the text of the Rule should trigger courts to rely on the Rule itself, instead of common-law admissibility standards concocted before the Rule was established.

³⁹ *Barfield v. Sho-Me Power Elec. Coop.*, No. 11-cv-04521-NLL, 2013 WL 3872181, at *4 (W.D. Mo. July 25, 2013).

⁴⁰ See, e.g., *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 325 (5th Cir. 2005). Unpublished decisions from the Sixth and Eleventh Circuits also support this approach. See *In re Carpenter Co.*, No. 14-cv-0302, 2014 WL 12809636, at *3 (6th Cir. 2014); *Sher v. Raytheon Co.*, 419 F. App’x 887, 890 (11th Cir. 2011).

⁴¹ Fed. R. Evid. 702, Committee Notes on Rules – 2000 Amendment.

Conclusion

ILR appreciates the opportunity to share these views. As North Carolina federal District Court Judge Thomas Schroeder recently remarked, “[d]ecisionmaking on the admissibility of expert testimony would be better served if trial judges acknowledged the Rule 104(a) standard and articulated how the expert’s opinion fared under each element of Rule 702.”⁴² We encourage the Committee to adopt amendments to address this problem including the approach we have outlined here and those submitted by other commenters.⁴³

⁴² Schroeder, *Admission of Expert Testimony*, 95 Notre Dame L. Rev. at 2062.

⁴³ See International Association of Defense Counsel, In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping (July 31, 2020); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts’ “Gatekeeping” Obligation (Mar. 2, 2020); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Subcommittee on Rule 702, In Support of Amending Rule 702 to Address the Problem of Insufficient Basis for Expert Testimony (Oct. 10, 2018); Coalition for Litigation Justice, Inc., In Support of Amending Federal Rule of Evidence 702 and Stronger Gatekeeping in Federal Courts (July 29, 2020); Thomas J. Sheehan, *et al.*, Amending Federal Rule of Evidence 702 (June 9, 2020); see also Lee Mickus, [Gatekeeping Reorientation: Amend Rule 702 to Correct Judicial Misunderstanding About Expert Evidence](#), Wash. Legal Found. Critical Legal Issues Working Paper Series, No. 217 (May 2020).



November 9, 2020

Via Electronic Mail

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Re: Comment on Amending Federal Rule of Evidence 702

Dear Ms. Wolmeldorf:

On behalf of Shook, Hardy & Bacon L.L.P. (“Shook”), we respectfully submit this Comment to the Advisory Committee on Evidence Rules (“Committee”) and its Rule 702 Subcommittee concerning potential amendments to Rule 702 and its Committee Notes. We urge the Committee to clarify that the proponent of expert testimony bears the burden of satisfying the admissibility requirements of Rule 702 by a preponderance of the evidence.

Shook is an international, trial-oriented firm with an emphasis on defending complex civil cases. The *Global Legal Post* recently recognized Shook as “the most active defendants’ firm for product liability cases between 2015 and 2019, working on 27,240 cases.”¹ Shook’s vast trial experience gives it specific insights into courts’ application of Rule 702 and the ways in which that use sometimes goes awry. In particular, Shook has identified three problematic trends in the application of the Rule: (1) the substitution of cross-examination for gatekeeping; (2) perfunctory references to weight versus admissibility; and (3) allowing experts to offer opinions based on cherry-picked data.

1. The substitution of cross-examination for gatekeeping

Judge Sarah Vance of the Eastern District of Louisiana recently observed during a panel discussion on expert testimony, “when I was a lawyer, we always said, ‘You don’t win a case on cross.’ You’re not going to win a case on cross-examination, and so I think cross-examining an expert is not going to carry the day with a jury.”² This is one reason that litigants believe motions to exclude shaky expert testimony are vital: once jurors hear an opinion from an expert designated

¹ Ben Edwards, *Product Liability Case Filings in US Federal Courts Reach Eight-Year High*, The Global Legal Post, June 1, 2020, <https://www.globallegalpost.com/big-stories/product-liability-case-filings-in-us-federal-courts-reach-eight-year-high-49884800/>.

² Daniel J. Capra, et al., *Conference on Best Practices for Managing Daubert Questions*, 88 *FORDHAM L. REV.* 1215, 1227 (2020).

as such by the court, it is unlikely that even brilliant cross-examination will convince them that the testimony is fundamentally unsound. Nonetheless, many courts still back away from their gatekeeping responsibilities, leaving flimsy or outright unsound expert evidence to cross-examination rather than excluding it.

Shook's experience in *Berger v. Philip Morris USA Inc.*, 2014 WL 10715266 (M.D. Fla. Aug. 29, 2014), provides an example. The evidentiary dispute involved the use of a "medical projection" to establish causation in a tobacco case. The plaintiffs offered an expert who had reverse-engineered a "backward projection" that "predicted" the plaintiff's chronic obstructive pulmonary disease in 1996 from pulmonary function test results two years later.

The defendant challenged the testimony on the basis of the "analytical gap." There was no basis, other than the expert's speculation, for the projection. A reconstructed diagnosis like this cannot be proven false. Indeed, it is designed to "fit" subsequent facts in the case rather than adhere to any scientific method.

The trial court admitted the questionable evidence, holding that the analytical gap was better addressed through cross-examination. It also held that the plaintiff would have to inform the jury that the opinion was not a "*conclusion reached through hard science.*" *Id.* at *2 (emphasis in original). Thus, the jury heard the evidence *despite* the fact that it was scientifically questionable, and despite the fact that cross-examination is a limited tool for correcting any scientific error.

2. Perfunctory references to "weight versus admissibility"

As numerous other commenters have pointed out,³ one of the primary difficulties with the current application of Rule 702 is that courts frequently conflate questions of admissibility (which determine whether evidence should be heard at trial) with questions of "weight" or "credibility." Challenges to an expert's underlying methodology should be *admissibility* questions, resulting in exclusion. Nonetheless, many courts—without analysis—treat them as *credibility* questions, which they then allow the jury to hear. Shook's experience in two different cases illustrates this issue.

In *Kay v. Sunbeam Products, Inc.*, 2010 WL 2292474 (W.D. Mo. May 27, 2010), plaintiffs alleged that defendant's electric blanket had caused a house fire.

³ See, e.g., International Association of Defense Counsel, In Support of Amending Rule 702 and Its Comments to Achieve More Robust and Consistent Gatekeeping (July 31, 2020); Federation of Defense & Corporate Counsel, Comment on Potential Amendment to Federal Rule of Evidence 702 (June 30, 2020); Letter from 50 General Counsel re Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation (Mar. 2, 2020); Lawyers for Civil Justice, Comment to the Advisory Committee on Evidence Rules and its Rule 702 Subcommittee, Clearing Up the Confusion: The Need for a Rule 702 Amendment to Address the Problems of Insufficient Basis and Overstatement (Sept. 6, 2019).

Plaintiffs proffered a fire investigator and an electrical engineer to establish that the electric blanket was the source of the fire because its fail-safe circuit had failed, purportedly leading to electrical arcing. The defendant challenged the experts on the grounds that they had not tested the blanket at issue (tests revealed the circuit was working) and there was no way to determine whether melting of the blanket's heating element was caused by an arcing event or the heat of the fire. *Id.* at *2.

The court did not evaluate the experts' methodologies. Instead, after a brief review of each side's contentions, it simply found that the defendant's objections "go more to the weight than the reliability" of the experts' opinions. *Id.* at *4.

Similarly, in *Dover v. R.J. Reynolds Tobacco Co.*, 2014 WL 4723116 (M.D. Fla. Sept. 22, 2014), defendants challenged the admission of testimony from a proposed expert who would testify that there existed "an effective dose range of nicotine necessary to initiate and sustain addiction" to cigarettes. *Id.* at *5. The defendants argued that the proposed expert—who held a doctorate in psychology rather than pharmacology—was proffering a results-driven theory invented by plaintiff's experts to prove that defendants' cigarettes were defective. The court spent only a paragraph on its analysis before allowing the testimony, concluding that the defendants' "contentions regarding methodology . . . go to the weight, not the admissibility," of the testimony. *Id.*

As these cases illustrate, all too often, under the current Rule, courts do not engage their actual gatekeeping responsibilities. Instead, without revealing any reasoning, they find that defendants' objections—even objections to whether the methodology used comports with the scientific method—are merely credibility issues, and then leave it to the jury to decide whether the methodological objections disqualify the testimony.

3. Allowing experts to base opinions on cherry-picked data

Expert testimony, like a computer algorithm, is subject to the principle "garbage in, garbage out." If an otherwise qualified expert is fed one-sided evidence or data generated only for litigation, then the testimony will be unreliable. Shook's experience with *Bryant v. Wyeth*, 2012 WL 12844751 (W.D. Wash. Aug. 22, 2012), illustrates this issue. The lawsuit challenged the prescription of specific types of hormone replacement therapy.

Various defendants moved to exclude two experts after they testified at deposition that, instead of conducting an independent investigation of the literature surrounding the challenged therapy, they "relied on documents 'hand-picked by counsel' to generate their reports." *Id.* at *2. The court nonetheless allowed the testimony, reasoning that "Defendants' objections go to the weight of the evidence to be offered, not its admissibility." *Id.* at *3.

The admissibility of expert evidence is supposed to relate directly to its reliability. The reliability of expert evidence depends upon the underlying information supporting it. Courts rightly look in part to whether expert opinion rests on data and methodology that have been independently developed or done so only for the purposes of litigation. Cherry-picked data, particularly when supplied by counsel, is not reliable, and a finding that one side's testimony rests on such data should preclude its admissibility if there is no other evidence of reliability.

Proposed Amendment

We join other commenters in proposing the following amendment to Rule 702: “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, after findings consistent with Rule 104, the court determines:...”

This language ensures that the trial court will refer to Rule 104 and its preponderance standard. It should also encourage both sides to brief the issues in terms of the preponderance of available evidence, which should help guide courts through the dangers of relying on cherry-picked or litigation-generated scientific evidence. Finally, it encourages courts to make findings on each factor, instead of perfunctorily dismissing objections as related to jury “weight,” or deciding that cross-examination can prevent jury confusion. The Committee Notes to Rule 702 should reflect this intent.

Shook also endorses the comments submitted on these issues by Lawyers for Civil Justice, the International Association of Defense Counsel, and the Washington Legal Foundation, which illustrate, through numerous empirical examples, the gravity of the problem and the need for further guidance from the Committee.

Thank you for your consideration of these important issues.

Respectfully submitted,



Madeline McDonough
Firm Chair

TAB 3

FORDHAM

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Daniel J. Capra
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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Amendment to Rule 106
Date: April 1, 2021

The Committee has been studying and discussing a request from Judge Paul Grimm to consider possible amendments to Rule 106. At the last meeting, the Committee made significant strides toward a proposed amendment to the Rule. At this meeting the Committee will decide whether to approve an amendment to Rule 106, with the recommendation that it be released for public comment.

Rule 106, known as the rule of completeness, currently provides as follows:

Rule 106. Remainder of or Related Writings or Recorded Statements

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 problems raised by Judge Grimm arise mostly in criminal cases, but as seen in this memo there are a number of Rule 106 rulings in civil cases as well. And this should not be surprising, because Rule 106 issues arise whenever an advocate makes a selective, misleading presentation of a document or statement. The possible strategic benefit in such a presentation is not limited to criminal cases.

Judge Grimm in *United States v. Bailey*, 2017 WL 5126163 (D.Md.), sets forth the following hypothetical to illustrate the need for a rule of completeness: There is an armed robbery and a gun is found. The defendant is being interrogated by a police officer and says, “yes I bought that gun about a year ago, but I sold it a few months later at a swap meet.” The government in its case-in-chief, through the testimony of the police officer, seeks to admit only the part about the

defendant buying the gun. This part is admissible as a statement of a party-opponent under Rule 801(d)(2). The defendant contends that admitting only the first part of the statement makes for an unfair, misleading presentation --- because without the completing part, the jury will draw the inference that he implicitly admitted owning the gun at the time of the robbery, when in fact he said no such thing.¹

Many courts require completion in the gun hypo, and that result is certainly supported by the policy underlying Rule 106. But a number of courts would not apply Rule 106, because they construe the rule to have two substantial limitations:

1. Some courts have held that Rule 106 cannot operate to admit a statement over the government's hearsay objection; and the defendant's statement about selling the gun is hearsay.² These courts hold that Rule 106 is only about the order of proof and is not a rule that trumps other rules of exclusion.

2. Courts have correctly held that that the text of Rule 106 does not provide for completion with an unrecorded oral statement. Most courts, however, have found a rule of completeness for oral statements in Rule 611(a) or the common law. But some courts have not --- perhaps because they have not been directed to Rule 611(a) or the common law by the party seeking completion.³

The Committee has reviewed and discussed Judge Grimm's proposals, which are: 1) to amend Rule 106 to allow a party to admit the party's statements over a hearsay objection, when they are necessary to complete an unfair, partial presentation of the statement offered by the proponent; and 2) to extend Rule 106 to cover unrecorded oral statements.

At this point, the Committee has reached several points of agreement regarding an amendment to Rule 106:

- The Committee resolved two years ago to retain the "fairness" language in the Rule --- and therefore the criteria for invoking the rule of completeness will remain the

¹ One of my students had another example. The defendant, let's call him Eric, is on trial for shooting the deputy. He stated to the police: "I shot the sheriff, but I did not shoot the deputy." The government introduces the first part of the statement (probably admissible in most courts under Rule 404(b) to show intent, or background, or inextricably intertwined, or some such, and offered to create an inference that the defendant shot the deputy as well). The defendant seeks to complete with the remainder of the statement.

Another example bandied about is the government offering a statement of the defendant, "I killed him" while the defendant offers to complete this deleted portion: "with kindness."

² See, e.g., *United States v. Sanjar*, 853 F.3d 190, 204 (5th Cir. 2017): "When offered by the government, a defendant's out-of-court statements are those of a party-opponent and thus not hearsay. Rule 801(d)(2)(A). When offered by the defense, however, such statements are hearsay."

³ The Supreme Court has stated that Rule 106 is only a "partial codification" of the common-law rule. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988).

same. The amendment, if proposed, would address only how a completing statement may be used.

- The Committee also resolved two years ago that an amendment, if proposed, would not change the existing rule with respect to the timing of completion.

Most importantly, the Committee at the last meeting took a straw poll on the two major issues: 1) whether completing information should be admissible over a hearsay objection; and 2) whether unrecorded oral statements should be covered by Rule 106 rather than by Rule 611(a) and the common law. Five Committee members and the Chair expressed a preference for the option that would both add oral statements and allow completion over a hearsay objection. One Committee member expressed a preference for an amendment that would add oral statements, while admitting completing statements for their non-hearsay context only. The Department of Justice voiced opposition to any amendment.

At the last meeting, the Chair asked the Reporter to prepare a draft amendment that would add oral statements and allow completion over a hearsay objection for the spring meeting. He also stated that the Committee Note should make it clear that the intent of the amendment was to displace common law --- as is the case with every other Federal Rule of Evidence.

This memo is in four parts.⁴ Part One discusses how and when Rule 106 applies, emphasizing that the requirements of the rule regarding the need for completion (which would not be changed by any proposed amendment) are stringent and that completion is rarely permitted. Part Two deals with the two major questions on which the courts are divided: 1) whether the rule operates as a hearsay exception, and 2) whether unrecorded oral statements are covered in one way or another. Part Three discusses some arguments in favor of and against an amendment to Rule 106, and the merits of various amendment alternatives that were presented at previous meetings. Part Four provides a draft of a proposed amendment to Rule 106, and a draft Committee Note, that reflects the position taken by a strong majority of the Committee in the straw poll at the last meeting.

At this meeting, the Committee will vote on whether a proposed amendment to Rule 106 will be approved, with the recommendation that it be released for public comment. If the proposal is approved and all thereafter goes well, the amendment would become effective on December 1, 2023.

⁴ Many passages from this memo are unchanged from the memo submitted for the last meeting. But there are changes, additions, and deletions that have been made to include new case law, to provide responses to some of the arguments and suggestions made at the last meeting, and to adapt to the positions taken by the Committee at the last meeting, as discussed above. Also, language has been added to the draft committee note in response to suggestions made at the last meeting.

I. How and When the Rule Applies.

A. Rule 106 Applies in Narrow Circumstances

Because concerns have been expressed from time to time that an amendment will allow rampant completion and constant disruption of the order of proof, this memo seeks to provide more perspective on the *very limited scope of the existing rule*. The possibility of completion arises only in very narrow circumstances. These narrow standards would not be expanded by the proposal that the Committee is considering, because the Committee has agreed that the “fairness” language of the existing Rule 106 is being retained.⁵

Rule 106 contains important threshold requirements that provide a substantial limitation on the consequences of the amendments being considered. It is not in any sense an automatic rule that a defendant is allowed to admit all exculpatory parts of a statement whenever the government admits an inculpatory part. Mere relevance is definitely not enough. Rather, the court must find two things before the rule of completion is triggered:

1. The statement offered by the proponent creates an inference *about the statement* that is inaccurate --- i.e., it gives a distorted picture of what the statement really means.

AND

2. The completing statement that the adversary seeks to introduce is necessary to eliminate the unfair inference and to make the statement accurate as a whole.

The Grimm example of the gun possession is one in which both of the above requirements are met. The portion chosen by the government creates an inaccurate picture about what was actually said. “I bought the gun” creates an inference that you still have it (exactly the inference the government is seeking) --- so it is misleading. The completing information – “I sold it” --- is necessary to eliminate a misleading impression about what the defendant said.

By way of contrast, another hypo will show where the rule of completeness does *not* require admission. Assume that the defendant is charged with possession of a firearm. He states to a police officer, “I had the gun on me, but I never used it.” The government will be allowed to admit the first part of that statement (as a party-opponent statement under Rule 801(d)(2)(A)) without having to complete with the second. That is because “I had the gun on me” creates no unfair inference in a prosecution for *possessing* the gun; it’s simply a confession of the crime. On the other hand, if the defendant is charged with *using* the firearm, completion should be required, because the first portion of the statement, “I had the gun on me” creates an unfair inference that he probably used the gun, and the second portion is necessary to eliminate that misleading impression.

Because the triggering requirements for Rule 106 are so narrow --- and would not be expanded by any proposal the Committee is considering --- it seems very unlikely that amending

⁵ Note that there is language in the draft Committee Note that emphasizes that nothing in the amendment will change the strict threshold requirements for invoking the rule.

it to trump the hearsay rule and to cover oral unrecorded statements will create a flood of completion requests. The D.C. Circuit Court of Appeals held that Rule 106 allows the use of hearsay evidence to complete a partial, misleading presentation, and in response to a “floodgates” argument the court stated that “[i]n almost all cases we think Rule 106 will be invoked rarely and for a limited purpose.” *United States v. Sutton*, 801 F.2d 1346, 1369 (D.C.Cir. 1986). There is nothing in the reported cases in the D.C. Circuit, nor in other circuits following the same rule, to indicate that the floodgates have been opened on Rule 106 completeness arguments.

The Department argued at the last meeting that completion is allowed much more frequently than is shown in the reported cases. There are several possible responses to this anecdotal report:

- It figures that the reported cases would not be a perfect indicator on all the uses of completion; if the court allows completion, that ruling will usually be in favor of a criminal defendant and so it is an unlikely subject for appeal. And it might well not be the subject of a reported opinion by the trial court.
- The reported cases, as seen below, are extremely narrow and ungenerous in applying an already narrow and ungenerous standard. The Department does not appear to be saying that completion, in practice, is automatic whenever the government uses a portion of any statement. It should not be surprising that some courts apply the narrow standards of completion somewhat more favorably than appears in the reported cases.
- If it is true, as the DOJ suggests, that courts are already allowing more completion than the reported cases show, then it must mean that courts are *already* finding completion to be permissible over a hearsay exception. If that is so, then the amendment will simply codify what is currently occurring. The Department has not stated that courts bent on completion are saying, “I would love to allow completion, but my hands are tied by the hearsay rule.” Rather the Department is saying that there is more completion going on than we can see from the reported cases. But it is hard to see, then, how the proposed amendment will open up more floodgates.⁶
- Perhaps the concern about floodgates is that it is the limitation on unrecorded oral statements that is keeping the courts from a deluge. But the fact is, as seen below, that most courts *are* admitting oral statements when necessary to complete. When that doesn’t happen, it is usually because the proponent relies only on Rule 106, as opposed to Rule 611(a) and the common law. But surely the Department doesn’t want to take advantage of lawyers who have innocently looked only to Rule 106, and who are not up on the Rule 611(a)/common law avenue to admissibility of an oral statement. Moreover, in criminal

⁶ It might be that the Department is arguing for a narrowing of the current “fairness” trigger to completion. But the Department previously proposed a narrowing, which the Committee added to the working draft --- and the Department later abandoned the venture. The Committee returned to the existing fairness standard. An argument that there will be a “wild west” of completion is clearly more about the triggering standard than any issue addressed by the proposed amendment.

cases, most cases are about the defendant's confession and the vast majority of them are written or recorded.

What follows are some the reported cases applying the fairness requirement of Rule 106, to illustrate the narrow circumstances in which it has been successfully invoked.

Here are some (the relatively few) examples of completion required:

- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1983): In a felon-gun possession case, the defendant admitted to the police that he was aware of drugs found under a bed, but stated simultaneously that he knew nothing about the gun that was found near it. The government offered only the part of the statement conceding awareness of the drugs. The relevance of that portion was that if the defendant knew about the drugs, he was likely to know about the gun. But that was an unfair inference from the statement as a whole, because the defendant explicitly *denied* knowing about a gun. So the portion offered by the government was misleading. The Seventh Circuit held that once the prosecution elicited testimony that the defendant admitted knowing about the drugs, the defendant should have been allowed to elicit the part about not knowing the gun was there. Otherwise the jury would use the statement as if the defendant implicitly admitted to having a gun, when that was not the case.
- *United States v. Sweiss*, 800 F.2d 684 (7th Cir. 1986): The government admitted a recording of a conversation between the defendant and an informant, which indicated that the defendant knew in advance of the conversation about a plot to obstruct justice. The government argued that this showed the defendant knew independently about, and so was connected to, the plot. But a prior recording of a conversation between the defendant and the same informant indicated that the defendant had been told about the plot *by the informant*. In effect, the government split up the statements “yes I know” and “because you told me.” The court held that the defendant had the right to introduce the prior recording under the rule of completeness, to dispel the misleading inference from the second recording that he had independent knowledge.
- *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005): This is a case where the prosecution conceded on appeal that the defendant's exculpatory statements, made in a post-arrest confession, should have been admitted under the rule of completeness. There is no discussion in the reported case of what those statements were, and why they were necessary to complete. The court stated that the prosecution was correct in making the concession.

- *Cuhaci v. Kouri Group, LP*, 2020 U.S. Dist. LEXIS 242583 (S.D. Fla. Dec. 28, 2020): This is an example of completion required in a civil case. In a lawsuit over the ownership of shares of stock, the plaintiff offered the front of the stock certificates at issue. The defendant sought to complete by introducing the back of the certificates. The court held that Rule 106 required the admission of the front and the back of the certificates. After quoting Rule 106, the court declared that the plaintiff's claim was squarely based on the underlying stock certificates, while the defendant's dismissal arguments "are largely founded on the purported transfers or sales of those shares being void based on restrictions reflected on the reverse-side of the stock certificates." The court concluded that "in fairness," the factfinder should consider not only the front of the stock certificates but also the back. **[Note: this is the only reported case that I could find in the entire year of 2020 in which completion was found to be required under Rule 106.]**

Here are some of the (many more) examples of completion not required:

- *United States v. Altvater*, 954 F.3d 45 (1st Cir. 2020): In an insider trading prosecution, the government offered portions of the defendant's deposition before the SEC. The defendant argued that the government offered a "massaged" portion, edited to do as much damage as possible to the defendant's position at trial: that he traded on publicly available information based on his own idiosyncratic views. The defendant contended that Rule 106 required admission of all the redacted portions of the deposition. But the court stated that the defendant failed to "engage in the granular level of analysis" necessary to succeed on the completeness challenge. The defendant requested that all redacted material be admitted "without attempting to meet his burden to explain why it would be necessary to admit into evidence each and every statement contained in the redacted material to dispel some alleged distortion caused by the government's redactions." Thus Rule 106 cannot be used for broadside claims that when portions are admitted, redactions must be admitted as well.
- *United States v. Williams*, 930 F.3d 44 (2nd Cir. 2019): Police found a gun in a car that was driven by the defendant. At a trial for felon-gun-possession, the government offered the defendant's oral post-arrest statement admitting the gun was his. The defendant sought to complete with other statements to the police, at the beginning of his interview, in

which he said the car belonged to his girlfriend and he did not know about the gun. The court held that the completeness principle applied only if the portions admitted by the government were misleading, and the portions offered by the defendant corrected the misimpression. In this case, the standards for completion were not met:

It is not uncommon for a suspect, upon interrogation by police, to first claim in a self-serving manner that he did not commit a crime, only thereafter to confess that he did. . . . [T]he mere fact that a suspect denies guilt before admitting it, does not—without more—mandate the admission of his self-serving denial. As the district court here aptly pointed out, Williams’s confession was “simply a reversal of his original position.”

- *United States v. Thiam*, 934 F.3d 89 (2nd Cir. 2019): The defendant was convicted for receiving bribes as a public official. He made inculpatory statements in his post-arrest interview, regarding his acceptance of bribes, that were admitted against him. He argued that the trial court erred in refusing to admit other excerpts of that interview under Rule 106. These excluded portions related to the role that other government officials played in the bribery scheme, and to personal loans that the defendant had received from other third parties. But these statements, while exculpatory, related to matters other than the defendant’s activity. The court stated that “[b]ecause the rule of completeness is violated only where admission of the statement in redacted form distorts its meaning . . . it was within the district court’s discretion to exclude these statements.”

- *United States v. Hird*, 901 F.3d 196 (3rd Cir. 2018): The defendant was a ticket-fixing judge charged with perjuring himself in a grand jury proceeding. He argued that the trial court should have admitted the portion of his grand jury testimony in which he stated that he never provided favors. The court found that the statement was not necessary for completing the portions of his testimony in which he (falsely) denied receiving consideration for fixing tickets. The court stated that the excerpt that the defendant sought to admit “occurs many pages before the testimony regarded as perjurious,” was “separated by the passage of time during questioning” and was “unrelated in the overall sequence of questions and to the answers grounding his conviction.” The court held that the rule of completeness does not apply to statements that are remote in time and circumstances from the statement offered by the proponent.

- *United States v. Shuck*, 1987 U.S. App. Lexis 1519471, at *6 (4th Cir.): The defendant’s previous statements about committing the charged crime were admitted, and he argued that his additional statements about how he had never been convicted of a crime should have been admitted to complete. The court found that completion was not necessary: “General rehabilitation, such as being free of a state or federal conviction * * *

is not directly relevant to Shuck’s admissions. . . . Nor were the additional portions necessary to avoid misleading the trier of fact.”

- *United States v. Branch*, 91 F.3d 699, 728 (5th Cir. 1996): After the disaster at the Waco compound, Castillo was charged with carrying a firearm during a crime of violence. He confessed to donning battle dress and picking up guns when he saw ATF agents approaching. He also stated that he never fired a gun during the raid. The government offered the former statement and not the latter. The court found that the exculpatory statement was not necessary for completion --- the “cold fact” that Castillo had retrieved several guns during the day was neither qualified nor explained by the fact that he never fired them. Importantly, Castillo was charged with *carrying* a gun during a crime of violence, and this charge did not require a finding that he shot a gun. The court concluded as follows:

We acknowledge the danger inherent in the selective admission of post-arrest statements. * * * [But] we do no violence to criminal defendants’ constitutional rights by applying Rule 106 as written and requiring that a defendant demonstrate with particularity the unfairness in the selective admission of his post-arrest statement.

- *United States v. Portillo*, 969 F.3d 144 (5th Cir. 2020): This is a case in which the government sought to introduce completing statements, but the admission of the statements was found to be error. The government’s cooperating witnesses were impeached with inconsistencies, and the trial judge admitted some accompanying consistent statements under Rule 106. The court’s analysis is as follows:

The government cites pages from the record where the defendants referred to specific portions of the statements that were later introduced at trial. But the government does not clearly explain why this questioning created a misleading impression about the entirety of the prior consistent statements. . . . The government has not demonstrated that the statements admitted into evidence were necessary to correct any misleading impressions created by the defendants’ references to the prior statements.

- *United States v. Dotson*, 715 F.3d 576, 581 (6th Cir. 2013): In a trial on charges of child pornography and exploitation of a minor, the trial judge admitted portions of a written statement given by the defendant to authorities following his arrest in which he stated that he made videos and photos of the victim; but the court rejected the defendant’s request to admit the entire statement. The omitted portions showed that Dotson had a rough upbringing and had been sexually abused as a child, and that he was concerned that the victim knew he was exploiting her. The court held that the omitted portions “did not in any

way inform his admission that he photographed the victim, made videos of her, and downloaded sexually explicit images of other children from the internet.”

- *United States v. Wandahsega*, 924 F.3d 868 (6th Cir. 2019): The defendant was convicted of abusive sexual contact with his six year old son. He sought to introduce a video of his supervised visit with his son, the victim, where his son hugged him and interacted well with him. The defendant offered the video under Rule 106, on the theory that it contradicted testimony from witnesses about the victim’s assertions that the defendant abused him. But the court found Rule 106 inapplicable because the government never sought to admit any portion of the video. *Rule 106 does not provide a ground of admissibility simply because the evidence proffered to complete contradicts the opponent’s evidence.*
- *United States v. Lewis*, 641 F.3d 773 (7th Cir. 2011): The defendant confessed to conspiracy in an interview with law enforcement. He sought to complete by eliciting testimony from the agent who interviewed him about how he had never mentioned any of his co-defendant's criminal associates by name. The court found that although this remainder could rebut the government's theory about the level of the defendant's involvement in the conspiracy, and could help to explain the defendant's theory of the case in general, it did not affect the meaning of any of the defendant's statements to which the agent had already testified. Accordingly, no remainders were necessary. Thus, a remainder under the fairness test has to be explanatory *of the portion that it completes.*
- *United States v. LeFevour*, 798 F.2d 977 (7th Cir. 1986): The court found that Rule 106 does not require the introduction of an entirely separate conversation, on a different subject matter, simply because it is relevant to the defense. Relevance is not a sufficient ground to allow completion under Rule 106.
- *United States v. Martinez-Camargo*, 764 Fed. Appx. 205 (9th Cir. 2019): A large shipment of marijuana was found in the defendant’s car when she crossed the border. The government offered excerpts of the defendant’s post-arrest statements. The defendant offered other portions in which she sought to explain her conduct and exculpate herself. The court held that Rule 106 applies only when the edited statement creates a distortion of the evidence. Because the admitted portions of her statement were not misleading, Rule 106 did not compel the admission of the omitted portions of the statement.
- *United States v. Brown*, 720 F.2d 1059 (9th Cir. 1983): This was a completing attempt by the *government* that was unsuccessful. The government called witnesses who

got plea deals, and introduced the deal terms on direct. The defendant argued on cross that there were promises made by the government that were not in the agreement. The government countered, for completeness purposes, with polygraph clauses in the agreements. But the court found the polygraph clauses not necessary for completion, because the defendant's attack was about what was *not* in the plea agreements.

- *United States v. Rodriguez*, 971 F.3d 1005 (9th Cir. 2020): This case did not involve a denial of completion but did emphasize the narrowness of the rule. The government offered a selection of recordings in a case where the defendant was attacking the investigation/prosecution as biased. Over the defendant's objection, the trial court instructed the jury that the government had presented "selective passages" of the recordings and "an opposing party is free to request the Court to order additional portions of a recording be played where necessary to place the portions played in context or to avoid any misleading impression resulting from just the portions played." The defendant argued that the instruction was error because it shifted the burden of proof and incorrectly suggested that both parties were equally able to introduce recordings where in fact the defendant would be barred from doing so under the hearsay rule. The court found no abuse of discretion, concluding that the instruction "aligned with the substance of Rule 106." But in a footnote, it cautioned against using such an instruction in the future:

[T]he midtrial instruction was unnecessary and, as formulated, ran the risk of being incomplete or potentially misleading. While the instruction was consistent with Federal Rule of Evidence 106, ***it failed to fully capture the restrictiveness of the rule of completeness, including the defendant's need to overcome significant evidentiary hurdles.***

- *United States v. Stein*, 2021 U.S. App. LEXIS 1963 (10th Cir. Jan. 25, 2021): Appealing from a false statements conviction, the defendant argued that the district court abused its discretion by denying his request under Rule 106 to play the entire recording of each of his multi-hour meetings — over a hundred hours of recordings, collectively. The court found that the district court did not abuse its discretion in denying the request, as (i) Rule 106 requires completion only when necessary to clarify or explain the portion already admitted; and (ii) the defendant did not identify which portions of the admitted statements required clarification; instead he argued broadly that the government's introduction of the recordings in clips was unfair.

- *United States v. Santos*, 947 F.3d 711 (11th Cir 2020): Appealing his conviction for obtaining naturalization wrongfully, the defendant argued that the trial court erred in excluding an exculpatory part of his confession. The court found no error. It noted that "Rule 106 does not automatically make the entire document admissible once one portion

has been introduced.” In this case, “the later exculpatory part of Santos’s statement does not explain or clarify the earlier inculpatory part. In the first part, Santos admitted to Special Agent Laboy that he was arrested, convicted, and imprisoned for manslaughter in the Dominican Republic in the 1980’s. This admission proved the fact of Santos’s prior conviction. That is a separate and different topic from why Santos failed to mention his criminal history . . . on his Form N-400 application.”

- *United States v. Nicoletti*, 2019 WL 1876814 (E.D. Mich.): A defendant charged with conspiracy to commit bank fraud argued that if the government was going to admit portions of wiretapped conversations that he had with a co-defendant, then all 13 hours of tape recordings should be included under Rule 106. The court stated that “[i]mportantly, Rule 106 places the burden on the party seeking admission to show that the additional evidence is relevant and provides context” and “only those parts which qualify or explain the subject matter of the portion offered by opposing counsel should be admitted.” Because the defendant did not specifically identify which portion of the recordings would clarify the government’s proffered evidence, Rule 106 provided no relief.
- *United States v. Rodriguez-Landa*, 2019 WL 175518 (S.D. Cal.): “The Court finds that Rule 106 does not permit the introduction of these statements as they are not ‘part’ of the same recorded conversation introduced by government exhibit. Although these statements were physically captured on the same audio recording, they arise out of a different conversation with a different participant.”
- *United States v. Benally*, 2019 WL 2567335 (D.N.M.): In a murder case, the government admitted excerpts from the defendant’s recorded statements to special agents during an interrogation. The statements described the defendant’s interactions with the decedent and included a portion of the interrogation where the defendant refused to apologize about the decedent’s death. The defendant sought to admit additional excerpts, explaining how the fight began, that the decedent had a knife, that the decedent previously started fights with him, and that he “teared up” when making the statements to the agents. The court held that the excerpts chosen by the government were not misleading and that nothing in the portions offered by the defendant corrected any misimpression.
- *Rodriguez v. Miami-Dade County*, 2018 WL 3458324 (M.D. Fla.): In a Title VII action, the plaintiff admitted some call logs and the defendant argued that the rule of completeness required admission of all call logs to the same people. The court found that the defendant made no argument that the remainder of the logs was necessary to rectify any misleading impression created by the plaintiff.

Of all the reported Rule 106 cases in federal courts, the ratio of “completion required” to “completion not required” is about 1/15.⁷ That is unsurprising because Rule 106 is a narrow rule. It does not send the trial court on a quest through mounds of evidence to try to find something that is relevant for the opponent.

B. Rule 106 Can Protect the Government

The rule of completeness is not a one-way street in favor of a criminal defendant. The government has an interest in being allowed to complete misleading presentations of statements proffered by the defendant, and Rule 106 has been applied to protect the government in such circumstances. For example, in *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988), it was the prosecutor who offered prior statements of a witness on redirect examination in order to complete what had been selectively adduced on cross-examination; the court found no error in the trial court’s allowing completion. Similarly, in *United States v. Mosquera*, 866 F.3d 1032, 1049 (11th Cir. 2018), the court held that Rule 106 applied when the defendant selectively admitted portions of an interview that a witness had with a government agent. The court noted that additional portions of the interview were properly admitted “to avoid misrepresentation.”

C. Rule 106 Can Apply in Civil Cases

As stated above, the possibility of a selective and unfair presentation is not limited to criminal cases. One example of completion required in a civil case is *Zahorik v. Smith Barney, Harris Upham & Co.*, 1987 U.S. Dist. Lexis 14078, at *6 (N.D. Ill.), which involved the introduction of charts that were misleading in the absence of the context in which they were prepared. The court found that it was “necessary to admit Huddleston’s entire affidavit in order to explain the context in which the charts were prepared.” It specifically noted that contemporaneous presentation of the affidavit was “preferable to Zahorek’s suggestion that Smith Barney could correct any misinterpretations through the use of live testimony or deposition testimony.” That was because, as the Advisory Committee Note to Rule 106 makes clear, repair work later in the trial may not be sufficient to correct the original misimpression.

See also Phoenix Assocs. III v. Stone, 60 F.3d 95, 101 (2nd Cir. 1995) (when financial statements prepared by an accountant were introduced, the trial court did not err in holding that the accountant’s workpapers were necessary to complete, because the financial statements on their own were misleading); *Brewer v. Jeep Corp.*, 724 F.2d 653, 656 (8th Cir. 1983): In a product liability action, “the appellant was free to introduce the film containing the jeep rollovers but only upon the condition that the written study explaining these graphic scenes also be offered. The trial

⁷ As stated above, the reported cases, while relevant, do not tell the whole story of how Rule 106 is used.

court's order required only that the complete report be admitted, the mundane as well as the sensational. In this the trial court was fair and its exercise of discretion was not an abuse.”

D. Rule 106 Partially Codifies the Common Law

The Supreme Court has stated that Rule 106 is a “partial codification” of the common-law rule of completeness. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988). The common-law rule of completeness has been described as follows by the court in *United States v. Littwin*, 338 F.2d 141 (6th Cir. 1964):

The general rule is that if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary.

Wigmore stressed that the common-law doctrine of completeness “does no more than recognize the dictates of good sense and common experience,” and laid out guidelines that courts could use to determine if the opponent should be allowed to introduce completing oral evidence. First, the purpose of introducing the remainder is to “obtain a correct understanding of the effect of the first part.” Second, only the remainder that “concerns the same subject, and is explanatory of the first part” is allowed for purposes of completeness.

Common law courts permitted completion of both written and oral statements.⁸ Wigmore supported completion with oral statements, concluding that any dispute about the accuracy of a witness’s recollection of an oral statement would raise a question of credibility for the jury.

Common-law courts grappled with the issue of completing statements that were otherwise inadmissible. While there was not complete uniformity on this subject, most common-law courts held that a statement necessary to complete was admissible over a hearsay objection.⁹ Some courts went so far as to characterize the right to complete as supplying an “independent exception to the rule against hearsay.”¹⁰

⁸ See Weinstein on Evidence at 106-4.

⁹ See Wigmore at § 2113, p. 660 (noting that “it is not uncommon for courts to treat the remaining utterance, thus put in, as having a legitimate assertive and testimonial value of its own – as if, having once got in, it could be used for any purpose whatever.”); Wright & Graham, at § 5072.1, p. 393 (“the major purpose of the common law completeness doctrine was to provide an exception to those rules that prevented the opponent from showing how the proponent had misled the jury”). See also *Simmons v. State*, 105 So. 2d 691 (Ala. App. 1958) (completeness “makes admissible self-serving statements which otherwise would be inadmissible”).

¹⁰ *Rokus v. City of Bridgeport*, 463 A.2d 252, 256 (Conn. 1983). See also *Stevenson v. United States*, 86 F. 106, 108 (5th Cir. 1898) (“when the United States proved the conversations and declarations the accused was entitled to have the full conversation or conversations given in evidence”); California Law Revision Commission Tentative Recommendation and Study Related to Uniform Rules of Evidence, Article VIII, Hearsay Evidence, 599 (Aug.

In sum, the common-law rule of completeness is broader than Rule 106 in at least two respects: 1. Completing statements are generally admissible under the common law even though they are hearsay --- and while this is true in many courts under Rule 106, it is not true in others; 2) Oral statements are admissible for completion under the common law, but they are not admissible under the terms of Rule 106. As we will see, this disparity in coverage as to oral statements has been corrected by most courts, who rely on either Rule 611(a) or the common law to admit oral statements when necessary for completion --- but not all courts do so.

In effect, the proposed amendment that was favored by most of Committee members at the last meeting would have the effect of restoring the common-law rule of completeness --- thus rendering consideration of the common law unnecessary (which was precisely the point of codifying the Federal Rules of Evidence).

Confusion Caused by Retaining the Common Law

The apparent viability of the common law underneath the current Rule 106 is, without doubt, a source of confusion. The Federal Rules of Evidence were intended to supplant the common law. The original Reporter, Professor Cleary, stated that the goal of the project was that after the Rules were enacted, there would be no common law. So for example, there is no common law of hearsay that is retained.¹¹ The common law limitations on habit evidence have been specifically abrogated by Rule 406. It's hard to see why the common law should be left to operate behind Rule 106 where it appears to have been superseded by every other rule.¹² There is no other rule of evidence that has been held to be subject to supplementation by the common law.

There is case law showing the confusion that is sown by the apparent retention of common law rules of completeness as a kind of backstop for Rule 106. For example, in the recent case of *United States v. Oloyede*, 933 F.3d 302 (4th Cir. 2019), one defendant, speaking to a police officer, made statements that inculpated him, and others that exculpated other defendants. Those other defendants moved for completion. Because the statements were oral, the defendants recognized that Rule 106 did not apply, but they maintained that “there is a still-viable common law on the rule of completeness” that should have allowed the entire statement to come in. The court responded:

“While we doubt that a common law rule of completeness survives Rule 106’s codification, we hold that any such common law rule cannot be used to justify the

1962) (“To the extent that this section makes hearsay admissible, we may regard the section as a special exception to the hearsay rule.”).

¹¹ See Rule 802, which provides that hearsay is inadmissible unless there is an exception --- and specifically not relying on common law as the source of any exception.

¹² Of course, privileges are an exception, but that is because Rule 501 (drafted by Congress over the opposition of the Advisory Committee) specifically provides that the federal common law of privilege is applicable. Rule 106 does not make a specific provision for common law.

admission of inadmissible hearsay. See Federal Rule of Evidence 802 (Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules proscribed by the Supreme Court).”

There are several takeaways from this pithy remark:

1. The Court was apparently unaware of the Supreme Court’s statement about partial codification in *Beech Aircraft*. If the Fourth Circuit can’t get this right, how can we expect regular lawyers to do so?
2. While not citing *Beech Aircraft*, maybe the court just disagreed with the *Beech* declaration. After all, the *Beech* declaration was not a holding. And on the merits, for the reasons stated, it is far better to have a system with no residual common law lurking beneath the code --- where the whole point was to have a federal code of evidence *rather than* the murky common law.
3. The court is not saying that the common law did not allow completion with hearsay. (That would be wrong to say, as discussed above). Rather it is saying that the common law cannot be a source of *admitting* hearsay. Under Rule 802, *common law is not listed as one of the sources for admitting hearsay*. This makes sense from the Advisory Committee’s position, as the Committee was trying to supplant the common law of hearsay --- the last thing it wanted was a bunch of common law hearsay exceptions being used to muck up the Rule 803/804 exceptions. But it does present a problem if a party is relying on the common law to offer hearsay under the rule of completeness.
4. Why did nobody invoke Rule 611(a) for admitting the oral statements? I think the answer is that the whole area of “completeness” is just too complicated right now. There are too many sources to keep track of. Here was a case where the defense counsel was diligent --- counsel had done enough work to realize that a common-law argument remained (which means counsel did better research than the court did) --- but counsel didn’t pick up the scent on Rule 611(a).¹³ That is just a sad state of affairs. It calls strongly for all completeness issues to be decided under one rule.

In sum, it is pretty clear that we would all be better off without a common law backstop to Rule 106. This is especially so because unlike some evidentiary questions that can be raised *in limine*, completion questions are usually raised *at trial* when a proponent offers just a portion of a statement. At that time, it is hard to expect the parties to have both the common law and Rule 611(a) in mind when they are seeking to solve a completion problem. It would clearly be *much better* if all completion issues were covered in a single rule. That is why the draft Committee Note *infra* states that the intent of the amendment is to completely displace the common law.

¹³ It’s hard to criticize counsel for not raising Rule 611(a). That rule is a broadly written grant of authority that gives the judge a bunch of discretion to control the presentation of evidence. It doesn’t say anything about completion. When there is already a rule that specifically governs completion, one might be excused for not considering Rule 611(a).

II. The Two Major Questions on Which Courts are Divided

A. Can Hearsay Be Admitted When Necessary to Complete Under Rule 106?

The most important problem --- and dispute among the courts --- regarding Rule 106 is whether the Rule requires the court to admit a completing statement over a hearsay objection. As discussed in prior memos, a fair number of courts have held that even in the narrow situation in which completion is allowed, a defendant cannot invoke Rule 106 to counter a hearsay objection. The rationale given is that Rule 106 cannot operate as a hearsay exception because it is not styled as a hearsay exception and is not located in Article VIII, where all the hearsay stuff is supposed to be. But as also noted previously, a number of courts have reasoned that in order to do its job of correcting unfairness, Rule 106 *has to* operate as a rule that will admit completing evidence over a hearsay objection. *See, e.g., Gudava v. Ne. Hosp. Corp.*, 2020 U.S. Dist. LEXIS 25151 (D. Mass.) (“Regardless of whether it satisfies an exception to the hearsay rule, defendant cannot simultaneously rely on evidence of the First Warning it issued to Gudava and bar Gudava from introducing evidence of her written appeal of that warning. Fairness dictates that either all or none of the entire record of Gudava's First Warning, including her appeal, will be admitted.”).

1. Conflict in the Cases:

Here is the conflicting case law on the hearsay question:

Cases holding or stating that Rule 106, when properly triggered, applies to overcome a hearsay objection to the remainder:

- *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986): The court notes that Rule 106 cannot do what it is intended to do --- correct a misleading impression --- unless it can be used as a vehicle to admit completing hearsay. The court also makes three important arguments for finding that Rule 106 operates as a hearsay exception:

1. “[E]very major rule of exclusion in the Federal Rules of Evidence contains the proviso, ‘except as otherwise provided by these rules.’ * * * There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.”
2. The DOJ petitioned Congress to add specific language stating that completing evidence had to be independently admissible. But Congress refused to add such language.
3. Rule 106 was patterned after the California rule, and that rule was (and is) known to allow for admissibility of hearsay when necessary to rectify a misleading statement.

- *United States v. Bucci*, 525 F.2d 116 (1st Cir. 2008) (“Case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.”).

- *United States v. Williams*, 930 F.3d 44 (2nd Cir. 2019) (Livingston, J.) (“when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced”); *United States v. Johnson*, 507 F.3d 793, 796 (2^d Cir. 2007) (under Rule 106, “even though a statement may be hearsay, an omitted portion of the statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion”).

- *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988): The *government* sought to complete with portions of the grand jury testimony of a witness. The defendant argued that the portions were hearsay. The court responded:

The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed.R.Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness to be considered contemporaneously. The rule simply speaks to the obvious notion that parties should not be able to lift selected portions out of context. *United States v. Sutton*, 801 F.2d 1346, 1366–69 (D.C.Cir.1986).

- *United States v. Portillo*, 969 F.3d 144 (5th Cir. 2020) (stating in dictum that Rule 106 allows the admission of statements necessary to complete “even when they are otherwise barred by the hearsay rule” and citing a Fourth Circuit case for the proposition).

- *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1983): “Ordinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible. But here the exculpatory remarks were part and parcel of the very statement a portion of which the Government was properly bringing before the jury, i.e. the defendant's admission about the marijuana. * * * The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence.”

- *United States v. Harry*, 816 F.3d 1268 (10th Cir. 2016) (noting that the fairness principle of Rule 106 “can override the rule excluding hearsay” but finding that fairness did not require completion in the instant case). See also *United States v. Lopez-Medina*, 596 F.3d 716 (10th Cir. 2010) (completing hearsay was found admissible, the court reasoning that a party who introduces a misleading portion opens the door to a fair completion).

Cases holding or stating that Rule 106 cannot be used to admit evidence over a hearsay objection:

- *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) (“Rule 106 does not render admissible evidence that is otherwise inadmissible.”); *Accord, United States Football League v. National Football League*, 842 F.2d 1335 (2nd Cir. 1988)(“The doctrine of completeness, Rule 106, does not compel admission of otherwise inadmissible hearsay evidence.”).

- *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014) (defendant’s web postings were not admissible under Rule 106 because they were hearsay); *United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008) (“Rule 106 does not render admissible the evidence which is otherwise inadmissible under the hearsay rules.”). *Accord United States v. Oloyede*, 933 F.3d 302 (4th Cir. 2019).

- *United States v. Adams*, 722 F.3d 788 (6th Cir. 2013) (discussed *infra*, holding that Rule 106 does not operate to admit hearsay even if admission is necessary to prevent an unfair result; the court recognizes that the government offered a misleading portion but held that the defendant had no relief under Rule 106); *United States v. McQuarrie*, 2020 WL 2732226 (6th Cir.) (“Although we have sometimes been critical of the rule, we have repeatedly held that exculpatory hearsay may not come in solely on the basis of completeness.”).

- *United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) (“a party cannot use the doctrine of completeness to circumvent Rule 803’s [sic] exclusion of hearsay testimony.”).

- *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987): “Neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the ‘ascertainment of the truth’ empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception.”

- *United States v. Hayat*, 710 F.3d 875, 896 (9th Cir. 2013) (“Rule 106 does not compel admission of otherwise inadmissible hearsay evidence.”); *see also United States v. Cisneros*, 2018 WL 3702497 (C.D. Ca. July 30, 2018) (exculpatory statements in a post-arrest interview could not be admitted under Rule 106 because they were hearsay, even assuming that they were necessary to clarify the defendant’s inculpatory statements); *United States v. Encinas*

Pablo, 2020 WL 516608 (D. Ariz.) (rejecting the defendant’s argument that his hearsay statements should be admitted under the rule of completeness because “out of court statements not falling within an exception to the hearsay rule are inadmissible regardless of Rule 106”).

In sum there is a clear conflict in the courts about whether Rule 106 can operate to overcome a hearsay objection.

2. Admitted for What Purpose?

In those cases where the courts have recognized that a remainder may be admitted under Rule 106 over a hearsay objection, there is some disagreement about the purpose for which that remainder is offered. The narrowest position is that the remainder can be offered not for its truth but only to put the original misleading statement in *context*. As such, it is not hearsay at all. Illustrative of this position is *United States v. Williams*, 930 F.3d 44 (2nd Cir. 2019), where the court states that “when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced.”

In *Williams*, the statement offered for completion was not, in fact, found admissible because it didn’t fit the strict fairness standards of Rule 106. In contrast, in most of the reported cases in which completing evidence *was* found admissible over a hearsay objection, it was found to be admissible *as proof of a fact*. Here are two examples:

- In *Sutton, supra*, the court held that defendant Sucher had the right under Rule 106 to admit portions of a conversation he had, where the government had admitted other portions that were misleading. The government offered Sucher’s statements that he sent documents to Kolbert to show consciousness of guilt. The court treats the remainder in this way:

Sucher's defense was that he innocently gave Kolbert the documents without any knowledge of illegality. Three of the four excluded statements *would support an inference consistent with that defense*. The second statement (2) could have supported Sucher's assertion that he provided documents to Kolbert out of a desire to cooperate with his fellow employee at DOE. The first (1) and fourth (4) statements would have supported an inference contrary to the government's contention that Sucher exhibited consciousness of his guilt. The possible contrary inference of (1) and (4) is that Sucher gave documents innocently, and was afraid that Kolbert may have falsely told Maxwell that Sucher, as the source of the documents, was a knowing and willing participant in the illegal conspiracy.

It is apparent that the court is holding that the completing statements are offered for the *fact* that Sucher had no consciousness of guilt. That’s what it means to “support an

inference.” The trial court had excluded the statements on the ground that they were hearsay to prove Sucher’s prior state of mind. And the appellate court is saying that, yes this is true, but it is *admissible* to prove that prior state of mind under Rule 106.

- In *Haddad, supra*, the Seventh Circuit held that when the government offered the defendant’s statement, “the drugs were mine,” the defendant should have been allowed to complete with the contemporaneous statement “but I don’t know about the gun.” The court found the exclusion to be harmless error, however. The analysis of why the completing statement should have been admitted, and the analysis of why exclusion was harmless, indicate that the court is saying that the statement should have been admitted to prove a fact --- that the defendant did not know about the gun:

The marijuana that Mr. Haddad admitted placing under the bed was only some six inches from the implicated gun. The defendant in effect said “Yes, I knew of the marijuana but I had no knowledge of the gun.” The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence. The error in the evidentiary ruling was, nevertheless, harmless.

Even though Mr. Haddad did not testify, he called his girlfriend, Ms. McMullin, to the witness stand. She testified that it was she who purchased the gun and that she hid it from the defendant and that the defendant had no knowledge of the weapon. So the defendant got before the jury the same message that is contained in the exculpatory portions of his statement to Officer Linder, to-wit: that he had no knowledge of the gun.

So the court is saying that the error is harmless because there was already alternative *proof of the same fact*.

This is not to say that a completing statement can never be used by a proponent solely for context. It is just to say that the court should be able, where necessary, to have the completing portion evaluated the same way as the portion admitted by the proponent --- as proof of a fact.

B. Does the Rule of Completeness Apply to Unrecorded Oral Statements?

Rule 106 does not, by its terms, apply to oral statements that have not been recorded --- which is, as stated above, a departure from the common law.

The exclusion of unrecorded statements from Rule 106 has led most courts to find an alternative way to admit such statements when necessary for completion --- and this makes good sense because, as Judge Grimm stated, there is no rational basis for a categorical distinction between an oral statement and a recorded statement if each meets the fairness requirement of Rule 106.

One possible way that courts have allowed oral statements where necessary to complete is to rely on the common law rule of completeness. As indicated above, the Supreme Court stated in *Beech Aircraft* that the common-law rule of completeness---which does cover unrecorded oral statements --- retains vitality. See *United States v. Sanjar*, 853 F.3d 190, 204 (5th Cir. 2017) (common law rule of completeness “is just a corollary of the principle that relevant evidence is generally admissible”).

But most courts do not directly rely on the common law --- probably because, like the Fourth Circuit in *Oleyede, supra*, they don’t think that a common law of evidence exists after the enactment of the Federal Rules of Evidence. Rather, most courts admit unrecorded statements for completion through an invocation of Rule 611(a), which grants courts the authority to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth.”

The leading case on unrecorded statements and completeness under Rule 611(a) is *United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987), where the court held that Rule 611(a), “compared to Rule 106, provides equivalent control over testimonial proof.” The court concluded that “whether we operate under Rule 106’s embodiment of the rule of completeness, or under the more general provision of Rule 611(a), we remain guided by the overarching principle that it is the trial court’s responsibility to exercise common sense and a sense of fairness to protect the rights of the parties.” Accord *United States v. Williams*, 930 F.3d 44 (2nd Cir. 2019) (“in this Circuit, the completeness principle applies to oral statements through Rule 611(a)”).

The end result is that in most courts unrecorded statements are subject to the rule of completeness in the same measure as written statements --- but, weirdly, not under the very rule that governs completeness.

Other than the Second Circuit cases cited above, the following courts have explicitly recognized a rule of completeness applicable to oral unrecorded statements, usually under Rule 611(a):

- *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (unrecorded statements of a government witness properly admitted to complete).
- *United States v. Verdugo*, 617 F.3d 565 (1st Cir. 2010) (“the district court retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements”).
- *United States v. Holden*, 557 F.3d 698, 704 (6th Cir. 2009): “The common law version of the rule was codified for written statements in Fed.R.Evid. 106, and has since been extended to oral statements through interpretation of Fed.R.Evid. 611(a). Courts treat the two as equivalent. *United States v. Shaver*, 89 Fed.Appx. 529, 532 (6th Cir.2004).”
- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1993) (exculpatory portion of an oral confession should have been admitted to complete; declaring that Rule 611(a) gives the judge the same authority regarding unrecorded statements as Rule 106 grants regarding written and recorded statements).
- *United States v. Woolbright*, 831 F.2d 1390 (8th Cir. 1987) (stating that Rule 611(a) supports a rule of completeness for unrecorded statements that is the same as that applied to written and recorded statements under Rule 106; but holding that neither rule allows the admission of otherwise inadmissible hearsay).
- *United States v. Lopez-Medina*, 596 F.3d 716, 734 (10th Cir. 2010) (“We have held the rule of completeness embodied in Rule 106 is substantially applicable to oral testimony as well by virtue of Fed. R. Evid. 611(a)”).
- *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005): “We have extended Rule 106 to oral testimony in light of Rule 611(a)'s requirement that the district court exercise ‘reasonable control’ over witness interrogation and the presentation of evidence to make them effective vehicles for the ascertainment of truth.”
- *United States v. Green*, 694 F. Supp. 107, 110 (E.D. Pa. 1988), *aff’d*, 875 F.2d 312 (3d Cir. 1989) (dictum; the court finds that the rule of completeness applies to unrecorded statements, relying on Second Circuit authority, but finds the offered portion in this case to be not necessary for completion).¹⁴

¹⁴ The Fifth Circuit in *United States v. Sanjar*, 876 F.3d 725, 739 (5th Cir. 2017), in dictum, seems to recognize that oral statements might be admissible to complete under some circumstances (though in *United States v. Gibson*, discussed *infra*, it specifically held that oral statements were not admissible to complete):

The language of Rule 106 expressly limits it “to situations in which part of a writing or recorded statement is introduced into evidence.” That said, the Eleventh Circuit has held that testimony may nonetheless fall within the rule’s ambit if it is “tantamount” to offering a recorded statement into evidence. But we have held that this standard is not met in the situation here when the agent neither read from the report nor quoted it.

The common law rule of completeness, which is just a corollary of the principle that relevant evidence is generally admissible, does provide a right to cross examine. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988). The rule comes into play, however, only when the additional inquiry is needed to “explain, vary, or contradict” the testimony already given. The other statements by Sanjar that

Besides the user-unfriendliness of having three separate sources of authority to cover the completeness problem (i.e., Rule 106 as to written and recorded statements and Rule 611(a) or the common law as to unrecorded oral statements), there is another important reason for amending Rule 106 to include coverage of unrecorded oral statements: There are some cases in which courts faced with a completeness argument as to unrecorded oral statements **simply say that Rule 106 does not apply, and so that is that --- these courts do not evaluate the statement under Rule 611(a) or the common-law rule of completeness.** That is to say, they implicitly reject --- or just ignore --- the Second Circuit’s view on applying the rule of completeness to unrecorded statements through Rule 611(a).

For example, in *United States v. Gibson*, 875 F.3d 179 (5th Cir. 2017), the defendant sought completion with an oral, unrecorded statement. The defendant relied on Rule 106 but the court stated that “Rule 106 applies only to written and recorded statements.” That statement was true as far as it goes. But no effort was made to consider admissibility of the statement under Rule 611(a) or the common law.

To be fair to the court in *Gibson*, it is likely that defense counsel relied solely on Rule 106, and never raised Rule 611(a) or the common law rule of completeness with regard to unrecorded oral statements offered to complete. But that in itself might indicate a reason to treat both recorded and unrecorded statements under a single rule --- in order to avoid a trap for the unwary. Again, arguments about completeness usually arise right at the trial, when it is unlikely that most lawyers (or judges) will be thinking about sources of law outside Rule 106 when faced with a completeness problem. Clearly it would be better to have a single rule, in a rule book, that everyone can rely on at the time of trial.

The Fifth Circuit in *Gibson* is not the only court that has excluded unrecorded statements without resort to Rule 611(a) or the common law. ***The following courts also have made statements that end their analysis of oral statements with the language of Rule 106:***

- *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (finding no relief from a misleading presentation because the completing statement was unrecorded and so Rule 106 does not apply).
- *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (refusing to consider completion with unrecorded statements because Rule 106 does not apply); *United States v. Hayat*, 710 F.3d 875, 895 (9th Cir. 2013) (“our cases have applied the rule of completeness only to written and recorded statements”). In *United States v. Liera-Morales*, 759 F.3d 1105, 1111 (9th

defense counsel sought to ask the agent about, many of which are assertions of innocence, were “not necessary to qualify, explain, or place into context” the limited statements the agent testified about on direct. [most citations omitted]

Cir. 2014), the 9th Circuit adhered to its view *even though it recognized that other circuits allow oral statements to complete*:

By its terms, Rule 106 “applies only to written and recorded statements.” *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir.2000). Consistent with Rule 106’s text, we have recently observed that “our cases have applied the rule only to written and recorded statements.” *United States v. Hayat*, 710 F.3d 875, 896 (9th Cir.2013) (internal quotation marks omitted). Nevertheless, at least two of our sister circuits have recognized that the principle underlying Rule 106 also applies to oral testimony “by virtue of Fed.R.Evid. 611(a), which obligates the court to make the interrogation and presentation effective for the ascertainment of the truth.” *United States v. Mussaleen*, 35 F.3d 692, 696 (2d Cir.1994) (internal quotation marks omitted); accord *United States v. Li*, 55 F.3d 325, 329 (7th Cir.1995) (“[T]he rule of completeness applied to the oral statement.”).

- *United States v. Ramirez-Perez*, 166 F.3d 1106 (11th Cir. 1999): The court held that the rule of completeness did not apply to the defendant’s confession *even though it was written and signed*. That is because the officer who took the confession was asked at trial only about what the defendant said, not what the defendant wrote down. The court concluded that “[b]ecause the prosecutor questioned the agent only about what Maclavio said rather than about what was written in the document, Rule 106 did not apply.”

Note: The result in *Ramirez-Perez* has to be wrong even in a circuit holding that Rule 106 does not apply to unrecorded statements. The proponent should not be able to avoid Rule 106 by asking the witness what he heard, when what he heard was placed in a record. The case provides a pretty good example of the need to treat recorded and unrecorded statements the same under the rule of completeness. The “oral statement” exception to Rule 106 is subject to abuse.¹⁵

- *United States v. Cooya*, 2012 WL 1414855 (M.D. Pa.) (“Rule 106 applies only to written and recorded statements”; no attempt made to analyze completeness under Rule 611 or the common law rule of completeness).

To clarify, none of the above case law holds that Rule 611(a) and the common law *cannot* be used for completion of oral statements. These cases immediately above mostly stop at Rule 106 and do not reach the Rule 611(a) question – often perhaps because the party seeking completeness never asked the court to do so (though as seen above the Ninth Circuit recognizes the existence of the Rule 611(a) case law without explicitly rejecting it, but does not follow it). But the very fact

¹⁵ It should be noted that *Ramirez-Perez* is inconsistent with other authority in the 11th Circuit. See *United States v. Baker*, supra (applying Rule 611(a) to an oral statement offered to complete). But that inconsistency would seem to point to some cause for rule clarification, given the complexity of the Rule 611(a)/common law construct for oral statements that is currently employed by most courts.

that the party may not have directed the court outside the language of Rule 106 might counsel in favor of a clarifying amendment that would put all statements offered for completion *under a single rule*.

As Judge Campbell has said, we don't need to draft rules for good lawyers, as they can work things out. We need to draft rules for lawyers that read the rules the way they are written and go no further. If that is the case, there is a good argument for amending Rule 106 to cover oral statements --- because *it will not change the result that is currently reached in the many courts that have properly addressed the matter*, and it will help the parties and courts where lawyers read the rule and do no more.

Again to emphasize: adding oral statements to Rule 106 will not create a management problem for the court, because most courts have already properly recognized that oral statements *are covered by the rule of completeness*. Thus, it is not a question of opening the floodgates or changing the law in most courts. It is basically a question of making the rule less opaque and more user-friendly.

III. Questions Raised About the Proposed Amendment

A. Admissible Over a Hearsay Objection

If the conflict on Rule 106 is to be resolved, it seems apparent that it must be resolved in favor of admissibility (in *some* form) of the completing evidence – again assuming that the strict requirements for completion under Rule 106 are established. It seems simply wrong to hold that the adverse party can introduce a misleading portion of a statement, and then turn around and object to evidence that would fairly be offered to rectify the misleading impression. Professor Wright and Graham opine that construing Rule 106 to allow such injustice would violate the basic principles of Rule 102:

No one has ever explained how these standards would be met by a construction that would allow a party to present evidence out of context so as to mislead the jury, [and] then assert an exclusionary rule to keep the other side from exposing his deception.

21A Wright et al., Federal Practice and Procedure, §5078.1.

What follows is a discussion of some of the arguments that have been made regarding an amendment that would allow completing evidence to be admissible over a hearsay objection.

1. Argument Against Amendment: The Testifying Alternative

Some courts have argued that a court's refusal to allow completion with hearsay statements is not unfair, because the defendant can simply rectify the situation by taking the stand and testifying to the completing statement. So for example, the argument is that the defendant in the Grimm hypothetical could simply take the stand and say, "when I told the officer I bought the gun, I also told him that I sold it before the crime."¹⁶

But there are a number of reasons why the defendant's testimony option is not a good solution to the unfairness problem:

1. The defendant, by testifying, might be subject to impeachment under the liberal tests employed by the courts under Rule 609. Impeachment with a prior conviction is a pretty heavy cost to pay for restoring fairness after the government has engineered a misleading impression.

2. The testimony remedy ignores the advantage that Rule 106 presents as to the *timing* of completion. The rule recognizes that contemporaneous completion is provided by the rule due to "the inadequacy of repair work when delayed to a later point in the trial." (Rule 106 Advisory Committee Note). Defendant's testifying in the defense case-in-chief is in no sense contemporaneous with the government's admission of the misleading portion.

3. Leaving completion to the defendant's testimony raises a tension with the defendant's constitutional right *not* to testify. The Seventh Circuit recognized the unfairness of the testimony alternative in *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981):

In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand does bear similarity to "[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination." [quoting Weinstein's Evidence].

See also United States v. Marin, 669 F.2d 73, 85 n.6 (2d Cir. 1982) ("when the government offers in evidence a defendant's confession and in confessing the defendant has also made exculpatory statements that the government seeks to omit, the defendant's Fifth Amendment rights may be implicated").

¹⁶ *See United States v. Holifield*, 2010 U.S. Dist. LEXIS 147815 (C.D.Cal.) ("The court orders that Defendant Jordan may not introduce any exculpatory statements, not previously introduced by the government, that constitute inadmissible hearsay" and that if the defendant wants to admit such statements "he must do so by taking the stand and testifying himself" because "Federal Rule of Evidence 106 does not influence the admissibility of such hearsay statements.").

4. In some cases the defendant is not seeking to complete his own statements, but rather offering the remainder of a statement by a *third party*, after the government selectively introduced a portion of the third party's statement. (Such as a statement made by a witness to a police officer). In those cases, it is hard to see how the defendant can testify his way out of a third party's statement that is redacted to be misleading.

In sum, the testimony alternative does not appear to be a good answer to the argument that it is unfair for the government to admit a misleading portion of a statement and then lodge a hearsay objection to the necessary remainder.

2. Argument Against Amendment: Parties Wouldn't Risk Being Rebutted by Completing Evidence

At a previous Committee meeting, the thought was raised that the problem of admitting misleading portions of a statement would be self-regulating --- meaning it wouldn't happen --- because the party would be worried that the remainder would be admitted somewhere down the line. Let's call that the "deterrence" argument --- you don't need an amendment because the party making the initial offer will be deterred from introducing a misleading portion.

There are two reasons to think that the deterrent effect of later rectification will not be sufficient to protect against the use of misleading portions. The first reason is recognized in the Advisory Committee Note and was previously discussed. A major reason for the rule is to permit contemporaneous completion because of "the inadequacy of repair work when delayed to a point later in the trial." Thus, the *very premise* of the rule is that the risk of correction "somewhere down the line" is not a sufficient deterrent.

Second and more importantly, if the "repair" would come from a hearsay statement, then *there will be no rectification down the line* in the courts that hold that Rule 106 does not allow admission of hearsay. That is the consequence of those cases --- the misleading statement is admitted, without ever being rebutted because the misleading party raises a hearsay objection to the remainder.

Is it really possible that a court would allow a party to admit a misleading portion of the statement, but then prevent a completion on hearsay grounds even though fairness would require it? The answer is yes. There are, in fact, decided cases in which the court recognizes that the initial portion is misleading, yet admissible --- and un rebuttable because the completing party seeks to complete with hearsay. The leading example of this troubling result is *United States v. Adams*, 722 F.3d 788, 827 (6th Cir. 2013). Defendant Maricle, a state court judge, was accused of conspiring to buy votes and to help appoint corrupt members of the Clay County Board of Elections. The government was allowed to present portions of a phone recording in which a cooperating witness (White) told Maricle about questions she had been asked during her grand jury testimony. White told Maricle that she had been asked whether Maricle had appointed her as an election officer. Maricle responded, "Did I appoint you? (Laugh)," and White said "Yeah." Maricle then said, "But I don't really have any authority to appoint anybody." That last statement was redacted

from the government’s presentation. That meant that the portion indicated that Maricle had essentially adopted the accusation that he had appointed White. When Maricle sought to complete with his statement that he didn’t even have authority to make the appointment, the court excluded it as hearsay.

Remarkably, the Sixth Circuit found that the government had unfairly presented the evidence, but that nothing could be done about it:

Defendants claim that “by severely cropping the transcripts, the government significantly altered the meaning of what [defendants] actually said.” Maricle Br. at 35. *Although we agree that these examples highlight the government's unfair presentation of the evidence, this court's bar against admitting hearsay under Rule 106 leaves defendants without redress.* (emphasis added).

In a footnote in *Adams*, the court stated that “should this court sitting en banc address whether Rule 106 requires that the other evidence be otherwise admissible, it might consider” all the authorities that have criticized the rule that allows the government to admit a misleading portion and then object on hearsay grounds to a necessary completion. It should be noted that *Adams* was written eight years ago; the Sixth Circuit has not sat en banc on the Rule 106 question. And it continues to apply the rule as it did in *Adams*. See, e.g., *United States v. McQuarrie*, 2020 WL 2732226 (6th Cir.) (“Although we have sometimes been critical of the rule, [citing *Adams*] we have repeatedly held that exculpatory hearsay may not come in solely on the basis of completeness.”).

For these reasons, the possibility that parties will be deterred from misleading presentations by the risk of rebuttal is not a ground for rejecting an amendment to Rule 106 that would allow the opponent to admit completing hearsay to remedy a misleading presentation.

3. Argument: What About the Constitution as a Remedy?

It might be argued that any unfairness resulting from the fact that a criminal defendant cannot rebut a misleading presentation with completing hearsay could be rectified by the Constitution. Couldn’t the defendant in *Adams* argue that his constitutional right to an effective defense was violated by the exclusion of his completing hearsay? For example, in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court found that the defendant’s constitutional right to an effective defense was violated when a confluence of state evidence rules barred the admissibility of hearsay evidence strongly indicating that a third party committed the crime. A response to this argument, however, is that the *Chambers* Court, and subsequent decisions, emphasize that the constitutional right to overcome evidentiary rules of exclusion is extremely narrow. The accused must show that the evidence rule infringes upon a “weighty interest” and that the exclusion is “arbitrary or disproportionate to the purposes[] [it is] designed to serve.” *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (finding that exclusion of exculpatory polygraph evidence does not violate the right to an effective defense). So whether an accused will be protected by the

Constitution in *Adams*-like situations is a matter of debate --- and leaving it to the constitution would lead to a case-by-case approach rather than a rule.

The federal case law that exists on the subject has denied *Chambers*-based claims where defendants argue unfairness because their inculpatory statements are admitted and their exculpatory statements are not. The leading case is *Gacy v. Welborn*, 994 F.2d 305, 325 (7th Cir. 1993). Gacy filed a petition for federal habeas corpus relief from his murder conviction. The government offered Gacy's inculpatory statements under Rule 801(d)(2)(A), and then, according to the court, "used the hearsay objections to prevent Gacy from getting the more favorable portions of his story before the jury indirectly." Nevertheless, the appellate court found no error in the trial court's exclusion of Gacy's statements. As the court explained:

Beyond explicit rules such as the privilege against self-incrimination and the confrontation clause, none of which applies here, the Constitution has little to say about rules of evidence. The hearsay rule and its exception for admissions of a party opponent are venerable doctrines; no serious constitutional challenge can be raised to them.

A challenge would lie if a state used its evidentiary rules to blot out a substantial defense. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979). These cases hold that states must permit defendants to introduce reliable third-party confessions when direct evidence is unavailable. *No court has extended them to require a state to admit defendants' own out of court words.*

But even if the Constitution could be a solution for allowing completing hearsay from a defendant, there are at least two reasons to prefer a rule change to cover such situations:

1. It is never a good idea to have evidence rules that are susceptible to unconstitutional application. That is not only a bad outcome in terms of the integrity of rulemaking. It is also a trap for the unwary. Lawyers who assume (reasonably) that evidence rules are controlling may not be aware of the line of cases establishing a constitutional right to an effective defense that overcomes certain evidentiary exclusions. And even lawyers that know about these cases may rightly think that they are too narrow to cover every instance of unfairness when the government introduces a misleading portion of a statement. It is notable that the *Adams* court itself, in holding that Adams had "no redress" to the unfairness, did not reference the constitutional right to an effective defense --- meaning at a minimum that Adams's counsel probably did not raise the point.

2. The constitutional right to an effective defense has no applicability where the misleading portion is offered *by the criminal defendant*, or by a party in a civil case. In those situations, the remedy against unfairness must come from the Evidence Rules, or not at all.

For these reasons, the unfairness resulting from an un rebutted misleading presentation should be a matter for Rule 106, not the constitutional right to an effective defense.

4. Argument Against Amendment: Completion Would Allow Unreliable Hearsay to be Admitted.

At a previous meeting, a Committee member expressed concern that an amendment to Rule 106 would allow “unreliable” hearsay to be admitted. The specific argument was that the defendant’s statement in the Grimm hypothetical that he gave the gun away should not be admissible for its truth because it is unreliable.

But there is a strong argument to be made that a concern about unreliability of a completing statement misses the point. To start with, in the classic case of an adversary’s statement, *the initial portion of the statement, offered by the government, is not admitted because it is reliable*. The rationale for admitting a party-opponent statement is described in the Advisory Committee Note to Rule 801:

Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility as evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. *No guarantee of trustworthiness is required in the case of an admission.*

Thus, a party-opponent statement is not admitted because it is reliable, but rather because it is consistent with the rationale of the adversary system, that you can use an opponent’s own statements against them.

The argument that allowing Rule 106 to admit hearsay would result in unreliable evidence being introduced misunderstands the point of the completion --- the completion is necessary to provide an *accurate indication of what the defendant actually said*, regardless of whether the statement is in whole or in part reliable. Under these circumstances, if the first statement need not be reliable, why should the second statement have to be, when admission is necessary to protect against unfairness and to provide the jury more accurate information of *what was actually said*?

It should be noted, as to reliability, that proponents retain complete control over the admissibility of “unreliable” remainders --- they are free to forego the initial misleading statement instead of seeking to admit it. They are also free to argue to the factfinder that the completing remainder is a lie. What they should not be able to do is introduce misleading (and often unreliable) statements and then object that a statement correcting the misrepresentation is “unreliable.”

5. Legislative History and Textual Arguments

Providing language in Rule 106 that would allow completing statements to be admissible over a hearsay objection appears to be consistent with legislative intent. This argument is based on two separate points about the drafting of the rule:

1. The rule was patterned after (though admittedly not the same as) the California rule, which has always been held to allow for completion with hearsay evidence.

2. When the rule was being considered in Congress, the DOJ sought to add language that completing evidence had to be independently admissible. During hearings on the Federal Rules of Evidence, Assistant Attorney General W. Vincent Rakestraw specifically requested that the Senate Judiciary Committee amend Rule 106 to permit the introduction of “any other part or any other writing or recorded statement *which is otherwise admissible.*” But Congress did not add that language.¹⁷

There is a contrary textual argument, however --- that Rule 106 cannot and should not operate as a hearsay exception because it is not placed with the other hearsay exceptions in Article 8. If the drafters had wanted a “rule of completeness hearsay exception” why wouldn’t they put it with the rest of the hearsay exceptions?

There are three pretty good responses to the location argument, however. First, Rule 802, which is the operative rule against hearsay¹⁸, provides that hearsay is inadmissible “unless any of the following provides otherwise:

- a federal statute;
- *these rules*; or
- other rules prescribed by the Supreme Court.

The reference is to *these* rules, meaning *all* of the Evidence Rules. If the drafters had wanted to limit hearsay exceptions to those in Article 8, Rule 802 would have referred to “the rules in this article” rather than “these rules.”

Second, courts have actually found other rules outside of Article 8 to be grounds for admitting hearsay. For example, Civil Rule 32(a)(4)(B) allows admission of hearsay from a deposition even though the declarant is not unavailable under the terms of the Evidence Rules. In effect the Civil Rule creates an independent hearsay exception. And courts have upheld that exception, referring to Rule 802’s list of sources for an exception outside of Article 8. *See, e.g., Fletcher v. Tomlinson*, 895 F.3d 1010, 1013 (8th Cir. 2018) (holding that Rule 32 authorizes admissibility of deposition hearsay even though it is not admissible under the Article 8 exceptions; relying on Rule 802 and noting that “[d]ecisions from around the country have concluded that Rule 32(a)(4)(B) operates as an independent exception to the hearsay rule.”). If a hearsay exception can be found completely outside the Evidence Rules, there is no reason why an exception cannot be found within those rules outside Article 8.¹⁹

¹⁷ Letter from Rakestraw to Senate Jud. Comm., 93rd Congress, 121-23.

¹⁸ Rule 801 provides the definition of hearsay; Rule 802 is the source of exclusion of hearsay.

¹⁹ Also, recently enacted Rules 902(13) and (14) effectively provide hearsay exceptions for testimony that authenticates electronic information --- a certificate is allowed as a substitute for trial testimony. And these exceptions are, of course, outside Article 8.

The third responsive argument regarding placement of Rule 106 is set forth by the D.C. Circuit in *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986). The court found the placement of Rule 106 to be a point *in favor* of finding a hearsay exception:

Rule 106 is found not in Rule 611, which governs the “Mode and Order of Interrogation and Presentation,” but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. See C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5078, at 376 (1977 & 1986 Supp.).

Moreover, every major rule of exclusion in the Federal Rules of Evidence contains the proviso, “except as otherwise provided by these rules,” which indicates that the draftsmen knew of the need to provide for relationships between rules and were familiar with a technique for doing this. There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.

In sum, it would appear that legislative history, a fair reading of the Evidence Rules, and the placement and language of Rule 106 support the conclusion that Rule 106 can operate as a hearsay exception for completing evidence.

6. Justifying a Rule 106 Hearsay Exception as a Matter of Forfeiture or “Opening the Door”

When a party makes a misleading presentation, it has been held in many circumstances that the party forfeits the right to complain about the consequences. This is one aspect of “opening the door” --- a well-established doctrine in evidence. See, e.g., *United States v. Spotted Bear*, 920 F.3d 1199, 1201 (8th Cir. 2019) (“When a criminal defendant creates a false or misleading impression on an issue, . . . the government may clarify, rebut, or complete the issue with what would otherwise be inadmissible evidence, *including hearsay statements.*”).

It has been held, for example, that a defendant who selectively reveals only the helpful parts of a testimonial statement forfeits the right to complain that the remainder is testimonial hearsay that violates the right to confrontation. The New York Court of Appeals, in *People v. Reid*, 19 N.Y.3d 382, 948 N.Y.S.2d 223, 227 (2012), put it this way:

If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant’s actions at trial, then a defendant could attempt to delude a jury by selectively treating only those details of a testimonial statement that are potentially helpful to the defense * * *. A defendant could do so with the secure knowledge that the concealed parts would not be admissible under the Confrontation Clause. To avoid such unfairness and to secure the truth-seeking goals of our courts, we hold that the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission.

If forfeiture-by-misleading is sufficient to overcome a *constitutional* objection, it certainly should be sufficient to overcome a hearsay objection.

Notably, the California Supreme Court has applied the *rule of completeness* to operate as a forfeiture provision where the proponent offers a misleading portion of a statement and objects to the admissibility of the remainder--- and in so doing it specifically rejected any concerns about admitting unreliable statements for completion purposes. In *People v. Vines*, 251 P.3d 943, 968–69 (Cal. 2011), the court stated that “like forfeiture by wrongdoing, [the rule of completeness] is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting . . . to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood.”

It is also notable that Evidence Rule 502(a), governing subject matter waiver of privilege, lifted the language from Rule 106 as the “fairness” standard for determining subject matter waiver. See Advisory Committee Note to Rule 502(a) (noting that the animating principle of Rule 106 and 502(a) are the same). Under Rule 502(a), a party that makes a “selective, misleading presentation [of privileged communications] that is unfair to the adversary opens itself to a more complete and accurate presentation” through undisclosed privileged communications on the same subject matter. *Id.* If a selective, misleading presentation results in a *subject matter waiver of privilege*, it is hard to see how it cannot result in a forfeiture of a hearsay objection under Rule 106.

Indeed, in the circuits that exclude completing evidence on hearsay grounds, there is an objectionable inconsistency between Rules 106 and 502(a), contrary to the legislative intent behind Rule 502(a) --- *which was directly enacted by Congress*. Congress concluded that the two rules addressed the same type of problem and should be applied in the same way.²⁰ So it would appear that an amendment that corrects the courts that ignore the relationship between Rule 106 and 502(a) would be consistent with congressional intent and the fabric of the rules. *See, e.g., Jochich v. Rush Univ. Med. Ctr.*, 2020 WL 1548955, at *2 (N.D. Ill.) (noting, in the context of an argument over the scope of attorney-client privilege, that “[t]he language concerning subject matter waiver —‘ought in fairness’— is taken from Rule 106 because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation”).

B. The Context Alternative

One argument against adding a hearsay exception to Rule 106 is that it is not needed to remedy the unfairness, because the statement, if necessary to complete, is admissible as non-

²⁰ Other rules with similar results are Rule 410(b)(1) (allowing admission of protected plea statements in which a selective and misleading impression can be corrected by those statements --- again using the “ought in fairness” standard); and Rule 804(b)(6)(hearsay objection forfeited for wrongdoing that did and was intended to keep the declarant from testifying). It makes no sense that a forfeiture of evidentiary protections is found in these rules but not in Rule 106.

hearsay. That would mean that the courts that do exclude completing evidence on hearsay grounds are simply wrong about the hearsay question itself (as the Second Circuit noted in the recent *Williams* case, discussed above). The foundation of the argument is that when the proponent offers evidence out of its necessary context, any out-of-court statement that is clearly necessary to place the evidence in proper context is not hearsay at all; rather it is admissible for the not-for-truth purpose of providing context.

If this analysis is right, then technically there would be no need to amend the rule, because the rule itself does not need to operate as a hearsay exception --- it already allows the completing statement to be admissible because that statement, offered only for context, does not offend the hearsay rule. But if a large number of courts are getting the hearsay question wrong, and have been doing so for years, a possible response short of a hearsay “exception” is to amend the rule to state that if the narrow conditions for completion are met, the completing statement may be admitted for the non-hearsay purpose of context. The amendment would be justified as sending a needed signal to many courts that they should be doing what they haven’t been doing. There are precedents for such an amendment --- i.e., telling the courts that they have been misapplying the rule and to stop it --- including: 1) the 2003 amendment to Rule 608(b), which corrected the courts that had been holding, incorrectly, that the Rule’s bar on extrinsic evidence was applicable to all forms of impeachment, not just impeachment for untruthful character; and 2) The 2006 amendment to Rule 404(a), which corrected courts that had been holding, incorrectly, that character evidence could be offered to prove conduct in some civil cases.²¹

Consequently, if the Committee determines that the completeness-hearsay problem is correctly resolved by admitting the completing portion for context, a rule amendment should be proposed to make that explicit. The question is whether that amendment goes far enough --- or whether it is necessary to provide for the possibility that the completing portion might be admissible as proof of a fact.

There are some pretty serious problems with a rule that allows completing statements to be admitted *only* for “context”:

1. If the completing statement can be used by the jury only for context and never as proof of a fact, the result will be an *evidentiary imbalance* --- the party that created the whole problem by offering a misleading portion is entitled to have that portion considered as proof of a fact, while the party simply seeking fairness is not allowed to argue that the completing portion can be used as proof of a fact. So the “wrongdoer” ends up with a comparative advantage.

²¹ The Rule 702 amendment that would add a preponderance of the evidence standard to the text, included in this agenda book, is another example.

2. The “context” solution can result in a *confusing limiting instruction* and a complicated situation for the jury to figure out. Take the Grimm hypo, for example, where the defendant says “I bought the gun, but I sold it before the crime.” The government can argue that the defendant’s possession of the gun before the crime has been proved by the defendant’s own statement “I bought the gun”--- and of course the jury will be allowed to draw the inference that because he bought the gun, he still had it at the time of the crime. The defendant, for his part, can’t argue that the evidence indicates that he no longer had the gun. He is limited to the argument that the completing statement may be considered, but only for “context.” If the jury follows that instruction --- a big if --- it would probably mean that the inferences that the jury would otherwise draw from the misleading portion should not be drawn because of the context of the statement. Apparently, that would mean that they should assume there is no evidence one way or the other about the defendant’s possession of the gun at the time of the crime – when in fact it should mean that there is affirmative evidence that the defendant did *not* have the gun at the time of the crime. That all seems a very complicated resolution, and one that is unfair to the defendant. And there is good reason to think that the jury will not be able to follow a context instruction in this instance. That is because the evidence of the gun purchase was offered precisely for the inference that the defendant continued to have the gun at the time of the crime.

3. If a rule is written that *only* allows completing statements to be admissible for context, then it changes the law in those circuits that currently allow completing statements to be admitted as proof of a fact. These cases were discussed earlier, but for a quick recap, see *United States v. Sutton*, D.C. Circuit, where the court held that the completing statements should have been admitted to prove that the defendant actually did not have a guilty state of mind; and *United States v. Haddad*, 7th Circuit, where the court held that the completing statement should have been admitted to prove that the defendant actually did not know about the gun in the house.

It would be ironic if an amendment purportedly intended to promote fairness under Rule 106 would actually operate to truncate the rule in the circuits that have applied it to allow hearsay statements to be admitted to prove a fact --- on fairness grounds.

Fundamentally the context alternative confuses the reason for allowing completion in the first place (to provide context) with the use to which the evidence should be put upon admission.

In the end, there is much to be said for a solution that would allow the completing portion to be admissible *to prove a fact*. It puts the parties on an even playing field; it avoids a confusing limiting instruction; and it would appear to be the just result --- because the party who introduced the misleading portion should have lost any right to complain.

Professor Dan Blinka, an important evidence scholar, explains the proper approach to completion this way:

The better practice . . . is to introduce the remaining parts on the same footing as those originally offered. . . Juries, like all people (even lawyers), are ill-equipped to draw tortured

distinctions between statements offered for their “truth” and those admitted solely to provide “context.” Nor does it seem necessary to carve out a unique rule for statements by party opponents. The real protection is [the] reminder that the rule of completeness is not an “unbridled opportunity” to waft inadmissible evidence before the jury: the trial judge should admit only those statements “which are necessary to provide context and prevent distortion.” This standard suffices without resort to a meaningless limiting instruction. When applying the rule of completeness, the judge is, in effect, ruling that a balanced, fair presentation of the evidence includes those parts requested by objecting counsel. Doctrinal messiness dissipates by conceptualizing the evidence as a single admissible unit.²²

Perhaps the best of all possible solutions is to give the court discretion to determine whether the completing statement should be admissible for context or as proof of a fact. The draft proposal that was subject to a straw vote at the last meeting in fact gives the court that discretion. It allows admission of the remainder “over a hearsay objection.” That means that the completing statement could be potentially used as proof of a fact, or merely for context. In either case, it is admissible over a hearsay objection. Note that the proposal does not say, for example, that the completing statement is admissible “despite the fact it is hearsay.” So the draft that was voted on by the Committee at the last meeting is flexible enough for the court to determine how the completing evidence can be used.

C. The Alternative of Including Unrecorded Oral Statements in the Text of Rule 106

1. Legislative History

The Advisory Committee Note to Rule 106 states that unrecorded oral statements are not covered due to “practical considerations.” That is pretty opaque, but there appear to be two concerns about admitting unrecorded oral statements to complete. First, there might be disputes about what the completing statement actually was, or even whether it was ever made --- that is unlikely to happen if the statement was written or recorded. Another possible rationale is that the drafters had it most prominently in mind to draft a rule requiring *contemporaneous* completion -- and they might have thought that contemporaneous completion for every conversation would be unduly disruptive.²³

²² 7 Wisconsin Practice, Evidence § 107.2 (4th ed. August 2019 update).

²³ For example, you might need to complete an oral conversation with a different witness who was also present and could testify to the remainder. It could be disruptive to interrupt the opponent’s case and present a witness. In contrast, the writing or recording has already been admitted, at least in part.

But any concern about difficulties of proof and about disruption hasn't played out, because the vast majority of courts *are in fact allowing oral statements for completion* --- under Rule 611(a).

So whatever the rationale for excluding oral conversations from Rule 106, the fact is that most courts *are* admitting oral statements if the strict grounds for completion under Rule 106 are met. *Thus the question is no longer about the merits of including oral statements but only about whether it should be done under a single rule rather than a hodgepodge of rules and common law.*

2. Difficulties in Proof as a Bar on Oral Unrecorded Statements?

Let's assume, *arguendo*, that the merits of including oral statements within the rule of completeness still needs to be discussed. Is there a reason to be concerned about oral statements because they might be harder to prove than written and recorded ones? The answer would seem to be that even if there is concern about disputes over unrecorded oral statements, complete exclusion of such statements is overkill. While there might be a dispute about the content or existence of some unrecorded statements in some cases, surely the difficulty of proof is a matter that could be handled on a case-by-case basis under Rule 403 --- as Judge Grimm has argued. Under this view, the fairness rationale of Rule 106 would apply to completing unrecorded statements, unless the court finds that the probative value of the completion is substantially outweighed by the difficulties and uncertainties of proving whether and what was said.

When it comes down to it, the problem raised by unrecorded statements offered to complete --- were they ever made, or are they being misreported --- is the problem raised by *every single unrecorded statement reported in a court*---such as an oral unrecorded declaration against interest or excited utterance. So why should completing unrecorded statements be treated differently from any other unrecorded statement? Moreover, when an unrecorded statement is being offered for completion, the statement that it is completing is very likely a part of a broader unrecorded statement, a portion of which is *offered initially by the adversary*. So in the Grimm hypothetical, the police officer takes the stand and testifies that the defendant told him he purchased the gun. The defendant wants completion with his oral statement that he sold the gun. Why is there any less uncertainty and difficulty in rendering the first statement, about the purchase? The officer is rightly allowed to testify to that first part even if there is a dispute about what was said. What was said becomes a question of credibility. So why should it be any different with the completing statement? That distinction does not make sense.

In the end, there is an argument that including unrecorded oral statements in Rule 106 will serve these separate purposes:

1) In those many circuits that cover unrecorded statements under Rule 611(a) or the common law, everything will now be collected under one rule. One advantage of good

codification is that an unseasoned litigator can just look at the written rule and figure out what to do. But that is not now possible with unrecorded oral completing statements, because looking at Rule 106, one would think that there would be no way to admit the completing statement. It is unlikely that Rule 611(a), or the common-law rule of completeness, would come readily to mind. So adding coverage of unrecorded statements to Rule 106 would be part of the good housekeeping and user-friendliness that is an important part of rulemaking. And, as stated above, it would assure that oral and written statements are treated the same way in terms of overcoming a hearsay objection.

2) In those courts that provide no protection at all for misleading portions of unrecorded statements, a rule amendment would bring an important substantive change grounded in fairness; and it would prevent bad faith attempts to avoid the rule of completeness in cases where oral statements are subsequently rendered into writing.

3. Reviewing the Practice in Courts Allowing Completion with Unrecorded Oral Statements.

As discussed above, most circuits allow completion of misleading statements with unrecorded statements. Given the concern about disputes over the content of an unrecorded statement, one might wonder whether these courts have had difficulties, e.g., extensive hearings to determine what was said.

At the federal level, I have not found a reported case on Rule 106 in which a court expressed a concern about an unrecorded statement offered for completion, in terms of difficulty of determining what, if anything, was said. Nor has there been any concern that I could find in the reported case law about the possibility of a presentation being problematically interrupted by the need to complete a conversation.

I have not found any case even discussing a dispute between the parties about an unrecorded statement. This is of course not dispositive, as I don't claim perfection, and anyway such disputes may not be reported. But it is some indication that there is not a state of discontent over admission of oral unrecorded statements to complete in those many federal jurisdictions that allow it.

As to the possibility of disruption with completing oral statements, to the extent there has been any concern at all, it appears to be remedied by allowing the trial court to have discretion regarding the timing of the completion. Because most courts have held that timing is within the discretion of the court, the courts appear to ameliorate the possibility of disruption by allowing the completing party to present the completing statements at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) (“While the wording of Rule 106 appears to require

the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly.”).

Likewise in the states allowing completion with oral unrecorded statements. Professor Richter researched the case law in these states and found no indication that there was a problem with proving the statements or with disrupting testimony.²⁴

In sum, as a strong majority of the Committee has determined, there is a strong case for including oral unrecorded statements in Rule 106.

²⁴ Professor Richter’s memorandum was submitted in prior agenda books.

IV. Draft of a Possible Amendment to Rule 106

Based on the straw vote at the last meeting, the draft for consideration allows completing statements to be admissible over a hearsay objection, and includes oral unrecorded statements within the coverage of the rule.

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Written or Oral Statements

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

Draft Committee Note²⁵

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that “[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court”). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime -- when that is not what he said. In this example the prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

²⁵ Note that the second paragraph of the Committee Note seeks to address the point that sometimes the completing statement should be admissible only for context and sometimes for its truth. In either case the statement would be admissible “over a hearsay objection.”

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial --- where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule.

The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. *See United States v. Bailey*, 2017 WL 5126163, at *7 (D.Md. Nov. 16, 2017) (“A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.”). Fundamentally, any question about the content of an oral unrecorded statement is no different under Rule 106 than it is in any other case in which an oral unrecorded statement is proffered. In extreme cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value --- in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. *See, e.g., Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101

(2nd Cir. 1995) (“While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly.”). Nothing in the amendment is intended to limit the court’s discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988), the Court in dictum referred to Rule 106 as a “partial codification” of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent --- especially when the rule is one, like the rule of completeness, that arises most often during the trial. Accordingly, the intent of the amendment is to completely displace the common law rule of completeness. This is especially appropriate because the results under this rule as amended will generally be in accord with the common-law doctrine of completeness.

TAB 4

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 615
Date: April 1, 2021

The Committee has been reviewing a possible change to Rule 615, the rule governing sequestration of witnesses. At the last meeting, the Committee reached tentative agreement on an amendment, and discussed additions to the draft Committee Note.

Rule 615 currently provides as follows:

Rule 615. Excluding 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:

- (a) a party who is a natural person;
- (b) an 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 person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person authorized by statute to be present.

As the Committee is well aware, the purpose of Rule 615 is "to aid in detecting testimony that is tailored to that of other witnesses and is less than candid." *United States v. Wylie*, 919 F.2d 969, 976 (5th Cir. 1990). As the court put it in *Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625,

628 (4th Cir.1996): “It is now well recognized that sequestering witnesses ‘is (next to cross-examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.’ ” (quoting 6 *Wigmore on Evidence* § 1838, at 463).

The main purpose of an amendment is to resolve the conflict in the courts about the extent of a Rule 615 order. The question in dispute is whether a Rule 615 order extends only to excluding witnesses from trial (as its language indicates) or whether it prohibits a prospective witness from obtaining or being provided trial testimony while excluded from the courtroom.

At its Fall, 2020 meeting, the Committee considered two alternatives: one that would automatically extend a Rule 615 order to prohibit prospective witnesses from accessing or being provided testimony outside the courtroom; and the other that would specify that the trial court has discretion to regulate such access outside the courtroom --- but must explicitly enter an order if it wishes to do so. The Committee voted in favor of a discretionary provision, with the text of the rule specifying that a Rule 615 order does not extend beyond the courtroom doors unless it says so expressly.

The Committee also discussed two further issues regarding Rule 615, on which there is some dispute or confusion in the courts:

1. Can lawyers be barred from disclosing trial testimony to prospective witnesses? The Committee determined that regulating lawyers with sequestration orders raised difficult, extra-evidentiary questions of professional responsibility and the right to the effective assistance of counsel. Consequently, the Committee decided not to address the question of the applicability of sequestration orders to lawyers in the text of Rule 615. It was resolved that the Committee Note should mention that the question of application to lawyers was not addressed by the amendment.

2. Does the exemption from sequestration that can be invoked by entity-parties under current Rule 615(b) allow the entity to exempt more than one witness? At the last meeting the Committee agreed that the entity-party should be limited to one witness, and that Rule 615(b) should be amended to clarify that limitation.

This memo is in four parts. Part One briefly discusses the conflict in the courts about whether a Rule 615 order extends *outside* the courtroom. Part Two briefly discusses whether court orders can or should prohibit lawyers from disclosing trial testimony to prospective witnesses. Part Three discusses the need to clarify that the right of entity-parties to designate an agent who is exempted from exclusion is limited to one agent. Part Four sets forth a draft amendment and Committee Note.

At this meeting, the Committee will formally vote on whether to recommend to the Standing Committee that an amendment to Rule 615 be released for public comment. If the Committee votes to do so, then the scheduled date for that amendment to be effective would be December 1, 2023.

I. The Extent of a Rule 615 Order

The text of Rule 615 limits the court's order under that rule to one that excludes the witness from the courtroom. And that is how some courts have construed Rule 615, i.e., as it is written. As the court stated in *United States v. Sepulveda*, 15 F.3d 1161, 1175–77 (1st Cir. 1993), “while the common law supported sequestration beyond the courtroom, Rule 615 contemplates a smaller reserve; by its terms, courts must ‘order witnesses excluded’ only from the courtroom proper.” It follows, under this construction, that nothing in Rule 615 prevents witnesses from talking to each other outside the courtroom; and nothing prevents an excluded prospective witness from obtaining, or being provided, trial testimony.

It's pretty obvious that the effectiveness of Rule 615 is undermined if it is limited to exclusion of witnesses from the courtroom. As the court put it in *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373–74 (5th Cir. 1981):

The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads a trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony.

The problem of tailoring by prospective witnesses is exacerbated by the ease with which an excluded witness can, if so inclined, access trial testimony these days. In the days of internet and social media, access to trial testimony can be pretty easy. Moreover, even if a witness is not inclined toward such access, those who are at the trial can easily send that witness the trial testimony --- by email, etc. And now, when at least some trial proceedings might be virtual, the risks of access by excluded witnesses are heightened even more. For example, Law 360, on August 6, 2020, reported that “McDermott Will & Emery LLP mistakenly allowed a restricted Zoom link for its client's trial to be distributed to individuals outside of the case.” Moreover, at least during the pandemic, many courts are making their trial proceedings more easily available to the public. Some federal trials are now on YouTube.

The court in *Sepulveda* (a case in which three witnesses were incarcerated in the same cell during trial and discussed testimony that each gave), opined that the solution to disclosure of trial testimony outside the courtroom was for the court to use its authority to issue an order that extends beyond the courtroom. Several other circuits are in agreement with the First Circuit's view that anything other than exclusion of witnesses from the courtroom must be regulated by a specific court order to that effect. See *United States v. Collier*, 932 F.3d 1067, 1077 (8th Cir. 2019) (“While Federal Rule of Evidence 615 authorizes the district court to sequester witnesses, sequestration orders do not forbid all contact with all trial witnesses at all times, *unless otherwise specified.*”) (emphasis added); *United States v. Brown*, 547 F.2d 36, 37 (3d Cir. 1976) (“Rule 615 relates

exclusively to the time testimony is being given by other witnesses. Its language is clear and unambiguous.”¹

The arguable problem with the *Sepulveda* demarcation is that it may be a trap for the unwary. A party might think that a Rule 615 order is sufficient to protect against *all* possible tailoring, and might not be aware that the court must explicitly state that its order extends outside the courtroom --- that is, a statement that the court is invoking “the rule” or “Rule 615” is not enough. There is nothing in the Rule that tells parties to ask for a broader order; and many courts might not think of the necessity for a broader order.

Because there is a general recognition that excluding witnesses from trial is not enough to prevent access to trial testimony, a majority of circuits construe Rule 615 orders as *automatically* extending to prevent disclosure of trial testimony to sequestered witnesses outside of court. *United States v. Robertson*, 895 F.3d 1206, 1214 (9th Cir. 2018), is a good example of this broader view. In *Robertson* a prospective witness for the government read a trial transcript. The trial judge had issued a sequestration order “under Rule 615.” The government argued, citing *Sepulveda*, that Rule 615 does not, by its terms, preclude potential trial witnesses from reviewing trial transcripts --- the violation would only occur if the witness heard the testimony while attending trial. The *Robertson* court rejected this literal view of Rule 615, and stated that most of the circuits agreed with the court’s position:

In our view, an interpretation of Rule 615 that distinguishes between hearing another witness give testimony in the courtroom and reading the witness’s testimony from a transcript runs counter to the rule’s core purpose—“to prevent witnesses from tailoring their testimony to that of earlier witnesses.” *Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th Cir. 2008). The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript. An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing. Therefore, we join those circuits that have determined there is no difference between reading and hearing testimony for purposes of Rule 615. See *United States v. McMahon*, 104 F.3d 638, 642–45 (4th Cir. 1997) (affirming the district court’s conclusion that a witness violated a Rule 615 exclusion order by reading daily trial transcripts); *United States v. Friedman*, 854 F.2d 535, 568 (2^d Cir. 1988)(recognizing that “the reading of testimony may violate an order excluding witnesses issued by a district court under Rule 615”); *United States v. Jimenez*, 780 F.2d 975, 980, n.7 (11th Cir. 1986) (concluding that a witness violated a Rule 615 exclusion order by reading the testimony of another agent witness from a prior mistrial); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373–74 (5th Cir. 1981) (holding that providing a witness transcribed portions of another witness’s testimony in preparation for his court appearance constitutes a violation of Rule 615). A trial witness

¹ See also *United States v. Teman*, 2020 U.S. Dist. LEXIS 99193 (S.D.N.Y. June 5, 2020) (“the Second Circuit has not held that Rule 615 extends beyond the courtroom to preclude out-of-court communications between witnesses during trial”). But there is Second Circuit case law appearing to indicate that Rule 615 orders extend outside the courtroom. *United States v. Friedman*, 854 F.2d 535, 568 (2^d Cir. 1988)(recognizing that “the reading of testimony may violate an order excluding witnesses issued by a district court under Rule 615”)

who reads testimony from the transcript of an earlier, related proceeding violates a Rule 615 exclusion order just as though he sat in the courtroom and listened to the testimony himself.²

The conflict in the courts about the extent of a Rule 615 order is *not* about whether the court *can* prevent prospective witnesses from talking to other witnesses or reading trial transcripts. The court clearly has the power to do so. The conflict is over whether a party must obtain a supplemental order (or supplemental language in a Rule 615 order) to prevent access to trial testimony --- or whether it is sufficient simply to invoke “the witness rule” or impose “a Rule 615 order.” To some extent this is a technical question, but it is surely a meaningful one if the order you end up with is just an invocation of the rule, and the rule is read not to prevent out-of-court access, as in *Sepulveda*. And on the other hand it is also meaningful if a witness is precluded from testifying for violating a “Rule 615 order” by accessing trial testimony on the internet, and the witness contends that he had no idea that a “Rule 615 order” extended outside the courtroom.

The confusion about the extent of a Rule 615 order is exacerbated by the fact that many Rule 615 orders appear to be terse (“I am entering a Rule 615 order”; or “I am invoking The Rule”) or vague. The Ohio Advisory Committee Note to Ohio Rule 615 makes the following point about the vagueness of “Rule 615 orders” or “exclusion orders”:

In practice, it is most common for trial courts to enter highly abbreviated orders on the subject. Normally a party will move for the “separation” (or “exclusion”) of witnesses, and the court will respond with a general statement that the motion is granted. This is usually followed by an announcement to the gallery that prospective witnesses should leave

² Beyond the cases cited, the law in the Tenth Circuit is that when the trial judge enters an order under Rule 615, it extends outside the courtroom. *See, e.g., Paradigm Alliance, Inc. v. Celeritas Technologies, LLC*, 722 F. Supp. 2d 1250 (D. Kan. 2010) (where the parties “invoked Rule 615” the court’s order prohibited an excluded witness from obtaining trial testimony). *See also United States v. Greschner*, 802 F.2d 373, 376 (10th Cir. 1986)(identifying a risk of reversal where sequestered witnesses discuss testimony); *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir. 1978)(requiring that district courts give instructions “making it clear that witnesses are not only excluded from the courtroom but also that they are not to relate to other witnesses what their testimony has been and what occurred in the courtroom”); *United States v. Baca*, 2020 WL 1325118 (D.N.M.) (“The Court agrees with those courts taking broad approaches to rule 615. Permitting witnesses to overhear the substance of others’ testimony in argument or any other form would defeat rule 615’s anti-tailoring, anti-fabrication, and anti-collusion aims.”).

On the other hand, the *Robinson* court’s citation of the Fourth Circuit case of *United States v. McMahon* is questionable. After *McMahon*, in *United States v. Rhynes*, 218 F.3d 310 (4th Cir. 2000), the en banc Fourth Circuit states that Rule 615’s “plain language relates only to ‘witnesses,’ and it serves only to exclude witnesses from the courtroom.” The holding in that case is that if the court is going to extend an order outside the courtroom, it must do so explicitly (and even then it cannot apply to counsel). So the Fourth Circuit should be considered as aligned with the First Circuit in the conflict about the extent of a Rule 615 order. *See United States v. Ali*, No. 15-4433, March 19, 2021 (4th Cir.) (stating the Rule 615 “serves only to exclude witnesses from the courtroom” and that “district courts frequently employ their discretionary authority to strengthen their sequestration orders outside the courtroom.”) (Thanks to Judge Schroeder for alerting me to this new case).

That means that the 1st, 3rd, 4th and 8th circuits are on one side of the issue, while the 2nd, 5th, 9th, 10th, and 11th circuits are on the other).

the courtroom and by a statement that the parties are responsible for policing the presence of their own witnesses. Though some courts then orally announce additional limitations on communications to or by witnesses, the far more usual approach is simply to assume that the generic order of “separation” adequately conveys whatever limitations have been imposed.

Some courts, in Ohio and elsewhere, have suggested that at least some additional forms of separation are implicit even in generally stated orders. This approach, however, *entails significant issues of fair warning, since the “implicit” terms of an order may not be revealed to the parties or witnesses until after the putative violation has occurred.*

Another problem with the existing Rule is that courts differ significantly in the order they provide. Without added clarity in the area, the consequences may be substantial: For example, in *Regan v. Hdr Eng'g*, 2021 US Dist LEXIS 12577 (D. Idaho Jan. 13, 2021), the court ordered the sequestration of witnesses, as follows: “In accordance with Federal Rule of Evidence 615, all non-party witnesses, including expert witnesses, will be excluded from the courtroom until they testify and have been released by the Court.” In contrast, the court in *United States v. Kail*, 2021 U.S. Dist. LEXIS 14635 (N.D. Cal. January 26, 2021), the court’s order specifically: (i) prohibited witnesses from listening to other witness testimony, either by remaining in the courtroom or otherwise listening to the trial via teleconference; and (ii) directed “all counsel to admonish witnesses that they are not to read trial transcripts or to discuss the case and their testimony with anyone other than counsel.” It would probably be a good thing to have a Rule that might help to provide for more consistency in sequestration orders.

Given all these considerations, the Committee has concluded that an amendment is necessary to specify the extent of a Rule 615 order and to provide a mechanism by which a court can extend its protection against outside the courtroom. Regulating access to trial testimony outside the courtroom promotes the intent of Rule 615 to limit tailoring. The Supreme Court has recognized that courts may need to enter orders that extend beyond the courtroom. In *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966), the Court criticized the state court for allowing prospective witnesses to obtain trial testimony outside the courtroom:

[T]he court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. *Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule.*

Moreover, as the Committee has recognized, an amendment is necessary to assure that people subject to the order have notice about what the order entails. The Supreme Court has held that when a witness violates a sequestration order, the court may cite the witness for contempt. *Holder v. United States*, 150 U.S. 91, 92 (1893). Such a serious consequence (or even the lesser consequence of excluding a witness’s testimony for reading a trial transcript) must be contingent on clear notice.

II. Counsel Disclosing Trial Testimony to Prospective Witnesses?

As the court stated in *United States v. Rhynes*, 218 F.3d 310 (4th Cir. 2000), Rule 615 on its face does not apply to lawyers: “It is clear from the plain and unambiguous language of Rule 615 that lawyers are simply not subject to the Rule. This Rule's plain language relates only to ‘witnesses,’ and it serves only to exclude witnesses from the courtroom.” But that does not answer the question of whether lawyers can be subject to an order that goes *beyond* Rule 615 to control conduct outside the courtroom. Thus, if Rule 615 is amended to specify that orders can be entered to go beyond exclusion, the question of regulating lawyers will arise.

A plurality of the en banc court in *Rhynes* held that a sequestration order could not bar counsel from using trial testimony to prepare a witness. But a number of courts have held that a court has discretion to include counsel in any order prohibiting disclosure of trial testimony to prospective witnesses. The rationale of this contrary view is that a “counsel exception” to the rule could lead to widespread tailoring. These courts also conclude that trial counsel’s preparation of witnesses can be effective without explicitly disclosing trial testimony. See, e.g., *Jerry Parks Equip. Co. v. Southeast Equip. Co., Inc.*, 817 F.2d 340, 342-43 (5th Cir.1987) (witness properly excluded for having a conversation with the party’s lawyer in which trial testimony was discussed); *Paradigm Alliance, Inc. v. Celeritas Technologies, LLC*, 722 F. Supp. 2d 1250, 1273 (D. Kan. 2010) (“It was clear from the manner in which Evans answered questions that his testimony was influenced by this pre-testimony preparation. To permit this specific type of pre-testimony preparation to influence a witness’s testimony based on information obtained through the in-court testimony of another witness would ultimately serve to largely nullify the purpose for which Rule 615 exists.”).

While it is true that the counsel question raises a conflict in the courts, it does not follow that it needs to be addressed in an amendment to Rule 615. Even if an order *can* be applied against counsel, such an order raises complex questions of professional responsibility; and in criminal cases it raises thorny questions about the right to effective assistance of counsel. At the last meeting Committee members agreed that issues grounded in professional responsibility and the right to effective assistance of counsel are generally beyond the ken of evidence rulemaking --- and that these sensitive issues are best dealt with on a case-by-case basis, without having an evidence rule seeking to control or influence their resolution.

III. Limiting the Number of an Entity’s Designated Representatives to One

As discussed at the last meeting, there appears to be some confusion regarding Rule 615 (b), which allows an entity party the right to exempt “an officer or employee” from exclusion. There is at least some dispute about whether the party-entity is limited to one exemption by right,

or is allowed more than one.³ That possible conflict is discussed by the United States District Court for the Middle District of Alabama in *United States v. McGregor*, 2012 WL 235519 (M.D.Ala. 2012), a case in which the government sought to designate multiple agents as immune from sequestration under subdivision (b):

The circuit courts are divided as to which provision of Rule 615 permits multiple agents. The Fourth and Sixth Circuit Courts of Appeals have limited the government to one representative under Rule 615(b) and one “essential-presence” agent under Rule 615(c). *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir.1991); *United States v. Farnham*, 791 F.2d 331, 335-36 (4th Cir.1986). By contrast, the Second Circuit Court of Appeals has permitted multiple representatives under Rule 615(b). *United States v. Jackson*, 60 F.3d 128, 134-35 (2d Cir.1995). The distinction between the two subsections is not merely academic. Rule 615(b) is a mandatory exception, whereas Rule 615(c) requires the government to make a showing that the second agent is essential to the presentation of its case.

I say above that this is a possible conflict, because I am not sure that the *McGregor* court has it exactly right. The court cites the Second Circuit case of *Jackson*, but the court there holds that there can be multiple agents under the “necessary” exception, Rule 615(c). It’s not a holding allowing multiple agents under (b). And *Pulley* allows only one agent under (b). So I think that the Alabama court might be overstating the holdings of both cases. The *Pulley* case cites a case from the Fifth Circuit in which two agents were exempted from exclusion, but the Fifth Circuit did not say that they were both exempt under (b). Rather it said, confoundingly, that subdivision (b) allowed multiple representatives, within the discretion of the judge, but that the trial court did not abuse discretion because “adequate grounds existed for excusing both Clark and Beaupre *under the second and third exceptions to the rule.*” *United State v. Alvarado*, 647 F.2d 537 (5th Cir. 1981).

In other words, the case for finding a true conflict in Rule 615(b) regarding the number of representatives allowed is relatively weak. A large majority of courts have applied Rule 615(b) the way it is read --- only one representative gets immunity from exclusion.⁴

³ References to “subdivision (b)” are to the current rule. If the amendment regarding the scope of a Rule 615 order were to be adopted, subdivision (b) would be renumbered to (a)(2). See the draft amendment below.

⁴ See, e.g., *United States v. Pulley*, 922 F.2d 1283 (6th Cir. 1991) (one representative only); *United States v. Green*, 293 F.3d 886, 892 (5th Cir. 2002) (multiple agents must be qualified as necessary under Rule 615(b)); *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986) (noting reliance on the singular phrasing of the Rule 615(b)); *Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co.*, 519 F. Supp. 668, 679 (D. Del. 1981) (“[T]he exception is clearly framed in the singular and the Court concludes, in the context of this case, that it does not permit counsel to designate more than one person to be present as a corporation’s representative.”); *Capeway Roofing Sys. v. Chao*, 391 F.3d 56, 59 (1st Cir. 2004) (“[T]he bare language of Rule 615 suggests that only one [agent] should have stayed.”); *United States v. Williams*, 1993 U.S. App. LEXIS 9786, at *5 (10th Cir.) (indicating that an entity party could only have designated one representative out of two potential witnesses); *United States v. White-Kinchion*, 2013 U.S. Dist. LEXIS 59201, *2-3 (D. Kan.) (refusing to permit multiple representatives under 615(b)).

Nonetheless, it is fair to state that there is at least some inconsistency and confusion in the case law on Rule 615(b). At the last meeting the Committee determined that if Rule 615 is to be amended to clarify its impact outside the courtroom, it would be useful to amend Rule 615(b) to clarify the number of witnesses who can be exempted.

On the merits, the Committee determined at the last meeting that the best solution is to allow the entity party to have only one exemption under Rule 615(b). The rationales for the limit to one exemption are:

1. If it is more than one, there is nothing in the rule that would guide the court's determination of *how many more?* Rule 615(b) gives the entity party the *right* to exempt a representative. There is nothing in the rule that limits that right other than a specific numerical limitation. And the only definitive number that can be found under the rule is--
- one.

2. The policy justification for Rule 615(b) is that, for purposes of avoiding exclusion, entities should be treated the same as individual parties. Individual parties cannot be excluded, for obvious reasons. The Advisory Committee Note to Rule 615 justifies the subdivision “[a]s the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present.” If entities did not have an absolute right to designate an agent, they would have a disadvantage as compared to individuals.⁵ But that very reason for having Rule 615(b) indicates that it should be limited to a single agent. Otherwise, *individual parties will be disadvantaged* because entities could have multiple witnesses exempt from exclusion and individual parties could not.

3. It's not the end of the world if the entity-party gets only one exemption under Rule 615(b). An entity-party that seeks more than one exemption can resort to Rule 615(c) for “essential” witnesses. And there is no numerical limitation on Rule 615(c) exemptions. *See, e.g., United States v. Cooper*, 949 F.3d 744 (D.C. Cir. 2020) (“Where the government wants to have two agent-witnesses in attendance throughout the trial, it is always free to designate one agent as its representative under subpart (b) and try to show under subpart (c) that the presence of the second agent is ‘essential’ to the presentation of its case.”)

For all these reasons, the draft of Rule 615 in the next section clarifies that an entity-party is entitled to only one exemption under Rule 615(b) --- (a)(2) in the draft. And the draft Committee Note emphasizes that there is no numerical limitation under the exemption for witnesses whose presence is “essential.”

⁵ Tellingly, the Committee Note states that “[m]ost of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness.”

Swapping Out a Representative Under Rule 615(b)

At the last meeting there was a short discussion about whether an entity party should be allowed to swap one exempted representative for another under Rule 615(b). The Committee appeared to agree that swapping out should be permitted, because in a long trial the entity may want different witnesses at the table for different parts of the trial. And the assumption was that swapping would do no violence to the numerical limitation in Rule 615(b), because there would be only one representative exempted at any time. The Minutes of the meeting reflect the Committee's determination that the draft Committee Note include a provision that would sanction an entity-party swapping out one exempt witness for another.

There are arguments to be made, however, that swapping out should not be permitted under Rule 615(b) --- i.e., that one exemption should mean *only one*. Here are the arguments against allowing entity-parties the right to substitute exempt witnesses:

1. The case law supporting substitution under the existing rule is weak. While there are understandably few reported cases, the leading one, *Breneman v. Kennecott Corp.*, 799 F.2d 470, 474 (9th Cir. 1986), provides scant support. In *Breneman* the court found no error in allowing the defendant to substitute a witness for exemption, reasoning that "if a corporation may designate two representatives to remain in court during the trial, there is no violation of Rule 615 if, as here, a corporation designates a different single representative for the discovery and trial phases of a case." This rationale supposes that an entity may designate multiple witnesses as exempt from exclusion --- when in fact that proposition is rejected by almost all courts, and would of course be rejected by the rule as it is proposed to be amended. Moreover, the *Breneman* court did not even decide this question, "because Breneman has made no showing that she was in any way prejudiced by Kennecott designating Quinn as its representative at the trial." So the leading case is dictum based on a dubious assumption.

2. Giving entities *carte blanche* to exchange witnesses gives them an advantage over individual parties, who cannot treat their right to be present at trial as a relay event. It should be remembered that the automatic exemption from sequestration for entity-parties impairs the goal of sequestration to prevent tailoring, and so should probably be applied narrowly.⁶ A sequential approach to witness-representatives designated by entities opens the door to gamesmanship and a playing field tilted in favor of already powerful entity litigants. Surely, it is the rare case in which a single entity representative *who is also a testifying witness* cannot sit through the entire proceeding and another *testifying witness* is the only viable replacement. In a case where such exigencies truly exist, an entity party should be capable of making a showing that the exchange of testifying designated representatives is "essential" to the presentation of the case, and so the witness is exempt under Rule 615(c).

⁶ 29 Fed. Prac. & Proc. Evid. § 6245 (2d ed.) (explaining that party exemptions are based in fairness, but should be narrowly construed given their threat to sequestration policy).

In the end, the “swapping” question arises infrequently enough that it may not be worth treating it at all in the Committee Note to Rule 615. If it is to be treated at all, the better argument is probably to state in the Committee Note that swapping should not be permitted. In the draft Note below, there is bracketed language for both positions --- and both can be dropped if the Committee wishes to leave this niche question where it found it.

IV. Draft of Proposed Amendment

The draft below was the draft reviewed at the previous meeting, with a few tweaks. First, the text now makes it explicit that if there is not an additional order, the Rule 615 order is limited to excluding witnesses. Also, certain changes and clarifications have been made to the Committee Note with regard to the court's discretion to regulate access to trial testimony, and with regard to the numerical limitation of exemptions by entity-parties. That additional language is underlined in the draft Note below.

Note. This draft is different from that voted on at the last meeting because it incorporates suggestions from the style committee

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony.

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

~~(a)~~ **(1)** a party who is a natural person;

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

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

~~(d)~~ **(4)** a person authorized by statute to be present.

(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 issue additional orders to:

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

(2) prohibit excluded witnesses from accessing trial testimony.

Draft Committee Note

Rule 615 has been amended ~~to clarify~~ for two purposes. Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony.

Many courts have found that a “Rule 615 order” extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial --- and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1214 (9th Cir. 2018) (“The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript.”). On the other hand, a rule extending an often vague “Rule 615 order” outside the courtroom raised questions of fair notice, given that the text of the Rule itself was limited to exclusion of witnesses from the courtroom.

An order under subdivision (a) operates only to exclude witnesses from the courtroom. Subdivision (b) emphasizes, though, that the court may by order extend the sequestration beyond the courtroom, to prohibit parties subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the Rule’s policy of preventing tailoring of testimony; and it is especially necessary if the trial is in whole or part virtual, in which case excluding witnesses “from the courtroom” would be meaningless.

The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

The amendment does not address the question whether the court can or should prohibit counsel from disclosing trial testimony to a sequestered witness. An order governing counsel’s disclosure of trial testimony to prepare a witness raises difficult questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, and is best addressed by the court on a case-by-case basis.

Finally, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated agent per entity. This limitation, which has been followed by most courts, provides parity for individual and entity parties. If an entity seeks to have more than one agent protected from exclusion, it is free to argue that the agent is essential to presenting the party’s claim or defense under subdivision (a)(3).

[The rule does not prohibit an entity-party from swapping one representative for another as the trial progresses, so long as only one is exempt at any time.] [The limitation to one exempt representative means that an entity-party is not allowed to substitute one witness for another during the trial.]

Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3). *See, e.g., United States v.*

Arayatanon, 980 F.3d 444 (5th Cir. 2020) (no abuse of discretion in exempting from exclusion two agents, upon a showing that both were essential to the presentation of the government's case).

Reporter's comments.

1. There was a suggestion at the last meeting that the Committee Note should provide guidelines for what should go into an order limiting access to trial testimony outside the courtroom. A counterargument is that the risks of access are going to differ from case to case and party to party. The ease of access may also be different. Technological developments may affect the likelihood of access. The importance of the case to the public may be a factor. All this means that there may be a concern that a Committee Note with a laundry list of guidelines might be unhelpful and perhaps it could become out of date at a certain point. If the Committee does wish to set forth more guidance than is found in the general language in the Committee Note, that is something that might be done in response to public comment. But if the Committee believes that there should be more specific guidance than is provided in the draft Committees Note before public comment, that guidance can be added at the Committee meeting.

2. The “essential” provision has been modified to clarify that the court can allow multiple exemptions under that provision --- the change is from “a person” to “any person.” The statutory exemption --- subdivision (a)(4) --- is not changed, because presumably the number of exemptions would be controlled by whatever statute is applicable. That might be only one witness, or more. Any attempt to specify the number would be contrary to the whole point of that provision, which is to defer to statutes.

TAB 5

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Circuit Splits on Interpreting Evidence Rules
Date: April 1, 2021

In 2002, the Evidence Rules Committee undertook a project to discover and analyze circuit splits in courts' interpretation of the Federal Rules of Evidence. The rationale for the project was that if there is a circuit split on a particular rule of evidence, that may well be a good reason for proposing an amendment for rectifying a split. After all, they are supposed to be the *Federal* Rules of Evidence, and one of the main reasons for codification was to provide uniform rules for the entire country.¹

The 2002 project uncovered about 15 rules on which the circuits reached different interpretations. The Advisory Committee found that the benefits of rectifying most of those splits was outweighed by the dislocation costs of proposing an amendment --- mostly this was because the problem that gave rise to the split did not arise very often. The project did lead to the amendment of several rules, however. Rules 404, 406, 606(b), and 608 were amended in the period between 2003 and 2006. Other splits recognized back then took longer to rectify --- Rule 804(b)(3) was amended in 2010, and Rule 801(d)(1)(B) was amended in 2014. And one of the splits raised

¹ Indeed Judge Becker's famous article on circuit splits under the Federal Rules of Evidence was instrumental in Chief Justice Rehnquist's decision to reconstitute the Advisory Committee, after it had been disbanded in 1975. See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years: The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 892 (1992).

in the 2002 project --- the conflict regarding the rule of completeness, Rule 106 --- is being considered by the Committee right now.²

Because the rules currently being considered by the Committee --- 106, 615, and 702 --- are nearing a final resolution, I thought it might be useful to revisit the question of circuit splits to see if there are any rules that might be put on the agenda going forward.³

This memo provides a short-ish introduction to the circuit splits that I have found in the current rules.⁴ The goal is to let the Committee know about the split and to provide some preliminary analysis --- and where appropriate to set out some possible language for an amendment, to assist the Committee in its review. If the Committee decides that any of these splits justifies further inquiry, then a full memo on the subject will be prepared for the next meeting.⁵

I. Expert Testimony on the Unreliability of Identification Evidence

There are conflicting decisions among the circuit courts as to the admissibility in criminal cases of defense expert testimony on the potential unreliability of eyewitness identification. The applicable rules are 403 and 702. Under Rule 403, the question is whether the probative value of the expert testimony is substantially outweighed by the risk of unfair prejudice and jury confusion. The question under Rule 702 is whether the expert is testifying to a subject matter on which the jury needs assistance.

A number of circuits have upheld their trial courts' exclusion of this type of expert testimony under either Rule 403 or 702.⁶ In many instances, the Rule 403 analysis has led a trial judge to provide, as a substitute for expert testimony, a comprehensive jury instruction about the

² They say one of the virtues of the rulemaking process is that it is deliberate, meaning slow. The history recounted here is a testament to that.

³ Many thanks to Cameron Molis, Columbia '21, for his outstanding work on this project.

⁴ There may well be others. Whether there is a "split" is often a matter of judgment.

⁵ This memo does not discuss the circuit splits involving Rules 106, 615 and 702 --- as those splits are currently being considered by the Committee. There is also a circuit split on whether a hearsay statement by an individual can be considered a statement by a party-opponent as to a successor in interest. That circuit split is discussed in a separate memo in this agenda book. Finally, there are circuit splits on certain questions arising under Rules 611(a), 1002, and 1006 --- all of which are discussed in separate memoranda in the agenda book.

⁶ See, e.g., *United States v. Fosher*, 590 F.2d 381, 383–84 (1st Cir. 1979) (finding the trial court's 403 balancing was not an abuse of discretion); *United States v. Rincon*, 28 F.3d 921, 923–26 (9th Cir. 1994) (holding it was not error for district court to exclude under Rules 403 and 702); *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996) (same); *United States v. Curry*, 977 F.2d 1042, 1052 (7th Cir. 1992) (same).

unreliability of identification evidence.⁷ Other courts have found that expert testimony on eyewitness identification can fail under Rule 702 alone without the need for Rule 403 balancing --- because the topic of identification is purportedly one on which the jury does not need assistance.⁸ Courts also express concern that expert testimony about identification might intrude on the jury’s prerogative of determining the credibility of identification witnesses.⁹

Other courts reach the opposite conclusion, either upholding admission or finding error in exclusions of expert testimony on eyewitness identification.¹⁰ While it is possible that these opposing outcomes are indicative of a split in the courts, some court approving of expert testimony make an effort to distinguish their facts from cases in which experts were excluded. In *United States v. Smith*,¹¹ for example, the Sixth Circuit declared that the trial court’s expert did not have the same shortcomings as the excluded expert in *United States v. Fosher*¹² because this expert provided a far more specific analysis of eyewitness identification reliability in situations identical to the facts of the instant case and he offered evidence to support the scientific acceptance of his research.¹³

But some of the dispute is not fact-based. Thus, in *United States v. Downing*, 753 F.2d 1224, 1243 (3d Cir. 1985), the Third Circuit explicitly identified its disagreement with cases like *Thevis* and *Fosher* when it noted that the concern over the creation of a “cottage industry” of psychological experts battling it out in criminal court was not a sufficient reason to exclude experts on the unreliability of identification evidence. Added to the mix is a report from the National Academy of Sciences advocating that expert testimony on the unreliability of identification methods should be admitted more often than it is by federal courts, because it is based on reliable studies, and it could assist the jury in assessing the reliability of the identification.¹⁴

⁷ See *Fosher*, 590 F.2d at 382; *Rincon*, 28 F.3d at 925-26; *Kime*, 99 F.3d at 883.

⁸ See, e.g., *Curry*, 977 F.2d at 1051 (noting that “the jury is generally aware of the problems with identification.”); *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) (district court did not err in excluding expert testimony on Rule 702 grounds); *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. 1982) (same).

⁹ See *Rincon*, 28 F.3d at 926; *Lumpkin*, 192 F.3d at 289.

¹⁰ See *United States v. Mathis*, 264 F.3d 321, 339–40 (3d Cir. 2001) (reversing trial court’s decision to exclude such testimony as abuse of discretion); *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir. 1984) (finding potential error in excluding expert but also finding any error to be harmless).

¹¹ 736 F.2d 1103 (6th Cir. 1984).

¹² 590 F.2d 381 (1st Cir. 1979).

¹³ See *Smith*, 736 F.2d at 1106–07.

¹⁴ See <https://www.innocenceproject.org/national-academy-of-sciences-issues-landmark-report-on-memory-and-eyewitness-identification/>

It is fair to state that there are differing attitudes in the courts about the admissibility of expert testimony on the unreliability of identifications. While this is a problem, it is unclear whether it should be remedied by an amendment to the Evidence Rules. It would surely be problematic to amend either Rule 403 or 702 to treat identification testimony specifically. Three years ago, the Committee decided that it would not propose a rule that would cover forensic evidence specifically, as the Evidence Rules are written for general application. And testimony on identifications is even narrower than testimony on forensics.

Perhaps the Committee might start thinking about adding another Article to the Evidence Rules that would address very specific problem areas. Sometimes it might be necessary to solve specific problems that can't be solved in the broad language of the existing rules.

It should be noted that many of the states have rules on particularized matters that are not treated in the Federal Rules of Evidence. Specifically, with regard to identification evidence, **Utah Rule of Evidence 617** provides as follows:

In cases where eyewitness identification is contested, the court shall exclude the evidence if the party challenging the evidence shows that a factfinder, considering the factors in this subsection (b), could not reasonably rely on the eyewitness identification. In making this determination, the court may consider, among other relevant factors, expert testimony and other evidence on the following:

- (1) Whether the witness had an adequate opportunity to observe the suspect committing the crime;
- (2) Whether the witness's level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;
- (3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;
- (4) Whether the witness was aware a crime was taking place and whether that awareness affected the witness's ability to perceive, remember, and relate it correctly;
- (5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;
- (6) The length of time that passed between the witness's original observation and the time the witness identified the suspect;
- (7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;

(8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and

(9) Whether any other aspect of the identification was shown to affect reliability.

On the merits, there is much to be said for allowing more expert testimony on the unreliability of identification evidence. First, the contention that the jury understands that identification testimony can be unreliable has not been verified by any study and in fact is undermined by the many wrongful convictions based on eyewitness testimony. But even if jurors know that identifications can be unreliable, an expert's testimony can still be helpful. The expert can explain *why* the identification procedure used in the specific case raises reliability questions. Experts testifying to the potential unreliability of identifications are allowed to testify in many state courts; and as stated above, the National Academies of Science advocates more widespread use of expert testimony in identification cases. Moreover, as the Rule 702 memo to the Committee notes, the courts are quite receptive to rather dubious forensic expert testimony offered by the government. It seems inconsistent to have a restrictive attitude to expert testimony offered by the defendant on the unreliability of identification evidence, which is based on dozens of valid empirical studies.

If the Committee is interested in pursuing either an amendment on identification evidence, or more broadly a new Evidence article on specific rules, I will prepare a detailed memo for the next meeting.

II. Rule 407 --- Does It Exclude Subsequent Changes in Contract Cases?

The courts are divided on whether changes in contract or policy language should be protected by Rule 407 as a subsequent remedial measure. To take an example, assume that an employee has signed a form contract, and claims that a certain clause supports his claim for overtime. The employer disagrees with that interpretation. In a breach of contract action, the employee wishes to introduce the fact that after he brought his lawsuit, the employer changed the language of the form contract to sharpen it, in a way that would have terminated the plaintiff's claimed interpretation. This is offered as proof that the employer recognized the strength of the plaintiff's interpretation. The Third, Fourth, Seventh, and Tenth Circuits have held that Rule 407 does apply to altered contract or policy language in breach of contract or warranty cases.¹⁵ These

¹⁵ See *Reynolds v. Univ. of Pa.*, 483 F. App'x 726, 733 (3d Cir. 2012) (finding no abuse of discretion in applying FRE 407 to evidence of changed website language in a breach of contract claim); *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 153–54 (4th Cir. 1995) (applying FRE 407 to exclude evidence that a payment limitation was discontinued in a case

courts have viewed changes in advertised language on a website, policy language in a contract, and terms in insurance offerings as subsequent remedial measures excludable by FRE 407. By contrast, the Eighth Circuit and district courts from the First, Seventh, and Eleventh Circuits have all refused to exclude this type of changed language in breach of contract or warranty cases, because such financial injuries do not appear to be within the concern of Rule 407, which speaks in the tort-based terms of “negligence” and “culpable conduct.”¹⁶

On the merits, there is an argument that the policy of Rule 407 should apply to contractual changes. The policy of Rule 407 is to remove a disincentive to fix something for fear that the fix will be used against you at trial. In contract cases, the drafter of the contract may be deterred from improving it for fear that the improvement will be used against him at trial. On the other hand, the policy basis of Rule 407 is probably pretty weak in most cases, because defendants would fix things anyway --- even without the protection of the rule --- for fear that not fixing them will lead to future injuries and greater liability. So there is an argument that it is a bad idea to extend a weak policy basis to a different fact situation --- to throw good money after bad, so to speak.

There is also a distinction in the context of tort and contract claims as applied to Rule 407. In the tort case, the plaintiff is saying, “if you fixed it before, I wouldn’t have lost my leg in the lawnmower.” In the contract case, the plaintiff is saying, “if you fixed the contract, there wouldn’t have been a breach of contract” but what he is also saying is that “if you fixed the contract, I wouldn’t have the right I am claiming now.” Which is weird.

If the rule were to be amended to specifically cover contract actions, it might look like this:

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; ~~or~~
- a need for a warning or instruction; or

alleging breach of contract due to an unjustified application of the limitation); *Pastor v. State Farm Mut. Auto. Ins. Co.*, 487 F.3d 1042, 1045 (7th Cir. 2007) (applying Rule 407 to evidence of a changed insurance policy in a breach of contract claim).

¹⁶ See *R.W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266, 274 (8th Cir. 1985) (finding 407 inapplicable where no negligence or culpable conduct finding is required); *Mowbray v. Waste Mgmt. Holdings, Inc.*, 45 F.Supp.2d 132, 141 (D. Mass. 1999) (finding Rule 407 to be inapplicable to breach of warranty cases because no proof of culpability or mental state are required); *All the Chips, Inc. v. OKI Am., Inc.*, 1990 WL 36860, at *4 (N.D. Ill.) (holding that since breach of contract requires no showing of any sort of fault, it negates the operation of Rule 407); *Smith v. Miller Brewing Co. Health Benefits Program*, 860 F. Supp. 855, 857 n.1 (M.D. Ga. 1994) (“[W]hen the dispute concerns the terms of a contract, changes in the language that make the intent of the drafter clearer, the court should consider that change in evaluating the disputed term.”).

- a breach of contract.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Another possibility would be to amend Rule 407 to *preclude* its use in contract actions. You could start the rule with a qualifier like, “In personal injury actions” --- for example.

III. Rule 407 – Does it Apply When the Action is Subsequent to the Injury But is not in Response to the Injury?

A number of courts have considered and are split on whether the Rule 407 protection applies where a measure has the effect of making an injury or harm less likely to occur, but the motivation for the change is unconnected to that injury or harm. Some courts literally interpret the rule, concluding that neither a motivation to remediate nor a causal connection to the plaintiff's injury is required --- if the measure was taken after the plaintiff's injury, the protection applies. Under this literal interpretation, Rule 407 would preclude evidence of a change made years after the event, taken for purposes completely unrelated to an injury. *See, e.g., Chlopek v. Fed. Ins. Co.*, 499 F.3d 692, 700 (7th Cir. 2007) (concluding that the intent or motive behind a measure is irrelevant). Other courts have concluded that Rule 407 is inapplicable when there is no causal connection, i.e. when the measure was not taken in response to the injury-causing event in the case. *See, e.g., Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 431–32 (5th Cir. 2006); *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 816 (9th Cir. 1989) (“The purpose of Rule 407 is to ensure that prospective defendants will not forego safety improvements because they fear that these improvements will be used against them as evidence of their liability.”).

Essentially this conflict is based on the difference between the purpose of the rule and the language of the rule. In the latest opinion on the subject, Judge Sargus emphasized the purpose of the rule and found Rule 407 inapplicable where the defendant's subsequent action was not made in response to the plaintiff's injury. *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation*, 2021 WL 486425 (S.D. Ohio):

The better interpretation of Rule 407 is that there must be some sort of causal connection or nexus between the injury-causing event and the subsequent measure. Under the literal interpretation of the rule, there is no logical limit to the Rule's application; a measure taken ten years after the injury-causing event could be considered a subsequent remedial measure because it is actually subsequent and may have reduced the likelihood that the harm would have occurred had the measure been in place earlier. This is nonsensical. . . .

The statutory history of the Rule demonstrates that the event causing the injury must be the trigger for the subsequent remedial measure. The original version of Rule 407 provided that “after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.” Act of Jan. 2, 1974, Pub. L. No. 93-595 1975, 88 Stat 1928. The text “in connection with the event” supplies such a causal connection. Subsequent amendments did not purport to change this meaning. In 1997, the Advisory Committee deleted this phrase, but it did not list this deletion as one of the substantive changes to the Rule, and the 2011 amendments were expressly limited to stylistic changes.

The two policies or purposes behind Rule 407 also show that the Rule requires more than mere subsequence. The first policy is that subsequent remedial measures are “equally consistent with injury by mere accident [and] through contributory negligence,” meaning evidence of such measures is poor proof of fault. . . .The first policy makes little sense applied to a measure that occurs years after an event that caused harm. Certainly, the measure may be still equally probative (or not probative) of an accident or negligence—but after enough time, the risk of admitting the evidence is less that the jury will conflate evidence of an innocent accident with evidence of negligence, but that the evidence of the later measure is simply irrelevant to proving any earlier negligence and is likely to distract the jury from the timeframe at issue. This is the province of Rules 401, 402, and 403—not Rule 407.

The second policy is that people should be encouraged to take steps to improve safety, which they would be deterred from doing if such acts would be counted against them in court. When a supposed remedial measure has no connection to the harm at issue in the case, it is difficult to imagine why any deterrence would result. If defendants do not view the measures taken as connected to a harm-causing event, then it is unlikely that they would be disincentivized from taking these actions and in anticipation of litigation of the injury-causing event.

These are compelling arguments for adding language to require the subsequent remedial measure to be responsive to the plaintiff’s injury. A counterargument is that it might sometimes be difficult to show that the defendant’s actions were triggered by a specific plaintiff’s injury --- especially where there are many cases in which multiple injuries have occurred. The current rule text has the virtue of simplicity (though leaving it as is means that the current conflict goes unabated). The counterargument to the difficulty of finding a connection between change and injury is that Rule 407 is a weakly founded rule in the first place, and so making it difficult to trigger its protection is a good thing, not a bad thing.

If the Committee were to decide to require a connection between the defendant’s measure and the plaintiff’s injury in order for Rule 407 to apply, one possible iteration is as follows:

Rule 407. Subsequent Remedial Measures

When measures are taken in response to an injury or harm that would have made ~~an earlier~~ that injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

IV. Rule 609(a), Theft-based Convictions

Rule 609(a)(2) provides that felonies involving a “dishonest act or false statement” are automatically admissible to impeach the character for truthfulness of any witness. Crimes covered under this subdivision obviously include perjury and fraud. You have to lie to be convicted of those crimes. The Committee Note to the 1990 amendment to Rule 609 (which corrected an error about how the rule would apply in civil cases) mentions that some decisions had taken “an unduly broad view of ‘dishonesty’ --- admitting convictions such as for bank robbery or bank larceny.” The Note indicates, however, that the Committee had decided not to amend the rule to address those decisions, even though they were wrong. It concluded that the legislative history provided sufficient guidance, because it states that admissibility under Rule 609(a)(2) is for crimes that require a lie for conviction.

Rule 609 was subsequently amended in 2006 (to prevent convictions from being automatically admitted merely because the witness lied at some point in committing the crime). The Committee Note to the 2006 amendment to the Rule emphasizes that the crimes covered by Rule 609(a)(2) are only those “in which the ultimate criminal act was itself an act of deceit.”

Despite these two Committee Notes, there is a small number of cases standing for the proposition that theft-based crimes are automatically admissible, even though a person does not have to lie to commit them.¹⁷ But the vast majority of courts has found that theft-based crimes are not automatically admissible under Rule 609(a)(2), and so are admissible only if they satisfy the balancing tests of Rule 609(a)(1) (and are felonies, as required by that subdivision).¹⁸

¹⁷ See *United States v. Carden*, 529 F.2d 443, 446 (5th Cir. 1976) (conviction for petty larceny is automatically admissible under Rule 609(a)(2)); *United States Xpress Enters. v. J.B. Hunt Transp.*, 320 F.3d 809, 816-817 (8th Cir. 2003) (conviction for receipt of stolen property is automatically admissible under Rule 609(a)(2)); *United States v. Brown*, 603 F.2d 1022 (1st Cir. 1979) (burglary and petty larceny are automatically admitted under Rule 609(a)(2)).

¹⁸ See *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982) (“We agree with defendant that robbery per se is not a crime of dishonesty within the meaning of 609(a)(2).”); *United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977) (crimes of stealth --- burglary and petty larceny --- are not within Rule 609(a)(2)); *United States v. Foster*, 227 F.3d 1096, 1100 (9th Cir. 2000) (holding that like shoplifting, burglary, grand theft, and bank robbery, receipt of stolen

On the merits, it is clear that theft convictions should not be automatically admissible. There is plenty in the legislative history, and the common law, to indicate that automatic admissibility is for crimes involving active lying only. A strict construction of Rule 609(a)(2) is sound policy: Because almost every criminal act is in some sense a dishonest act in either preparation or execution, a broad construction of Rule 609(a)(2) would swallow up Rule 609(a)(1) and would lead to mandatory admission of almost all prior convictions --- even though many of these convictions would have slight probative value as to the witness's character for truthfulness, and would carry significant prejudicial effect. Given the predominance of the Rule 403 balancing approach throughout the Federal Rules, and the general grant of discretion that the rules provide to trial judges, it makes sense to limit where possible a rule that mandates admission and thus prohibits the use of judicial discretion and balancing. As the D.C. Circuit Court of Appeals has stated:

Rule 609(a)(2) is to be construed narrowly; it is not *carte blanche* for admission on an undifferentiated basis of all previous convictions for purposes of impeachment; rather, precisely because it involves no discretion on the part of the trial court, Rule 609(a)(2) must be confined to a narrow subset of crimes—those that bear directly upon the accused's propensity to testify truthfully.

United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978).

The question is whether Rule 609(a)(2) should be amended to clarify that theft-based crimes are not included. Cutting against an amendment is the fact that the Advisory Committee twice passed on dealing with the problem even though it was amending the rule in other respects. The case law is not different now than it was back then --- there are only a few reported cases in which theft-based crimes have been found automatically admissible. However, if the Committee thinks that it is finally time to treat theft-based convictions specifically in the rule, it might be amended like this:

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement. For purposes of this rule, an act of theft may not be treated as a dishonest act or false statement.

property is not per se a crime of dishonesty for purposes of Rule 609(a)(2)); *United States v. Smith*, 179 U.S. App. D.C. 162, 551 F.2d 348, 362 (1976) (attempted robbery does not involve dishonesty or a false statement); *United States v. Washington*, 702 F.3d 886 (6th Cir. 2012) (theft of services was not automatically admissible to impeach, because it was a crime of stealth, not a crime involving an active element of misrepresentation); *United States v. Johnson*, 388 F.3d 96 (3d Cir. 2004) (conviction for purse snatching was improperly admitted under Rule 609(a)(2)).

V. Rule 609(b), Timing of the Conviction

Rule 609(b) provides a more exclusionary test for old convictions that are offered to impeach a witness's character for truthfulness. Admitting an old conviction requires the court to find that "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." (This is the reverse of the Rule 403 test.)

Timing is important because if the conviction is covered by Rule 609(b), the balancing test is tilted toward exclusion. But if the conviction is instead covered by Rule 609(a), then: 1) falsity-based convictions are automatically admissible; 2) non-falsity based convictions against a criminal defendant are admissible if the probative value outweighs prejudice; and 3) non-falsity based convictions of all other witnesses are covered by the inclusive Rule 403 test.

"Old" in Rule 609(b) means that "more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later." So we know what the starting point is. But the rule does not speak to the endpoint. In response to this ambiguity, courts have adopted at least three different approaches for marking the endpoint. The Third, Fifth, Seventh, Eighth, and Ninth Circuits have each stated that the endpoint is the date the trial in question begins.¹⁹ In contrast, the Fifth Circuit (in conflict with another panel) and various district courts have ended the measuring period on the date the relevant witness testifies.²⁰ Finally, the Seventh and Eighth Circuit have also, on occasion, marked the endpoint as the date on which the offense being litigated was committed.²¹

This is a pretty narrow question. It clearly does not come up often --- it involves only a witness whose conviction's timing is so close to ten years as to fall off the 609(a) cliff somewhere between the offense and the testimony.

If, however, the Committee is interested in clarifying the timing question, it would seem that the date of the witness's testimony is the best fit with the policy of Rule 609. Rule 609 allows convictions for impeachment of the witness's character for truthfulness – the relevant time for that

¹⁹ See *United States v. Hans*, 738 F.2d 88, 93 (3d Cir. 1984) (measuring whether conviction/release "occurred within 10 years of the trial"); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1075 (5th Cir. 1982) (measuring "ten years prior to trial"); *United States v. Thompson*, 806 F.2d 1332, 1339 (7th Cir. 1986); *United States v. Cobb*, 588 F.2d 607, 612 n.5. (8th Cir. 1978) (measuring until "the date of [defendant's] trial"); *United States v. Portillo*, 633 F.2d 1313, 1323 n.6. (9th Cir. 1980) (measuring until "the time of trial").

²⁰ See *United States v. Cathey*, 591 F.2d 268, 274 (5th Cir. 1979); *United States v. Pettiford*, 238 F.R.D. 33, 37 (D.D.C. 2006); *Kiniun v. Minn. Life Ins. Co.*, 2013 U.S. Dist. LEXIS 196081, at *12 n.10 (N.D. Fla.); *United States v. Brown*, 409 F. Supp. 890, 894 (W.D.N.Y. 1976).

²¹ See *United States v. Foley*, 683 F.2d 273, 277 (8th Cir. 1982); *Rodriguez v. United States*, 286 F.3d 972, 983 (7th Cir. 2002).

assessment by the factfinder is *when the witness testifies* --- because that is when the jury assesses the witness's character for truthfulness.

There is a risk, though, if the relevant date is the date of testimony. A party who has a witness with a 9-year 360 day-old conviction and wants to protect their witness may delay their testimony until after the 10-year clock runs out. But that same strategic thinking might occur with the trial date, if that date is the endpoint. And in any case, this is a scenario that would seem quite rare.

If the Committee does wish to deal with the Rule 609(b) timing question, the change might look like this:

- (b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if, on the day the witness first testifies, more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
 - (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

VI. Rule 613(b) --- Laying a Foundation with the Witness

Under common law, a party seeking to impeach a witness with a prior inconsistent statement was required to lay a foundation for the statement before introducing it. This was referred to as “the rule in Queen Caroline’s case.” That rule required the cross-examining party to confront the witness directly on cross-examination with the inconsistent statement. At that point, the witness would have an opportunity to admit, explain, repudiate, or deny the statement.

Rule 613(b), on its face, changes the common-law foundation requirements. The rule provides that when a witness is examined concerning a prior statement, this statement need not be shown to the witness at the time of the examination. However, extrinsic evidence of the statement may not be introduced unless the witness is given some opportunity, *at some point in the trial*, to

explain, repudiate, or deny the statement.²² Assuming such an opportunity has been provided, extrinsic evidence of the statement is admissible subject to Rule 403.²³

Despite the language of the rule and the apparent intent of the drafters, many federal courts have held that Rule 613(b) *does not* abolish the traditional common-law requirement of laying a foundation with the witness prior to the introduction of a prior inconsistent statement.²⁴ Other federal courts apply the rule as written and hold that a prior foundation is not required.²⁵ Yet even those courts that read the rule to dispense with a prior foundation requirement nonetheless recognize that a trial court has the power to control the order of proof under Rule 611(a), and that this power can be exercised on a case-by-case basis to require a prior foundation before admitting extrinsic evidence of an inconsistent statement. As the First Circuit stated in *United States v. Hudson*, 970 F.2d 948, 956 n.2 (1st Cir. 1992): “Rule 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law prior foundation requirement when such an approach seems fit.” The *Hudson* Court concluded that Rule 613 “was not intended to eliminate trial judge discretion to manage the trial in a way designed to promote accuracy and fairness.” See also *United States v. Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite Rule 613 “to conclude

²² See, e.g., *United States v. McCall*, 85 F.3d 1193 (6th Cir. 1996) (no error when the government in rebuttal introduced extrinsic evidence of a defense witness’s prior inconsistent statement; while the prosecution did not confront the witness with the prior statement, the defense could have recalled the witness and did not, choosing instead to argue that the government’s impeachment attempt was a failure); *United States v. Hudson*, 970 F.2d 948 (1st Cir. 1992) (foundation for admitting extrinsic evidence of a prior inconsistent statement does not require that the witness have an opportunity to explain or deny the statement before it is introduced; all that is required is that the witness at least be available for recall during the course of the trial; a trial court can exercise its discretion to require a prior confrontation, but here the court labored under a misapprehension of law that a prior confrontation was always required; therefore it was reversible error to exclude a prior inconsistent statement of a government witness on the ground that the witness was not confronted with the statement before it was proffered).

²³ See, e.g., *United States v. Watkins*, 591 F.3d 780 (5th Cir. 2009) (after a witness denies making a statement during cross-examination, evidence may be introduced to prove the statement was made, subject to Rule 403); *United States v. Meza*, 701 F.3d 411, 426 (5th Cir. 2012) (no error in allowing the prosecution to introduce extrinsic evidence of a prior inconsistent statement where the witness conceded making the statement but attempted to explain it away: Rule 613(b) “makes no exception for prior inconsistent statements that are explained instead of denied”).

²⁴ The following cases are among those that retain the common-law rule: *United States v. DiNapoli*, 557 F.2d 962 (2d Cir. 1977); *United States v. Sutton*, 41 F.3d 1257 (8th Cir. 1994) (the trial judge properly excluded testimony as to inconsistent statements by a prosecution witness on the ground that the witness had not been given an opportunity to explain or deny the prior statement while on the witness stand); *United States v. Cutler*, 676 F.2d 1245 (9th Cir. 1982); *United States v. Bonnett*, 877 F.2d 1450, 1462 (10th Cir. 1989) (“before a prior inconsistent statement may be introduced, the party making the statement must be given the opportunity to explain or deny the same”).

²⁵ The following cases are among those holding that Rule 613(b) dispenses with a general prior foundation requirement: *United States v. McGuire*, 744 F.2d 1197 (6th Cir. 1984); *United States v. Young*, 86 F.3d 944 (9th Cir. 1996) (rejecting the argument that an inconsistent statement was inadmissible because no foundation was laid on cross-examination; all that is required is that the witness have an opportunity to explain or deny the statement at some point, and such an opportunity can be provided by recalling the witness); *Wammock v. Celotex Corp.*, 793 F.2d 1518 (11th Cir. 1986) (noting, however, that prior foundation is the preferred method).

that in particular circumstances the older approach should be used in order to avoid confusing witnesses and jurors”).²⁶

As a practical matter, in most cases of prior inconsistent statement impeachment, the foundation will be developed in the same manner as it is in the traditional common-law jurisdiction. That is because laying the foundation while the witness is on the stand testifying will usually prove to be the most efficient way of proceeding. For one thing, presenting the statement to the witness may be needed to satisfy authentication or best evidence concerns. And at any rate it may be risky to dispense with a prior foundation, because the witness could become unavailable before the statement is proffered. If that occurs, the admissibility of the extrinsic evidence is subject to the discretion of the court; and that discretion is rarely exercised in favor of a party who had a chance to confront the witness with the statement and did not do so.²⁷

The Eleventh Circuit noted the prudence of adhering to the common-law procedure as a practical matter in *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1522 (11th Cir. 1986):

Rule 613(b) does not supplant the traditional method of confronting a witness with his inconsistent statement prior to its introduction as the preferred method of proceeding. In fact, where the proponent of the testimony fails to do so, and the witness subsequently becomes unavailable, the proponent runs the risk that the court will properly exercise its discretion to not allow the admission of the prior statement. For this reason, most courts consider the touchstone of admissibility under rule 613(b) to be the continued availability of the witness for recall to explain the inconsistent statements.

On the merits, the more flexible foundation requirements established by the text of Rule 613(b) were a good faith attempt to deal with some legitimate problems. The common-law rule is in some cases a trap for the unwary: (1) statements might be excluded due to an inadvertent failure to lay a foundation at the time the witness testifies; (2) problems are presented when inconsistent statements are discovered after the witness testifies; and (3) there is the danger under the common-law rule of prematurely alerting collusive witnesses to the evidence available for impeachment.

²⁶ The possibly problematic use of Rule 611(a) to override the requirements of Rule 613(b) is discussed in the memo on Rule 611(a) in this agenda book.

²⁷ See, e.g., *United States v. Schnapp*, 322 F.3d 564 (8th Cir. 2003) (no error in prohibiting the defendant from introducing an inconsistent statement from a prosecution witness; counsel had not asked the witness about the statement either on cross-examination or when recalled by the defense, and it was well within the judge’s discretion not to permit deviation from the traditional procedure of providing a witness an opportunity to explain or deny the statement); *In re Nautilus Motor Tanker Co.*, 862 F. Supp. 1251 (D.N.J. 1994) (inconsistent statements are not admissible where the plaintiff did not try to offer them until the end of the trial, and at that point there was no opportunity to recall the witnesses; the court chose not to exercise its discretion to dispense with the witness’s explanation or denial).

However, these problems could probably be better handled by a provision codifying the common-law rule, with the textual proviso that the trial court has discretion to dispense with the traditional foundation requirement when that is necessary in the interests of justice. This textual solution would be similar to that provided in Rule 611(b), which recognizes the merits of the common-law rule of scope limitations on cross-examination, but which nonetheless permits the trial court in its discretion to dispense with the rule in appropriate circumstances.

The prior foundation requirement has its virtues. For example, it avoids the cost and delay of providing extrinsic evidence of the prior inconsistent statement if the witness, when confronted with it, admits having made it. Also, it avoids a certain type of trial-by-ambush. Judge Selya, concurring in *United States v. Hudson*, 970 F.2d 948, 959 (1st Cir. 1992), has summarized the virtues of the common-law approach as follows:

[The common-law rule] works to avoid unfair surprise, gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency, facilitates judges' efforts to conduct trials in an orderly manner, and conserves scarce judicial resources. At the same time, insistence upon a prior foundational requirement, subject, of course, to relaxation in the presider's discretion if the interests of justice otherwise require, does not impose an undue burden on the proponent of the evidence.

If the Committee decides to consider some kind of amendment to deal with whatever dispute in the courts exists regarding Rule 613(b), the question is what such an amendment might look like. If the problem is that some courts are not adhering to the explicit language of the rule, and the Committee thinks that they should be doing so, then there is not really much to be done about that.²⁸ But if the problem is that the Rule itself has made the wrong choice, and that there should be a return to the common-law rule (while allowing for some flexibility) then the rule might be amended as follows:

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement ~~is admissible only if~~ should not be admitted unless the witness is given an opportunity to explain or deny the statement before it is introduced. But the court may in its discretion delay the witness's 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).

²⁸ The situation is unlike the problem with Rule 702, where some courts have ignored the fact that the admissibility requirements must be proved by a preponderance of the evidence. The preponderance of the evidence standard is not explicitly placed in the text of Rule 702.

VII. Rule 701 – The Line Between Lay and Expert Testimony

In 2000, Rule 701 was amended to address the problem of parties calling expert witnesses but styling them as lay witnesses. The Advisory Committee determined that it was an abuse to evade the requirements of Rule 702 (and its accompanying disclosure requirements) by offering expert testimony in lay clothing. Rule 701 was amended to provide that testimony of a purported lay witness was regulated by Rule 702 to the extent that it was based on “scientific, technical, or other specialized knowledge” --- drawing that phrase from Rule 702. The Committee was quite aware that the line between expert and lay testimony is often fuzzy --- and that the term “specialized knowledge” is subject to differing interpretations. **The Committee Note to the 2000 amendment attempted to provide some guidance:**

Rule 701 has been amended to eliminate²⁹ the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness’s testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. *See Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that “there is no good reason to allow what is essentially surprise expert testimony,” and that “the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process”). *See also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 “subverts the requirements of Federal Rule of Criminal Procedure 16 (a)(1)(E)”).

The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g., United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules

²⁹ That turned out to be overly optimistic.

on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness's testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the “prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.” *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp.* 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook*, 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra*.

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on “special knowledge.” In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony “results from a process of reasoning familiar in everyday life,” while expert testimony “results from a process of reasoning which can be mastered only by specialists in the field.” The court in *Brown* noted that a lay witness with experience could testify that a substance

appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

It is definitely fair to state that there is a conflict in the courts in navigating the line between lay and expert testimony. Obviously the cases are highly fact-dependent, but in the hundreds of reported cases on this point since 2000, you can definitely find similar fact situations decided differently --- that is to say, one case holds that the opinion should have been evaluated as expert testimony and another says the same opinion was properly admitted as lay witness testimony. Most of the cases in the criminal context are about law enforcement witnesses testifying to matters such as drug code, gang structure, drug conspiracy operations, etc. So as an example of conflict, several circuits have permitted non-expert testimony on the meaning of codewords or ambiguous statements, with the witness having only reviewed transcripts and intercepted calls (i.e., without personal knowledge of the code), and relying for their opinion on their general experience.³⁰ But others have barred lay testimony derived from a review of information gathered during an investigation because the witness did not participate in or observe the relevant conversation as it was occurring, and did not have personal knowledge of the facts they relayed.³¹ These latter courts properly distinguish between “knowledge derived from previous professional experience” (which is expert testimony) and “knowledge derived from the investigation at hand” (which is lay testimony).³²

³⁰ See *United States v. El-Mezain*, 664 F.3d 467, 515 (5th Cir. 2011); *United States v. Rollins*, 544 F.3d 820, 831–33 (7th Cir. 2008); *United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007).

³¹ See *United States v. Johnson*, 617 F.3d 286, 293–294 (4th Cir. 2010) (law enforcement agent's purported lay opinion testimony regarding his interpretation of wiretapped telephone calls was erroneously admitted, as the agent did not participate in surveillance that produced wiretapped calls, did not personally observe events and activities discussed in recordings, and the opinions were based on post-hoc assessments of calls rather than his own perceptions); *United States v. Peoples*, 250 F.3d 630, 639–42 (8th Cir. 2001) (“Agent Neal lacked first-hand knowledge of the matters about which she testified. Her opinions were based on her investigation after the fact, not on her perception of the facts. Accordingly, the district court erred in admitting Agent Neal's opinions about the recorded conversations.”). See also *United States v. Malagon*, 964 F.3d 657 (7th Cir. 2020) (“As a party to the conversation, [the witness’s] testimony as to the meaning of the words used by the parties in the conversation falls within Rule 701” and “[n]othing in his testimony indicates that his testimony is based on specialized knowledge, as opposed to his understanding of the conversation as a participant in it.”).

³² The quoted language, and the distinction, is found in *United States v. Cristerna-Gonzalez*, 962 F.3d 1253 (10th Cir. 2020) (finding testimony about movement of drugs and meaning of coded terms to be expert testimony because it was “based on prior training and experience rather than what was learned in the investigation of the drugs in the [car]”).

And then there are courts that distinguish problematically between specialized lay testimony and specialized expert testimony --- despite the fact that testimony based on “specialized knowledge” is covered by Rule 702. *See, e.g., United States v. Savage*, 970 F.3d 217 (3rd Cir. 2020) (“We require lay testimony to be grounded either in experience or specialized knowledge.”).

If the Committee is interested in revisiting the line between lay and expert testimony, one solution that might be considered is to provide, in rule text, some guidance in the rule rather than simply to replicate the language of Rule 702 (“scientific, technical or specialized knowledge”) as the 2000 amendment did. In 2000, there was a lot of helpful guidance in the Committee Note, but maybe the situation can be improved if some of the relevant considerations are lifted to rule text.

In terms of guidance, the Committee might consider a test that distinguishes expert and lay testimony based on the different process necessary to come to an expert conclusion. As Professor Ed Imwinkelried notes, what differentiates lay witness testimony from expert testimony is the *reasoning process* that underlies each. Professor Imwinkelried elaborates as follows:

[T]o draw the line and intelligently analyze the admissibility of lay and expert opinions, the judge should focus on the reasoning processes underlying the two types of opinions. . . . [T]here are fundamental epistemological differences between the two types of opinions. While lay witnesses form their generalizations primarily through firsthand knowledge, out of necessity experts rely on other, hearsay sources of information. Like Newton, to some extent, every expert stands on the shoulder of the giants who preceded him or her. Furthermore, although lay witnesses must acquire their information about the case-specific facts to be evaluated exclusively through personal knowledge, Federal Rule of Evidence 703 permits experts to draw on a much wider range of sources of information. Once the judge appreciates the basic differences between the reasoning process underlying a lay opinion and that supporting an expert opinion, the analysis is fairly straightforward. By carefully dissecting the reasoning process underpinning the witness's opinion, the courts will not only improve the courts' ability to distinguish between lay and expert opinions * * * [T]he judge ought to ask: What is the warrant for that conclusion? How did you reason to that opinion?

Edward J. Imwinkelried, *Distinguishing Lay from Expert Opinion: The Need to Focus on the Epistemological Differences Between the Reasoning Process Used by Lay and Expert Witnesses*, 68 SMU L. REV. 73, 85–86 (2015).

If an amendment were to be proposed along the lines of Professor Imwinkelried’s reasoning, it might look like this:

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; ~~and~~
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702; and
- (d) drawn from the witness's involvement with the specific facts at issue.

But on the other hand, because the line between lay and expert witnesses is so fuzzy, and because the term "specialized knowledge" is not exactly precise, this might be one of those areas in evidence that are better left alone. It is possible that no textual change will be able to fix it any better than it was fixed in 2000. For example, the phrase I chose above—"drawn from the witness's involvement with the facts at issue" --- may not clarify much. What is "involvement"? Is there a better word that will capture the epistemological difference between lay and expert opinions?

If the Committee wants a more in-depth workup of the cases and problems before deciding how to proceed, I can provide that for the next meeting.

VIII. Rule 801(d)(2) --- Prior Statements of Experts

Assume that an expert report contains a statement that the opposing party wants to offer as proof of a fact. This is hearsay. But might it be admissible as the statement of an agent of the party-opponent? Some courts have held that a retained expert is an agent of the party-opponent.³³ But other courts have disagreed. The leading case to the contrary is Judge Becker's opinion in *Kirk v. Raymark Indus.*, 61 F.3d 147, 164 (3d Cir. 1995). Judge Becker reasoned as follows:

³³ See *Collins v. Wayne Corp.*, 621 F.2d 777, 780 (5th Cir. 1980) (admitting the statement under 801(d)(2)(C)); *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.)*, 534 F.3d 986, 1016 (9th Cir. 2008) (same); *Aliotta v. AMTRAK*, 315 F.3d 756, 762–63 (7th Cir. 2003) (admitting the statement under 801(d)(2)(D)).

[D]espite the fact that one party retained and paid for the services of an expert witness, expert witnesses are supposed to testify impartially in the sphere of their expertise. Thus, one can call an expert witness even if one disagrees with the testimony of the expert. Rule 801(d)(2)(C) requires that the declarant be an agent of the party-opponent against whom the admission is offered, and this precludes the admission of the prior testimony of an expert witness where, as normally will be the case, the expert has not agreed to be subject to the client's control in giving his or her testimony. See *Sabel v. Mead Johnson & Co.*, 737 F.Supp. 135, 138 (D.Mass.1990). Since an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent. See Restatement (Second) of Agency § 1 cmt. a (1958) (“The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act.”).

The conflict in the case law with regard to experts as agents is not as stark as it seems. Many of the cases holding that experts are agents involve experts who actually were hired by the principal to investigate or provide recommendations regarding a matter --- eventually they were called to testify to what they found. Judge Becker describes one opinion as follows:

In that case the court made a finding that the expert witness was an agent of the defendant and the defendant employed the expert to investigate and analyze the bus accident. The court determined that in giving his deposition, the expert was performing the function that the manufacturer had employed him to perform. As such, the court concluded that the expert's report of his investigation and his deposition testimony in which he explained his analysis and investigation was an admission of the defendant.³⁴

A similar result would occur if the expert was an employee. The expert's opinion would be admissible over a hearsay objection under Rule 801(d)(2)(C)/(D).

Given the fact-dependent nature of the question, it is not clear that any amendment would be useful in delineating when an expert is an agent of the principal and when she is not for purposes of Rule 801(d)(2). It would seem inappropriate to institute a bright-line rule that an expert is either always or never an agent of the principal. And drafting language for some middle, case-by-case determination seems to be getting into the kind of weeds that are usually avoided in drafting the Evidence Rules. But if the Committee disagrees and wishes to investigate the matter further, a memorandum and draft amendment will be prepared for discussion at the next meeting.

³⁴ The case described is *Collins v. Wayne Corp.*, 621 F.2d 777, 780 (5th Cir. 1980).

IX. Admissibility of Hearsay Statements by Government Agents under Rule 801(d)(2)(D)

There is some dispute in the courts about whether a government official's hearsay statement is admissible against the government under Rule 801(d)(2)(D). In one of the earliest cases on this subject, Judge Bazelon reasoned that the federal government is a defendant's party-opponent in a criminal trial, and therefore statements made by government agents can be admitted against that opponent.³⁵ Similarly, the Ninth Circuit found statements from a Department of Transportation memorandum to be admissible against the government under FRE 801(d)(2)(D).³⁶ The Second Circuit has used similar reasoning to hold that a prosecutor's hearsay statements can be offered against the government as party-opponent statements --- at least in cases in which the prosecutor is directly involved.³⁷ Other courts disagree, holding that in criminal cases, government employees and agents cannot "bind the sovereign."³⁸

While it looks like there is a conflict at first glance, there in fact appears to be a case-by-case approach on attributing statements to the government on the basis of agency. The line in most cases appears to be that statements made in or to a court are admissible over a hearsay objection, while statements that are not made in a court context are usually excluded.³⁹ Decisions consistent with this line include exclusion of a report issued by an Inspector General not attendant to a litigation,⁴⁰ and exclusion of statements made by a government informant during an investigation.⁴¹

There may be some value in providing guidance on when statements of a government agent can be attributed to the government. There also may be value in expanding the notion of attribution. There is an argument that it is unfair for private parties litigating against the government to have all manner of their agents' statements admissible against them, while the statements of the

³⁵ See *United States v. Morgan*, 189 U.S. App. D.C. 155 n.10., 581 F.2d 933, 937 (1978).

³⁶ See *United States v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989).

³⁷ See, e.g., *United States v. Salerno*, 937 F.2d 797, 811–12 (2d Cir. 1991).

³⁸ See *United States v. Pandilidis*, 524 F.2d 644, 650 (6th Cir. 1975); *United States v. Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997) (suggesting without deciding that a prosecutor cannot bind the sovereign and acknowledging the divergence from other courts); *United States v. Kampiles*, 609 F.2d 1233, 1246 (7th Cir. 1979) ("Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party. Nothing in the Federal Rules of Evidence suggests an intention to alter the traditional rule and defendant has cited no truly contrary case indicating such a trend.").

³⁹ See *United States v. Yildiz*, 355 F.3d 80, 82 (2d Cir. 2004).

⁴⁰ See *United States v. Garza*, 448 F.3d 294, 298-99 (5th Cir. 2006).

⁴¹ See *Lippay v. Christos*, 996 F.2d 1490, 1497-98 (3d Cir. 1993).

government agents are barred. But the argument against any amendments are three, at least: 1) attribution is largely a case-by-case approach that will be hard to describe; 2) in the end there is not that much of a difference among the cases; and 3) writing a rule specifically for government agents --- even one that says simply “including government agents” --- gets into the weeds that the Evidence Rules usually avoid.

X. Rule 803(3) --- State of Mind Statements Offered to Prove the Conduct of a Non-Declarant

In *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), the state of mind exception to the hearsay rule was applied to admit a party’s statement of intent to travel to a location, as evidence that he subsequently traveled toward that destination. The opinion went on to say in dicta that a statement mentioning a traveling companion would likewise be admissible to show that the *companion* had traveled with the declarant.

The use of a state of mind statement to prove the conduct of a non-declarant is problematic, so it is not surprising that there is a split in the courts on the subject. The rationale for extending the state of mind exception to prove the conduct of a non-declarant is dubious. The Committee Note to Rule 803(3) states that the basis for admitting state of mind statements is that the declarant has a unique perspective into his own state of mind. This rationale obviously does not apply to the declarant’s conclusion about the state of mind of *someone else*. A declarant might have unique perception of his own state of mind, but he has no special perspective into the thoughts and feelings of another person.

The report of the House Judiciary Committee regarding Rule 803(3) stated that the Committee intended that Rule 803(3) be construed to limit the *Hillmon* doctrine “so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.” The Senate Report made no mention of this limitation. And no such limitation was specifically included in the text of the rule.

The federal courts have interpreted this ambiguous legislative history in differing ways. Some courts have adopted the House limitation and refused to admit a statement that the declarant intended to meet with a third party as proof that the declarant and the third party did indeed meet.⁴²

⁴² See, e.g., *Gual Morales v. Hernandez Vega*, 579 F.2d 677 (1st Cir. 1978) (a witness’s statement that “I intend to see [the defendant]” was not admissible when offered to prove that the witness met with the defendant); *United States v. Jenkins*, 579 F.2d 840 (4th Cir. 1978) (accepting the House limitation on *Hillmon*).

One court has permitted the declarant's statement to be used to show another's conduct, at least where the trial court gives a limiting instruction that the statement cannot be used to prove the intent or conduct of another, but can only be used for the inference that the declarant carried out his intended action (though that instruction seems to work at cross-purposes with the holding that the state of mind statement can be used to prove the conduct of a non-declarant).⁴³ The Second Circuit has taken a compromise approach, allowing a declarant's statement of intent to be admitted to prove the conduct of a non-declarant only "when there is independent evidence which connects the declarant's statement with the non-declarant's activities."⁴⁴ Thus as to state of mind statements, the Second Circuit has incorporated a corroborating circumstances requirement, akin to that in Rule 804(b)(3) --- without any textual support for doing so.

On the merits, the best result without doubt is that a state of mind statement should not be admissible to prove the conduct of a non-declarant. Just because somebody knows their own state of mind (a dubious prospect to start with) doesn't mean that they have any special insight into the state of mind (much less conduct) of another person. Potentially, the hearsay rule is rendered a nullity if state of mind statements are admitted to prove the conduct of another --- because every person's statement is in some way reflective of a state of mind.

The compromise measure of the Second Circuit --- allowing such statements to prove the conduct of another if there are corroborating circumstances indicating trustworthiness --- is questionable for at least three reasons. First, it is subject to being applied in a flimsy way. Second, it is lifted from Rule 804(b)(3), but it obviously only applies in that rule if the declarant is shown to be unavailable. As applied to Rule 803(3), a state of mind statement could be offered to prove the conduct of a non-declarant without the proponent having to try to produce the declarant. And third, the declaration against interest exception is based on a more solid ground of reliability to start with --- that people don't say disserving things unless they are true. The basis for the state of mind exception --- that people know their own state of mind --- is dubious.⁴⁵

⁴³ See, e.g., *United States v. Astorga-Torres*, 682 F.2d 1331 (9th Cir. 1982).

⁴⁴ *United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir. 1987) (an informant's statement that he was going to meet Delvecchio to complete a drug transaction was inadmissible where there was no independent evidence of Delvecchio's presence at the meeting). Compare *United States v. Sperling*, 726 F.2d 69 (2d Cir. 1984) (an informant's statement that he planned to meet Sperling to complete a drug transaction was admissible where the declarant's statement of intent to meet with the defendant was confirmed by later eyewitness testimony that the meeting actually took place).

⁴⁵ For more on the use of state of mind statements to prove the subsequent conduct of another, see Lynn McLain, "I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—and the Role of the Due Process Clause as to Nontestimonial Hearsay, 32 *Cardozo L. Rev.* 373 (2010) (advocating that the state of mind exception should not be used to prove the conduct of a non-declarant).

If an amendment were proposed to preclude a state of mind statement from being offered to prove the conduct of a non-declarant, it might look like this:

(3) ***Then-Existing Mental, Emotional, or Physical Condition.*** A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including:

(A) a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will; or

(B) a statement offered to prove the state of mind or conduct of someone other than the declarant.

XI. Rule 803(3) --- A Spontaneity Requirement for State of Mind Statements

Rule 803(3) does not guarantee that the declarant’s state of mind will be spontaneous in any meaningful sense. All it requires in text is that the statement be one that is “then-existing” --- meaning a statement like “I love my spouse” is admissible to prove that the declarant was in love with the spouse at the time of the statement, whereas “I loved my spouse yesterday” is not admissible to prove that fact under Rule 803(3).⁴⁶ But this “then-existing” requirement is different from a “spontaneity” requirement. So there is a substantial risk under the rule that a declarant will make a statement about a fabricated state of mind. For example, in *United States v. Lawal*, 736 F.2d 5 (2d Cir. 1984), the defendant arrived at Customs after a flight from Nigeria, and drugs were found in his luggage. At that point, the defendant made a “spontaneous” statement of anger at being “set up” and duped by a person in Nigeria. At trial, the defendant offered this statement to prove that he had no intent to smuggle drugs. The trial court excluded the statement on the ground that it was unreliable. But the Court of Appeals held that this was error. The court reasoned that the statement expressed the declarant’s then-existing state of mind (of innocence), and this is all that the Rule requires. The court concluded that statements that fit the definition of Rule 803(3) cannot be excluded as hearsay, even if they are self-serving and made under untrustworthy circumstances; the trial court does not have the discretion to exclude untrustworthy statements unless there is language in the rule supporting that exclusion. Thus, the actual untrustworthiness of a statement of the declarant’s existing state of mind goes to the weight and not the admissibility

⁴⁶ See, e.g., *United States v. Hayat*, 710 F.3d 875 (9th Cir. 2013) (statement by the defendant that he had never intended to go to a terrorist training camp was not admissible under Rule 803(3) because it was referring to a past, not a present, state of mind).

of the statement. *See also United States v. DiMaria*, 727 F.2d 265, 271 (2d Cir. 1984) (Friendly, J.) (exculpatory statement of state of mind made under untrustworthy circumstances is admissible under Rule 803(3): “False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that rule are read to mean what they say, its truth or falsity is for the jury to determine.”); *United States v. Peak*, 856 F.2d 825 (7th Cir. 1988) (an exculpatory statement by the defendant was held admissible under Rule 803(3) despite the contention that the defendant had an opportunity to fabricate a then-existing state of mind).

Despite the rule text, some courts have held that statements of a state of mind made without spontaneity and with the likelihood of fabrication are not admissible.⁴⁷ They reason that spontaneity is an inherent part of the rationale for the exception, albeit not stated in the text of the rule. Exclusion in these courts is particularly likely with respect to exculpatory statements of criminal defendants made under circumstances in which the defendant has a reason to lie. The problem with courts requiring spontaneity is that, while trustworthiness may be a part of the *rationale* for Rule 803(3), the rule *as written* does not contain a provision for excluding untrustworthy statements that would otherwise fall within the hearsay exception—in contrast to some other hearsay exceptions such as Rule 803(6), which contain specific language excluding untrustworthy statements. All that is required under Rule 803(3) is that the statement must be of a “then-existing” state of mind; and the defendant’s statement in a case like *Lawal* clearly meets this requirement (“I feel so innocent right now”). Courts are not allowed, outside the rulemaking process, to impose textual limitations on hearsay exceptions.

If the Committee is interested in exploring an amendment, there are two possibilities: One is to codify *Lawal* more explicitly, and the other is to add a spontaneity requirement to the exception. The latter approach seems preferable, because the language of Rule 803(3) is simply inadequate to guarantee the trustworthiness that the hearsay exceptions are supposed to provide. A trustworthiness add-on might look like this:

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A spontaneous statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant’s will.

⁴⁷ *See, e.g., United States v. Reyes*, 239 F.3d 722 (5th Cir. 2001) (no error in excluding an exculpatory statement by a criminal defendant; the defendant suspected that the person he was speaking to was a government informant and that the conversation was being monitored; the defendant’s statements were more self-serving than candid, and lacked the spontaneity required for admission under Rule 803(3)); *United States v. Faust*, 850 F.2d 575 (9th Cir. 1988) (an exculpatory letter written by the defendant was not admissible under Rule 803(3) because the defendant had time to reflect in drafting the letter, and thus any evidence of state of mind provided by the letter was unreliable).

XII. Rule 803(4) --- Statements by Children Regarding Sexual Abuse

Rule 803(4) provides a hearsay exception for statements made for, and reasonably pertinent to, “medical diagnosis or treatment.” The intent of the Advisory Committee was to preclude statements attributing fault --- the example given in the original Advisory Committee Note is that a statement “a car hit me after running a red light” would not be admissible to show that the driver was negligent. That said, courts have, under this exception, admitted the accusatory statements of children who relate acts of sexual abuse. So, a statement like “my dad sexually abused me,” made to medical personnel, has been admitted under Rule 803(4) to prove that the father did the act. The reasoning is that the accusation is pertinent to treatment, because the doctor’s treatment includes protecting the child from further harm.

The conflict in the case law is not about the admissibility of a child’s accusation per se. All courts who have addressed the question have held that such an accusation can be covered by the “pertinent to medical treatment” language of Rule 803(4). The conflict is that some circuits have added an additional requirement intended to preserve the reliability guarantees of the hearsay exception in the case of child victims. In these circuits, the prosecution must show that the child understood that she was speaking to medical personnel and appreciated that telling the truth was necessary in order to get properly treated. The leading case for this point of view is *United States v. Renville*, 779 F.2d 430, 438 (8th Cir. 1985) (child’s statement attributing fault is admissible under Rule 803(4) only “where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding.”). A good application of the *Renville* standards is found in *United States v. Sumner*, 204 F.3d 1182, 1185 (8th Cir. 2000), where the court found that a child’s statement to a doctor accusing the defendant of sexual abuse was erroneously admitted under Rule 803(4):

Although Dr. Zitzow explained that he was a doctor, he did not discuss with [the victim] the need for truthful revelations or emphasize that the identification of the abuser was important to Dr. Zitzow’s attempts to help her overcome any emotional trauma resulting from the abuse to which she had been subjected.

The Tenth Circuit follows *Renville* but with a twist: it places the burden on the defendant to provide evidence that the child-declarant did not understand she was being treated by doctors and needed to be truthful. *United States v. Pacheco*, 154 F.3d 1236 (10th Cir. 1998).

Other courts admit statements of child-declarants without the *Renville* guarantee. These courts are more flexible and look to the circumstances to determine whether the child was seeking treatment or diagnosis. *See, e.g., United States v. Kootswatewa*, 893 F.3d 1127 (9th Cir. 2018) (child’s statements to a nurse practitioner regarding sexual abuse were admissible; an adequate foundation for the treatment motive was laid by a showing of the context in which the statement was made --- the statements were made in response to questions from a medical official in a medical facility); *Danaipour v. McLarey*, 386 F.3d 289, 296, n.1 (1st Cir. 2004) (rejecting as

“unnecessarily inflexible” the rule that statements by children are admissible only where the physician makes clear to the child that truthfully identifying the abuser is necessary to diagnosis and treatment: “There are many ways in which a party wishing to enter into evidence a statement under Rule 803(4) can demonstrate that the statement was made for the purpose of diagnosis and treatment.”).

So there is a dispute in the courts about the treatment of child-victim statements of sexual abuse under Rule 803(4). But an amendment may not be an ideal solution. The cases seem inherently fact-based. And more importantly, amending Rule 803(4) to cover a specific kind of case like a prosecution for child sexual abuse would go to a level of detail that is in tension with the general approach of the Federal Rules of Evidence. The Committee passed on a proposal to adopt a rule regulating forensic evidence on the ground that it was specifically directed to one type of evidence --- thus *too* specific. An amendment to cover child sexual abuse cases is even more refined --- it applies to one type of case. Of course it is true that Rules 412-415 are tied to specific cases. But Rule 412 is well-steeped in the policy of protecting victims of sexual assault. An amendment to Rule 803(4) would be much narrower, as it would cover the treatment of one type of statement in one type of factual situation. And as to Rules 413-415, they were directly enacted by Congress --- over the objection of the Advisory Committee, which argued that the rules were contrary to the generalized approach of the Federal Rules of Evidence.

As discussed above, there may come a time when it makes sense to have a whole new article of the Federal Rules of Evidence to deal with specific kinds of cases or specific kinds of evidence. That time may be now. If so, the treatment of statements made to doctors by child-victims may be a good candidate for an amendment, given the conflict in the case law. But it does not appear to fit in Rule 803(4).

XIII. Rule 804(b)(1) Predecessor-in-Interest Requirement in Civil Cases

Rule 804(b)(1) provides that prior testimony is admissible if it is “offered against a party who had --- or, in a civil case, whose predecessor in interest had --- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.” There is a conflict in the case law about the meaning of the term “predecessor in interest” when prior testimony is offered in a civil case against a litigant who was not a party in the prior proceeding.⁴⁸ Most courts have held that a

⁴⁸ The possibility of using prior testimony against a party that did not actually cross-examine the declarant previously is limited to civil cases; extending admissibility to a criminal case would violate a defendant’s right to confrontation,

prior cross-examination can bind a new party if the prior cross-examiner had a similar motive and opportunity to cross-examine the declarant as the new party would have if the declarant were available. The basic question for these courts is whether the prior cross-examiner did as good a job as the new party could have expected to do if the witness were available. The leading case is *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), in which the Third Circuit construed the predecessor-in-interest language as mandating only a “sufficient community of interest” between the prior litigant and the party against whom the hearsay is offered. The justification for this position is that if the prior development of the testimony was as effective and thorough as the subsequent party could expect to have done, it is not unfair to admit the testimony against that later party. At the very least, the opponent should have to present a credible argument that it would develop the testimony differently, and more effectively, if the declarant were available to testify in the present proceeding.⁴⁹

There are a few opinions of district courts that interpret “predecessor-in-interest” to mean something closer to the common law concept of privity.⁵⁰ Finally, there is one opinion in which the court favored a strict construction of the “predecessor-in-interest” requirement of Rule 804(b)(1), but nonetheless admitted prior testimony under the residual exception as a “near miss”—so long as the party’s development of the testimony was effective enough to bind the party against whom the testimony is now offered.⁵¹

especially after *Crawford v. Washington*, 541 U.S. 36 (2004) (finding that testimonial hearsay cannot be admitted against a defendant unless the *defendant* is provided the opportunity to cross-examine the declarant).

⁴⁹ See, e.g., *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 283 (4th Cir. 1993) (in a product liability case resulting from asbestos exposure, the court held that a deposition from another asbestos case was properly admitted against the plaintiff as prior testimony, even though she had no relationship to the plaintiff in that prior litigation; the party against whom the deposition is offered “must point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination”; the plaintiff in this case was in the same situation with respect to asbestos exposure as the plaintiff in the case in which the deposition was taken); *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983) (deposition from a prior litigation is admissible against a nonparty to that litigation, where the party who cross-examined the deponent had the same goal in cross-examination as the party against whom the deposition is now offered); *Volland-Golden v. City of Chi.*, 89 F. Supp. 3d 983, 987–88 (N.D. Ill. 2015) (“every federal Court of Appeals to address the issue head-on has determined that the term “predecessor in interest” does not invoke the common law concept of privity but rather sets out a more forgiving standard”).

⁵⁰ See *In re Screws Antitrust Litig.*, 526 F. Supp. 1316, 1318–19 (D. Mass. 1981); *Lightsey v. John Crane, Inc.*, 2005 U.S. Dist. LEXIS 51646, at *8–9 (N.D. Ga. Sep. 2, 2005) (“Further, in the absence of a definitive ruling from the Eleventh Circuit, this Court is inclined to give the term “predecessor in interest” [sic] its common definition.”).

⁵¹ *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985) (a deposition was offered against a defendant who was not a party to the litigation in which the deposition was taken; the party who cross-examined the deponent was probably not a predecessor in interest because there was no legal relationship between them; however, because the defendant could have added nothing to the cross-examination that did take place, the deposition was admissible against the defendant under the residual exception, as a “near miss” of the prior testimony exception).

If the Committee decides that it wants to address the “predecessor in interest” language of Rule 804(b)(1), it should definitely do so in accord with the vast majority of cases that have taken a flexible approach. There is no good reason to exclude testimony if the prior party was in the same situation regarding the witness as the new one is, and the new party can point to nothing that it could have pursued that was not pursued. It must be remembered that the alternative to admitting the prior testimony *is no evidence at all*, because the declarant is by definition unavailable.

An amendment to accord with the majority rule might look like this:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, ~~whose predecessor in interest~~ another party had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Maybe there needs to be something added to assure that the development of the testimony by the different party was adequate (or, as effective as the new party’s development would be if it had the chance). Putting this qualifier in the rule presents a drafting challenge. But it can be argued that the qualifier is necessary. It is one thing if the party itself blew the cross-examination the first time around. It’s another thing to say that the new party is bound by a terrible cross-examination that was made by a different party, albeit one with a similar motive and opportunity.

If some qualifier such as “the prior party’s development was as effective as the party could have done” then it might be better drafting to separate civil and criminal cases. The point being that adding an “equal effectiveness” qualifier is a challenge. And given the fact that there is really not much conflict in the results in the cases, there is some doubt on whether the challenge of an amendment is worth the reward.

XIV. Rule 804(b)(1) – Grand Jury Testimony Offered by the Defendant Against the Government

Another circuit split has developed in the application of Rule 804(b)(1) — the hearsay exception for prior testimony — in a relatively narrow fact situation: the prosecutor calls a witness before the grand jury, and the witness gives testimony favorable to the defendant; at trial, the witness is unavailable (usually because he declares the Fifth Amendment privilege and the

government refuses to immunize him) and the defendant offers the grand jury testimony under Rule 804(b)(1).

The 2nd and 1st Circuits have held that exculpatory grand jury testimony is usually inadmissible under Rule 804(b)(1). The D.C. and the 6th and 9th Circuits have held that such testimony is admissible.

The leading Second Circuit case is *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993), in which two witnesses gave grand jury testimony that favored the defendant, then each declared their privilege and refused to testify at trial. The question for the court was whether the prosecutor had a motive to attack the witness at the grand jury that was similar to the motive she would have at trial. The *DiNapoli* court held that generally the prosecutor's motives would be dissimilar. It explained as follows:

The proper approach ... in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding has at a prior proceeding an interest of *substantially similar intensity* to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings — both what is at stake and the applicable burden of proof * * * will be relevant though not conclusive on the ultimate issue of similarity of motive. (Emphasis added).

The *DiNapoli* court held that because the standard of proof at the grand jury is so much lower than that at trial, the level of intensity to attack a witness favorable to the defendant is usually not similar to the level of intensity that would apply at a trial. On the facts of the case, when the witnesses gave exculpatory testimony at the grand jury, there was no doubt about probable cause as to any of the defendants in the case, because they had already been indicted, and the grand jury was simply investigating whether other targets should be indicted. As the court put it, “the grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the [conspiracy] existed and that the defendants had participated in it to commit crimes.” In contrast, at trial, where the government had the burden to prove the defendants guilty beyond a reasonable doubt, the prosecutor would have had a substantial incentive to attack the testimony of any exculpatory witness.

While the *DiNapoli* Court did not establish a bright-line rule, it is clear that, under the Court's decision, exculpatory grand jury testimony will only rarely be admissible against the government under Rule 804(b)(1). A similarity of motive is likely to be found only where the indictment is in doubt because the case as to probable cause is close — in that rare situation, the intensity of interest in attacking an exculpatory witness could be similar to what it would be at a trial.⁵²

⁵² See *United States v. Peterson*, 100 F.3d 7 (2d Cir. 1996) (exculpatory grand jury testimony was not admissible as prior testimony where the evidence before the state grand jury “provided ample probable cause to indict

The First Circuit is in accord with the Second Circuit’s view that the government’s motive to develop testimony at the grand jury is usually not similar to the motive to develop testimony at trial. See *United States v. Omar*, 104 F.3d 519, 522-24 (1st Cir.1997)

In contrast, the D.C. and 6th and 9th Circuits have a bright-line rule that exculpatory grand jury testimony is *always* admissible against the government at trial — i.e., that there is always a similar motive to attack the exculpatory testimony at these two proceedings. See, e.g., *United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990); *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997). This view is explained by the 9th Circuit, which adopted the D.C. Circuit view, in *United States v. McFall*, 558 F.3d 951 (9th Cir. 2009). The *McFall* court analyzed the “similar motive” question in the following passage:

The question is whether the government's motive in examining Sawyer [the exculpatory witness] before the grand jury was sufficiently similar to what its motive would be in challenging his testimony at McFall's trial. Prosecutors need not have pursued every opportunity to question Sawyer before the grand jury; the exception requires only that they possessed the motive to do so.

* * *

As a threshold matter, we must determine at what level of generality the government's respective motives should be compared, an issue that has divided the circuits. . . . In *United States v. Miller*, 904 F.2d 65, 68 (D.C.Cir.1990), the D.C. Circuit compared the government's respective motives at a high level of generality. The *Miller* Court concluded that “[b]efore the grand jury and at trial” the testimony of an unavailable co-conspirator “was to be directed to the same issue — the guilt or innocence” of the defendants — and thus, the government's motives were sufficiently similar. *Id.*; accord *United States v. Foster*, 128 F.3d 949, 957 (6th Cir.1997) (citing *Miller* with approval). . .

In *United States v. DiNapoli*, 8 F.3d 909 (2d Cir.1993) (en banc), in contrast, the Second Circuit required comparison of motives at a fine-grained level of particularity. See *id.* at 912 (“[W]e do not accept the proposition ... that the test of similar motive is simply whether at the two proceedings the questioner takes the same side of the same issue.”); see *id.* (stating that the proper test for similarity of motive is whether the questioner had “a substantially similar degree of *interest* in prevailing” on the related issues at both proceedings) (emphasis added); accord *United States v. Omar*, 104 F.3d 519, 522-24 (1st

Peterson” and therefore the government’s incentive to attack testimony favorable to Peterson was not similar to the incentive it would have at trial).

Cir.1997) (concluding that the government will rarely have a similar motive in questioning a witness before a grand jury as it would have at trial).

* * *

The government's motivation in questioning Sawyer before the grand jury was likely not as intense as it would have been at trial, both because it had already indicted McFall, and because the standard of proof for obtaining a conviction is much higher than the standard for securing an indictment. We cannot agree, however, with the Second Circuit's gloss on Rule 804(b)(1). As one of the dissenters in *DiNapoli* (an en banc decision) noted, the requirement of similar “intensity” of motivation conflicts with the rule's plain language, which requires “similar” but not identical motivation. *Id.* at 916 (Pratt, J., dissenting) * * * .

On balance, we agree with the D.C. Circuit's elaboration of the “similar motive” test and conclude that the government's fundamental objective in questioning Sawyer before the grand jury was to draw out testimony that would support its theory that McFall conspired with Sawyer to commit extortion — the same motive it possessed at trial. That motive may not have been as intense before the grand jury, but Rule 804(b)(1) does not require an identical quantum of motivation.

In sum, the dispute in the courts is over how to interpret the standard of “similar motive” with respect to exculpatory grand jury testimony. The Second Circuit view is that “motive” includes a requirement of similar “intensity” of interest in developing the testimony at the grand jury, while the Ninth Circuit rejects that position.

But would an amendment be a useful way to address the circuit conflict? In 2010, the Committee considered whether to propose an amendment to solve this problem and decided against it. The Committee concluded that an amendment would be dealing with a very narrow fact situation — exculpatory grand jury testimony.⁵³ Moreover, the only amendment that could be cleanly written is one that would automatically admit exculpatory grand jury testimony against the government. The contrary view — that of the Second Circuit — is not an automatic rule excluding such testimony. Rather it is a case by case approach. So it would be more difficult to codify the Second Circuit view. One possible iteration is: “but grand jury testimony is admissible under this exception if at the time of the testimony the obtaining of the indictment was in doubt.” Query whether that will be helpful. Another possible iteration is “but grand jury testimony is admissible

⁵³ Exculpatory grand jury testimony is a relative rarity because the government does not have an obligation to present exculpatory evidence to the grand jury. *United States v. Williams*, 504 U.S. 36 (1992).

under this exception only if the prosecutor has an interest in developing the grand jury testimony that is of similar intensity as the interest in developing it at trial.” Again, query if that is sufficient to capture all the possible permutations.⁵⁴

An automatic rule of admissibility could be written more cleanly. For example, something like the following sentence could be added to the end of the rule :

“Testimony of a witness at a grand jury is admissible against the government under this exception.”

But it is likely that a rule amendment *mandating* admissibility of exculpatory grand jury testimony would be strenuously opposed by the DOJ. And on the merits, that amendment could result in a change in grand jury practice in a number of circuits that would require some serious consideration (and perhaps empirical research). Certainly it could be predicted that a rule change from a case by case approach to automatic admissibility would require prosecutors in districts subject to the change to treat every instance of exculpatory grand jury testimony as a trial-like event. A mandated change in practice before a grand jury should not be done lightly by way of an evidence rule.

The other alternative would be to try to add something about “intensity” of motive to the Rule — that is, a general amendment as opposed to one dealing only with exculpatory grand jury testimony. An amendment incorporating the Second Circuit approach might look like this:

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive and intensity of interest to develop it by direct, cross-, or redirect examination.

An amendment incorporating the Ninth Circuit approach might look like this:

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar ~~motive~~ objective to develop it by direct, cross-, or redirect examination.

The word “objective” seems less likely to be read as having an intensity factor. The option of “motive, but not including intensity of interest” is another possibility, though it seems balky.

But to apply new language outside the grand jury context may create unintended consequences in a wide variety of cases and situations, including depositions. And yet to limit the

⁵⁴ Moreover, if the correct concept is “intensity” then that concept should be applied to all prior testimony, not just exculpatory grand jury testimony. That broader question may or may not be something the Committee might want to explore. See the text *infra*.

reference to “intensity” to grand jury testimony would get very down into the weeds, for a relatively small return.

One difference between 2010 and now is that the Committee was influenced not to act in part because *McFall* was a recent case, and there was some hope that the Supreme Court might rectify the conflict. Ten years later, this has not happened, and so there is at least an argument that if there needs to be a solution, it is rulemaking that will have to do it. On the other hand, it can be seen as a niche problem that does not arise with sufficient frequency to warrant an amendment.

XV. Rule 804(b)(3) --- The Meaning of the Corroborating Circumstances Requirement

Rule 804(b)(3) is the hearsay exception for declarations against interest. It provides that in a criminal case a declaration against penal interest is not admissible unless the proponent establishes that it is “supported by corroborating circumstances that clearly indicate its trustworthiness.” The Rule was amended in 2010 to clarify that in a criminal case both the government and the defendant must provide corroborating circumstances --- the rule had previously provided that it was only the defendant that had the obligation.

When that amendment was being prepared, the Committee also considered whether the rule should be amended to rectify a conflict in the courts about the meaning of “corroborating circumstances.” A question that divided the courts was whether, in determining corroborating circumstances, the court could or must consider the existence of corroborating *evidence*. For example, assume that a defendant is charged with murdering Joe. The declarant says “I killed Joe, the defendant wasn’t even there.” That statement is not admissible on the defendant’s behalf without corroborating circumstances. Now assume that the defendant can show that the declarant’s fingerprints are on the murder weapon, or that a witness saw the declarant in the vicinity of the murder just before it occurred. These facts corroborate the declarant’s account, and help to establish that the declarant is telling the truth. However, they are not circumstantial guarantees of trustworthiness in the making of the statement. Examples of circumstantial guarantees of trustworthiness include: 1) the declarant made the statement spontaneously, 2) to a person he trusted, 3) not long after the murder.

In defining “corroborating circumstances,” most courts consider whether independent evidence supports or contradicts the declarant’s statement. *See, e.g., United States v. Desena*, 260 F.3d 150 (2d Cir. 2001) (declarant identified himself and the defendant as perpetrators of an arson; the corroborating circumstances requirement was met in part by the testimony of an eyewitness whose description of the scene of the arson the day of the crime matched the declarant’s description of the defendant’s actions); *United State v. Mines*, 894 F.2d 403 (4th Cir. 1990) (corroborating circumstances requirement not met because other evidence contradicts the declarant’s account);

United States v. Butler, 71 F.3d 243, 253 (7th Cir. 1995) (concluding that the declarant's comments exculpating the defendant were not admissible in part because there was no direct evidence to corroborate them); *United States v. Hamilton*, 19 F.3d 350, 357 (7th Cir. 1994) (finding corroborating circumstances largely because the declarant's account was corroborated by other witnesses); *United States v. Paguio*, 114 F.3d 928 (9th Cir. 1997) (finding corroborating circumstances almost solely by the fact that documents in the transaction supported the declarant's account that he alone committed the fraud); *United States v. Westry*, 524 F.3d 1198 (11th Cir. 2008) (corroborating circumstances requirement met by testimony of other witnesses supporting the declarant's account, i.e., by corroborating evidence); *United States v. Kelley*, 2007 U.S. Dist. Lexis 14854 (S.D. Tex.) (statement by defendant's brother claiming ownership of guns and drugs was admissible as an exculpatory declaration against interest; corroborating circumstances found in part by the fact that the declarant actually had drugs on his person when arrested, and he correctly described where drugs and guns could be found).

A minority of courts hold that independent evidence (or the lack of it) must be treated as irrelevant to the requirement of corroborating circumstances, and that the court must focus only on the circumstances under which the statement was made. *See, e.g., United States v. Barone*, 114 F.3d 1284, 1300 (1st Cir. 1997) ("The corroboration that is required by Rule 804(b)(3) is not independent evidence supporting the truth of the matters asserted by the hearsay statements, but evidence that clearly indicates that the statements are worthy of belief, based upon the circumstances in which the statements were made."). *See also United States v. Bobo*, 994 F.2d 524, 528 (8th Cir. 1993) (noting that the Eighth Circuit refers to five factors which aid in determining the trustworthiness of a hearsay statement that is against the penal interests of the declarant — none of which concern corroborating evidence: "1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, 2) the general character of the speaker, 3) whether other people heard the out-of-court statement⁵⁵, 4) whether the statement was made spontaneously, and 5) the timing of the declaration and the relationship between the speaker and the witness."); *United States v. Franklin*, 415 F.3d 537, 547 (6th Cir. 2005) ("[t]o determine whether a statement is sufficiently trustworthy for admission under Rule 804(b)(3), the court is not to focus on whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself.").⁵⁶

⁵⁵ This factor is misguided. It assures that the statement was actually made, but that is not a hearsay problem. That is a problem of a witness lying in court about whether the statement was made.

⁵⁶ There is conflicting authority in the Sixth Circuit. *See United States v. Price*, 134 F.3d 340 (6th Cir. 1998): In an appeal from narcotics convictions, the court held it error to exclude post-custodial statements from a person involved in the drug transaction, which indicated that the money for the drugs belonged only to the declarant, and that the defendant was not a substantial participant in the transaction. The court found corroborating circumstances because: the declarant and the defendant did not have a close relationship; the statement was made after the declarant was advised of his *Miranda* rights; and *independent evidence was consistent with the declarant's assertion*.

The holdings that reject the use of corroborative evidence are curiously based on a theory of the right to confrontation that is long abandoned. At one time, the Confrontation Clause protection was grounded in a requirement of “particularized guarantees of trustworthiness” --- and the Court in *Idaho v. Wright*, 497 U.S. 805 (1990), held that the standard of particularized guarantees of trustworthiness required the court to look only at circumstantial guarantees of reliability --- corroboration was irrelevant. But there is no reason to import the *Wright* analysis into the different, rule-based standard of “corroborating circumstances” in Rule 804(b)(3). (Assuming this principle from *Wright* made any sense in the first place; the Court in *Wright* did not bother to explain its holding that corroboration is irrelevant to trustworthiness).

One could argue, at the time of some of these decisions, that *Wright*, though not on point for the hearsay exception, could be used as persuasive authority on the meaning of trustworthiness. But that time has long past. The *Wright* analysis on trustworthiness has been completely displaced by the focus on testimoniality in *Crawford v. Washington*. Yet the courts rejecting the use of corroborative evidence under Rule 804(b)(3) *still* rely on *Wright*. See, e.g., *United States v. Lubell*, 301 F.Supp.2d 88, 91 (D.Mass. 2007) (“In this context, corroboration does not refer to * * * whether the witness' testimony conforms with other evidence in the case. Rather, corroborating circumstances refers to ‘only those that surround the making of the statement and that render the declarant particularly worthy of belief.’ *Idaho v. Wright*, 497 U.S. 805, 819 (1990)”); *United States v. Johnson*, 2007 U.S. Dist. Lexis 62035 (E.D. Mich.) (relying on the overruled Supreme Court case of *Ohio v. Roberts* to conclude that corroborating evidence is irrelevant to corroborating circumstances under Rule 804(b)(3)).

In 2010 the Committee considered proposing an amendment that would require a court applying the Rule 804(b)(3) corroborating circumstances requirement to consider the presence or absence of corroborating evidence. (This would have been an add-on to the amendment that extended the requirement to the government in criminal cases). The Committee decided not to address the conflict in the courts on the corroboration question, even though it was proposing an amendment to the rule on other grounds. Here is the account of the Committee’s decision from the 2009 minutes:

Members noted that the disagreement in the courts about the meaning of “corroborating circumstances” did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the irrelevance of the abrogated Confrontation cases is directly addressed by those courts. The vast majority of courts consider corroborating evidence as relevant to the corroborating circumstances inquiry. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

The Committee was essentially predicting that the courts on the wrong side of the issue would see the error of their ways. But that has not really been the case. The circuits rejecting

corroborating evidence are the First, Sixth and Eighth. The First Circuit has held fast to its position. See *United States v. Taylor*, 848 F.3d 476 (1st Cir. 2017) (rejecting the argument that independent evidence can be used in support of a finding of corroborating circumstances). The Eighth Circuit has a case in the intervening years that seems to work at cross-purposes. In *United States v. Henley*, 766 F.3d 893 (8th Cir. 2014), the court held that a confession made by another was admissible as a declaration against penal interest. But the court found it was properly excluded. It stated that even if it were against penal interest, it was “still inadmissible if it lacked indicia of trustworthiness.” That sounds like a reference to circumstantial guarantees. But in finding the statement lacking, the court noted that there were many witnesses who disputed the declarant’s account. That is a reference to corroborating evidence. As to the Sixth Circuit, there is nothing in the interim to indicate that it has altered its view.

Moreover, the Committee’s assessment in 2010 that the conflict “did not run very deep” is subject to question. There is case law in three circuits that rejects corroborating evidence in the corroborating circumstances inquiry. Three circuits can be thought to be a pretty deep conflict.

Finally, there is now an additional reason to require the courts to consider corroborating evidence in the corroborating circumstances inquiry--- that same requirement has been added to Rule 807 (the residual exception) in the 2019 amendment to that Rule. That rule now provides that the court must find that “the statement is supported by sufficient guarantees of trustworthiness --- after considering the totality of circumstances under which it was made *and evidence, if any, corroborating the statement.*” The Committee Note to the amendment explains as follows:

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

In specifically adding the consideration of corroborating evidence as part of the trustworthiness requirement, the Committee was reacting to case law in the Eighth Circuit holding that corroboration was irrelevant under Rule 807, *and relying on Idaho v. Wright for that proposition. See United States v. Stoney End of Horn*, 829 F.3d 681 (8th Cir. 2016) (holding that corroboration has no place in the Rule 807 trustworthiness enquiry and citing *Wright*). So the Committee was correcting what it saw as an error in rejecting corroborating evidence as part of the trustworthiness enquiry. Why would it not employ the same fix for the same error in what is essentially the same question --- the search for guarantees of trustworthiness?⁵⁷

⁵⁷ When the Committee was working on Rule 807, I digested all of the case law, and found that courts had recognized that the Rule 804(b)(3) corroborating circumstances requirement was essentially equivalent to the

After the amendment to Rule 807, there is a good argument that there is an inconsistency between Rule 804(b)(3) and 807, in those courts that reject the relevance of corroborating evidence in assessing “corroborating circumstances” under Rule 804(b)(3). The bottom line is there was probably a pretty good reason in 2010 for addressing the corroboration requirement in the text of Rule 804(b)(3). And there is a better reason now.⁵⁸

If the Committee wishes to proceed with an amendment to Rule 804(b)(3) to require consideration of the presence or absence of corroboration, the change might look like this:

A statement that:

(A) [is disserving]; and

(B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds is supported by corroborating circumstances that clearly indicating trustworthiness --- after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement. ~~if offered in a criminal case as one that tends to expose the declarant to criminal liability~~

The draft language borrows from the language of the 2019 amendment to Rule 807.

XVI. The Applicability of the Corroborating Circumstances Requirement to Civil Cases

As seen above, the corroborating circumstances requirement applies to admission of a declaration against penal interest “if it is offered in a criminal case.” But in *American Automotive*

trustworthiness requirement of Rule 807. If you met one, you met the other. And if you failed one, you failed the other. *See, e.g., United States v. Benko*, 2013 WL 2467675 (D.Va.): The defendant argued that a declarant’s statement was admissible as a declaration against penal interest, and alternatively as residual hearsay. The court found that Rule 804(b)(3) was inapplicable, because of lack of corroborating circumstances indicating trustworthiness, noting that the statement was “fatally uncorroborated.” Turning to the residual exception, the court held that the statement failed to meet the trustworthiness requirement for the same reasons it failed to meet the Rule 804(b)(3) corroborating circumstances requirement.

⁵⁸ It can be pointed out that the case law rejecting corroboration under Rule 804(b)(3) is not only inconsistent with Rule 807 as amended ---it is also inconsistent with the co-conspirator exception, see *Bourjaily v. United States*, 483 U.S. 171 (1987) (considering corroborating evidence on the question of whether the declarant is a coconspirator).

Accessories, Inc. v. Fishman, 175 F.3d 534 (7th Cir. 1999), the court held that the corroborating circumstances requirement applied to declarations against penal interest offered in *civil cases*. Favia, an employee of American, was discovered by the company to have written checks to fictional accounts. When confronted, he admitted that he cashed the checks for his own benefit, receiving payment for the checks from Fishman, who took a fee for the service. American sued Fishman to recover the funds, arguing that Fishman was in on the fraud. Favia's statements to his employer were offered as declarations against Favia's penal interest. The lower court found that American had not met its burden of showing that the statements were supported by corroborating circumstances clearly indicating their trustworthiness; summary judgment was granted for Fishman.

The Seventh Circuit read the corroborating circumstances requirement into civil cases. It basically concluded that it was important to have a "unitary standard" for declarations against penal interest, no matter in what case and no matter by whom they are offered. And the court reasoned that if there are sufficient doubts concerning the reliability of statements that tend to subject the declarant to criminal liability --- doubts that need to be shored up by the extra requirement of corroborating circumstances --- those doubts are equally applicable when the statement is offered in a civil case.

There are a few district court decisions that are consistent with *Fishman* in that they either hold or assume that the corroborating circumstances requirement applies in civil cases. *See SEC v. 800America.com*, 2006 U.S. Dist. LEXIS (S.D.N.Y.) (SEC enforcement proceeding; statement exculpating the defendant is not admissible as a declaration against penal interest because the defendant did not provide corroborating circumstances indicating that the statement was reliable); *Farr Man Coffee v. Chester*, 1993 U.S. Dist. LEXIS 8992 (S.D.N.Y.); (corroborating circumstances required, and found, in a civil case); *JVC Am., Inc. v. Guardsmark, LLC*, 2007 U.S. Dist. LEXIS 71529 (N.D. Ga.) (stating in dictum that corroborating circumstances are required for declarations against penal interest offered in civil cases).

But other cases disagree with *Fishman*, taking the straightforward position that the corroborating circumstances requirement, by its terms, applies only in criminal cases --- and courts don't have authority to read a requirement into an evidence rule that plainly is not there. For example, in *United States v. Riley*, 920 F.3d 200 (4th Cir. 2019), the court affirmed revocation of supervised release based on a convicted drug offender's admission of methamphetamine use and distribution to his probation officer. Even without a showing of corroborating circumstances, the statement was found properly admitted as a declaration of the offender's penal interest, because the corroborating circumstances requirement applies only in criminal proceedings, which supervised release revocation proceedings are not. And in *Linde v. Arab Bank*, 97 F.Supp.3d 287 (E.D.N.Y. 2015), the court held that statements by Hamas taking responsibility for terrorist bombings were admissible in a civil case against a bank, alleging that the bank funded Hamas. The court stated as follows:

It bears mentioning that this is not a criminal case. Thus, Rule 804(b)(3)(B)'s requirement that a statement against interest be supported by corroborating circumstances does not apply, because the statement is not “offered in a criminal case.”

The Committee considered extending the corroborating circumstances requirement to civil cases in the work that led up to the 2010 amendment. That work actually started in 2001 (believe it or not), with a proposed amendment that was issued for public comment in 2003. That proposed amendment made the corroborating circumstances requirement applicable in all cases.⁵⁹ The extension to civil cases was based on *Fishman*, which was the only circuit court case on point at the time. The Committee Note to the proposal provided as follows:

The corroborating circumstances requirement has also been applied to declarations against penal interest offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 541 (7th Cir. 1999) (noting the advantage of a “unitary standard” for admissibility of declarations against penal interest). This unitary approach to declarations against penal interest assures all litigants that only reliable hearsay statements will be admitted under the exception.

When the 2003 proposal was sent out for public comment, the extension of the corroborating circumstances requirement to civil cases was opposed by the American College of Trial Lawyers. The College argued that it would “move a difficult aspect of the criminal procedural law into the civil procedural law, without any compelling reason to do so.” The College thought that any change to civil cases should at least await more case law on the subject. It was especially concerned that the change would create proof problems for plaintiffs in antitrust cases, and saw no justification for imposing an extra evidentiary requirement in such cases. Other public comments were favorable, however, arguing the benefit of having a unitary standard for admissibility of declarations against penal interest in all cases.

The 2003 proposed amendment came to an end when, after being approved by the Standing Committee and the Judicial Conference, it was sent back by the Supreme Court. By that time, *Crawford v. Washington* was on the docket, and the Court was concerned that applying the “corroborating circumstances” requirement to government-proffered hearsay in criminal cases might not mesh with whatever new test for the Confrontation Clause might be developed.

When it was eventually concluded that *Crawford* posed no bar to a corroborating circumstances requirement (because that would have nothing to do with whether the hearsay statement was testimonial), the Committee started its process anew --- and the amendment to Rule

⁵⁹ As said previously, the original rule did not apply to government-offered statements in criminal cases, and the major point of the proposed amendment was to require the government to prove corroborating circumstances, just like the defendant had always been required to do.

804(b)(3) finally became effective in 2010.⁶⁰ During this second process, the Committee revisited the question of the applicability of the corroborating circumstances requirement to civil cases. The Committee noted the dearth of case law in the intervening years and took to heart the concerns previously expressed by the American College of Trial Lawyers. The idea of a “unitary standard” was downplayed because the standard *would* be unitary in criminal cases (given that both the prosecution and the defendant would have to prove corroborating circumstances after the amendment), and the use of declarations against penal interest in civil cases is quite infrequent. The Committee unanimously decided not to address the applicability of the corroborating circumstances requirement to civil cases. A short statement was added to the 2010 Committee Note indicating that the Committee was taking no position on the applicability of the corroborating circumstances requirement in civil cases.

The difference between then and now is that now there is conflicting law between two circuits on the subject, as shown above. But there are still only two circuit court cases. It is clearly a question that does not often arise. So the case for an amendment to clarify the applicability of the corroborating circumstances requirement to civil cases is not especially strong.

On the merits of extending the requirement to civil cases, there are arguments on both sides. The College has a point: it might not be a great idea to criminalize civil practice, and the corroborating circumstances requirement might impose a real impediment on civil plaintiffs (especially because the declarant by definition cannot be produced to testify). The other side of the argument is that expressed above: if the basis of the corroborating circumstances requirement is that the against-penal-interest requirement is too flimsy to support reliability on its own, then that concern applies to all cases, not just criminal cases.

If the Committee wishes to extend the corroborating circumstances requirement to civil cases, it need only delete the language “offered in a criminal case” from Rule 804(b)(3)(B). If the Committee is of the view that the requirement should not extend to civil cases, then there is nothing to do. That is what the rule already says, and the fact that the Seventh Circuit has misread it does not mean it has to be amended again to say “when we say a criminal case, we mean a criminal case.”

⁶⁰ This is why Reporters don’t have term limits. The average time from first memo to actual amendment is about six years. The record so far is 13 years.

XVII. Rule 806 --- Impeaching Hearsay Declarants With Bad Acts

Rule 806 provides that when hearsay is admitted, “the declarant’s credibility may be attacked . . . by any evidence that would be admissible for the purposes if the declarant had testified as a witness.” The rule recognizes that when hearsay is admitted, it is the declarant who is effectively testifying at trial --- so for impeachment purposes, the declarant should be treated the same as a trial witness. Any other rule might allow a party to avoid impeachment of a witness by trying to admit the witness’s hearsay statement in lieu of the witness’s testimony.

There is a conflict in the courts about the viability of one form of impeachment under Rule 806: impeachment of the witness’s character for truthfulness by evidence of prior bad acts. Rule 608(b), as applied at trial, limits the examiner to the witness’s answers; it precludes extrinsic evidence of bad acts offered to impeach the witness’s character for truthfulness. It can therefore be argued that bad act impeachment of a hearsay declarant who is not present to testify is impermissible, because it would require admission of extrinsic evidence of the bad act when the witness is not at trial to be asked about it and deny it. But the counter-argument is that the need to determine the credibility of a hearsay declarant is the same as with respect to an in-court witness, and so bad act evidence cannot be barred if it is the only way to raise the bad act. Rule 806 is clear in its intent that the adverse party is to have at least the same impeachment weapons as she would have if the witness were to testify.

In some courts, bad act impeachment is a permissible means of impeaching a hearsay declarant, if the witness who relates the hearsay has no knowledge of the bad act.⁶¹ (Extrinsic evidence would not be required if the witness knows about the bad act and so can be asked about it.) The reasoning is that resort to extrinsic proof is the only meaningful way, in the absence of the declarant or any knowledge of the part of the witness, to disclose the bad act to the jury.⁶²

In other courts, extrinsic evidence is never admissible to prove a bad act offered to impeach the hearsay declarant’s character for truthfulness. For example, the court in *United States v. Saada*, 212 F.3d 210, 222 (3d Cir. 2000), relied on the “plain language” of Rule 806, which it read as creating exactly the same impeachment rules for in-court witnesses and hearsay declarants, with one exception—impeachment with inconsistent statements (where provision is made for admissibility even if the declarant never had an opportunity to explain or deny the statement). Because extrinsic evidence could not be used for bad act impeachment if the witness were to testify

⁶¹ See, e.g., *United States v. Burton*, 937 F.2d 324 (7th Cir. 1991) (error to preclude cross-examination of an FBI agent regarding the criminal record of a non-testifying government informant whose hearsay statements in a tape-recorded conversation were played to the jury).

⁶² See, e.g., *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988) (the court observed that when an unavailable declarant cannot be cross-examined, resort to extrinsic evidence may be the only means of presenting such evidence to the jury; in this case, however, the declarant’s videotaped admission that he had lied on a single occasion was properly excluded under Rule 403).

at trial, the court reasoned that it cannot be used if the statement is introduced as hearsay. The court found that the rule's express exception for different treatment of inconsistent statements cut against any judicially-created differential treatment for bad-acts impeachment; that is, if Congress had wanted to create differential treatment for bad acts, it knew how to do so because it had done so for prior inconsistent statements. The court recognized that the ban on extrinsic proof, as applied to impeachment of hearsay declarants, "prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct." Nevertheless, this drawback "may not override the language of Rules 806 and 608(b)." This means that the witness at trial who relates the hearsay could be asked about the hearsay declarant's bad act --- but only if that witness happens to know the hearsay declarant and has knowledge of the bad act. That will be a random event.⁶³

The problem with the result in *Saada* is that it is inconsistent with the *intent* of Rule 806, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. At trial, the bad acts could at least be referred to on cross-examination if the declarant were to testify, whereas if the statement is introduced as hearsay it is only randomly possible that the jury will hear about the declarant's bad acts, i.e., only if the witness relating the hearsay happens to know about the bad act.⁶⁴ Presumably counsel could not ask the witness relating the statement if she knows about the hearsay declarant's bad act if the witness clearly does not know about it. Moreover, if the hearsay is related in a written or recorded statement, there is nobody to ask about the hearsay declarant's bad act, so the opponent is especially disadvantaged in an attempt to impeach the hearsay declarant.

⁶³ See *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997): The court affirmed convictions for a drug trafficking conspiracy, holding there was no abuse of discretion in precluding cross-examination of an undercover officer as to whether a deceased declarant whose hearsay statements he had testified to had ever made false statements on an employment application or had ever violated any court orders. The court noted Rule 608(b)'s bar on extrinsic evidence of misconduct to impeach; "[a]ccordingly, [defendant]'s counsel could have asked [the officer] only if [the declarant] had ever lied on an employment form or violated any court orders, and could not have made reference to any extrinsic proof of those acts." Because the officer had known the declarant for only two months, the court found no abuse of discretion in the conclusion "that the questions were of little utility."

⁶⁴ For commentary in support of allowing extrinsic evidence of bad act impeachment under Rule 806, see Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 Ohio St.L.J. 495, 526 (1995):

If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. ... In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a non-testifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. ... These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a non-testifying declarant with specific instances of conduct showing untruthfulness.

Assuming, though, that the *Saada* result is wrong on the merits, it is surely right about its construction of the existing Rule 806. The rule specifically provides an adjustment for impeaching hearsay declarants with prior inconsistent statements --- the Rule 613(b) requirement of providing an opportunity to explain or deny the statement is specifically made inapplicable to impeachment of hearsay declarants. (And for good reason, because they are not in court to explain or deny). But a similar adjustment was not made to impeachment with bad acts. There is nothing in the legislative history that I could find to explain why the Advisory Committee applied a carve-out to prior inconsistent statements but not to bad act impeachment. But that is what happened.

If the Committee wishes to rectify the conflict in the cases – or if the Committee simply believes that there is a hole in Rule 806 that needs to be fixed, then an amendment might look like this:

Rule 806. Attacking and Supporting the Declarant’s Credibility

(a) General Rule. When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.

(b) Inconsistent Statement or Conduct. The court may admit evidence of the declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

(c) Specific Instances of Conduct. The court may admit extrinsic evidence to prove specific instances of the declarant’s conduct in order to attack or support the declarant’s character for truthfulness.

(d) Declarant Called as a Witness. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

TAB 6

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Possible Amendment to the Best Evidence Rule for Foreign Language Recordings
Date: April 1, 2021

There is some conflict and confusion in the federal courts concerning the admissibility of English transcripts of foreign-language recordings under the Best Evidence rule.

First, there is confusion about the status of an English transcript of a foreign-language recording at trial. The majority of federal courts treat English transcripts as “substantive evidence” to be relied upon by the jury to determine the content of a foreign-language recording. But some courts have treated English transcripts of foreign-language recordings as they would transcripts of English-language recordings, holding that they are admissible only as “aids” to assist the fact-finder in understanding the original foreign-language recording.

Second, there is confusion about the admission of the original foreign-language recordings at trial under the Best Evidence rule. In most of the cases allowing substantive use of transcripts, the original foreign-language recordings have been admitted into evidence *along with* the English transcripts. A few federal courts, however, have permitted admission of an English transcript without mandating the admission of the original foreign-language recording under the Best Evidence rule. And some courts have refused to allow the jury access to the original foreign-language recordings based upon potential prejudice and confusion.

These issues were on full display in the Tenth Circuit’s recent opinion in *United States v. Chavez*.¹ Over a lengthy and vigorous dissent (by Judge Hartz, a former member of the Standing Committee), the majority held that FRE 1002, the Best Evidence rule, precludes a district court from admitting an English transcript of a foreign-language recording without first admitting the foreign-language recording itself. In so holding, the court characterized foreign-language recordings as the “primary” evidence to be relied upon by the jury and deemed an English transcript of such a recording merely an “aid” to understanding.

The issue for the Committee is whether an amendment to Article X of the Federal Rules of Evidence to allow for the admission of English transcripts of foreign-language recordings is necessary or advisable. This memorandum will address the issues surrounding foreign-language

¹ 976 F.3d 1178 (10th Cir. 2020).

recordings in four parts. Part I will briefly provide background on the Best Evidence rule and its application to transcripts of recordings. Part II will describe the varying approaches taken by the federal courts in addressing the admission of English language transcripts of foreign-language recordings. Part III evaluates the merits and demerits of these varying approaches, as well as their consistency with the Best Evidence rule. Finally, Part IV will offer some preliminary ideas about potential amendments to Article X to clarify and unify the approach to English transcripts of foreign-language recordings in the federal courts.

I. The Best Evidence Rule

The Best Evidence rule is found in FRE 1002, which provides:

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

The Rule is designed to promote the accuracy of the fact-finding process, in part, due to concerns about mis-transmission of critical facts due to the use of written copies or human recollection:

[Oral testimony as to the terms of a writing] is subject to a greater risk of error than oral testimony as to events or other situations; human memory is not often capable of reciting the precise terms of a writing, and when the terms are in dispute only the writing itself, or a true copy, provides reliable evidence.²

As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfulness or by inadvertence.³

The Best Evidence rule was uniformly recognized at common law. Although Rule 1002 retains the common law requirement of an original to prove the content of a writing, the common law rule has been relaxed by FRE 1003, which allows for the admissibility of “duplicates.”⁴ Article X also contains exceptions to the Best Evidence rule, such as for summaries used to prove the content of voluminous writings, as well as in circumstances where originals cannot be had.⁵ In justifying exceptions to the Best Evidence rule, the original Advisory Committee described it as one “of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible.”⁶

The application of the Best Evidence rule to *English language* recordings is well-settled. Proving that a particular conversation took place on a recording implicates the Best Evidence rule because it requires proof of the “content” of the recording. A transcript of the recording does not qualify as a “duplicate.”⁷ Thus, a transcript of a recording may not be introduced

² *Seiler v. Lucasfilm, Ltd.* 808 F.2d 1316, 1319 (9th Cir. 1986).

³ 4 John Henry Wigmore, *Evidence* § 1179 (3d Ed. 1940).

⁴ Fed. R. Evid. 1003 and Advisory Committee’s note (“When the only concern is with getting words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness.”).

⁵ Fed. R. Evid. 1006; 1004.

⁶ Fed. R. Evid. 1004 Advisory Committee’s note.

⁷ It is not a “counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.” Fed. R. Evid. 1001(e).

without production of the recording itself (unless the proponent can demonstrate unavailability of the recording). Transcripts are frequently introduced as aids to juror understanding, however, to be consulted while the recording is played in court.⁸ The jury is instructed that the recording itself is evidence and that they are to rely upon it -- and not the transcript -- if they find any discrepancy between the two.⁹

Allowing jurors to listen to a recording and to determine its content for themselves makes eminent sense in the context of English-language recordings. In keeping with the policy of Rule 1002, the original recording itself constitutes the best evidence of the events and conversations it portrays and jurors are equally able to interpret it. When the recording is of a conversation conducted in a language other than English, however, the rationale for requiring presentation of the original recording falters because jurors are unable to comprehend and interpret the recorded conversation on their own. Due to this disconnect between the Best Evidence rule and foreign-language recordings, most federal courts have permitted English-language transcripts to be admitted as substantive evidence of the content of foreign-language recordings. Although a few federal cases have held that English-language transcripts may be admitted *in lieu* of the original foreign-language recordings, most federal courts have found English translation transcripts admissible as substantive evidence when admitted *in addition* to the original foreign-language recordings. Recently, a panel of the Tenth Circuit reversed a drug conviction due to the prosecution's use of an English transcript of a foreign-language recording without admission of the foreign-language recording itself.

II. Federal Authority on Admission of Foreign Language Recordings

A. The Tenth Circuit's Opinion in United States v. Chavez

In *United States v. Chavez*, the defendant was convicted of drug distribution.¹⁰ During his trial, the government admitted into evidence three transcripts made from audio recordings of conversations between the defendant and a confidential informant during controlled drug buys. The conversations were conducted mainly in Spanish and the transcripts translated the conversations into English. The government did not admit the actual audio recordings into evidence or play them for the jury. Although the defense conceded the accuracy of the transcripts at one point in the trial, the defense later objected to the admission of the transcripts based upon the Best Evidence rule. The defense demanded that the government play the actual recordings in Spanish and “provide a line by line translation about who is saying what, when” for the jury. The district court overruled the defendant's Best Evidence objection to the admission of the transcripts and instructed the jury:

⁸ Transcripts are typically used as aids only while the recording is played in court and do not go to the jury room. See e.g., *United States v. Calderin-Rodriguez*, 244 F.3d 977 (8th Cir. 2001) (use of transcripts permissible where jury only viewed transcripts as tapes played in the courtroom; judge instructed jury to rely on tapes themselves); *United States v. Scarborough*, 43 F.3d 1021, 1025 (6th Cir. 1994) (“preferred practice” is not to submit transcripts to jury unless parties stipulate to accuracy). Some courts have admitted transcripts as substantive evidence when the transcripts are authenticated and satisfy all applicable hearsay, expert opinion and confrontation concerns.

⁹ *United States v. McMillan*, 101, 105-106 (8th Cir. 1974).

¹⁰ 976 F.3d 1178 (10th Cir. 2020).

The translated transcripts are the evidence you should rely on. You are not free to reject the translation contained in the transcripts of the tape recordings ... you are free to give this evidence whatever weight or consideration you deem to be justified.¹¹

The Tenth Circuit reversed Chavez’s conviction due to the admission of the English transcripts without admission of the underlying audio recordings. The court reasoned that the Best Evidence rule was triggered because the government sought to prove the content of the audio recordings by offering the transcripts into evidence. The court held that the plain language of FRE 1002 mandates that the original foreign-language recordings be admitted into evidence before English translations of them may be admitted:

[U]nder the plain meaning of Rule 1002, the best-evidence rule does *not* permit courts to admit English translation transcripts of foreign-language recordings when the recordings themselves are not also in evidence.

The court went on to note that “Congress has approved of specific exceptions to the best-evidence rule, . . . but an exception for foreign-language recordings is not among them.” The Tenth Circuit reversed Chavez’s conviction, finding that the erroneous admission of the English transcripts without admission of the underlying recordings was not harmless.¹²

Thus, the Tenth Circuit held that the Best Evidence rule’s well-accepted operation with respect to English-language recordings applies to foreign-language recordings in exactly the same way – the proponent must admit the foreign-language recording as the primary evidence and English-language transcripts may be offered merely to aid the jury in evaluating the admitted recordings:

Specifically, we have allowed English-translation transcripts of foreign language recordings only as aids in understanding the *admitted* recordings themselves (i.e., the primary evidence). In other words, under our practice, the English-translation transcript is permitted for use only in conjunction with the foreign-language audio recording: it is the recording itself – not the transcript of the recording – that constitutes the primary evidence.¹³

¹¹ Although the defendant challenged this jury instruction on appeal, the majority did not reach the issue of the instruction because it reversed based upon the Best Evidence rule.

¹² Although it appears that the defense did not challenge the accuracy of the transcripts, the Tenth Circuit majority opinion expressed serious reservations about the transcripts: “The transcript is devoid of information regarding its authorship and other aspects of its creation. The transcript contains no information addressing who prepared it, how much time elapsed between the statements in each row, what process its preparer used to create it, or how and why the statements were broken up in the manner that they were, among other missing contextual details.” The court also expressed concerns about how four Spanish words could translate to thirty-eight words in English as was reflected in one of the transcripts. Apparently, the government hired “a firm” to perform the translation of the recordings but did not call the preparer to testify due to logistical difficulties. Instead, the government called a law enforcement agent who had previously performed “interpretation” for the government to review the transcripts and affirm their accuracy at trial. *Chavez*, 976 F.3d 1178 at n.6. The confidential informant who participated in the conversations also testified to the accuracy of the transcripts.

¹³ *Chavez*, 967 F.3d at 1196. In a footnote, the majority opinion suggested that the district court must *admit* the recordings but retained discretion to “properly regulate the use of such foreign language audio recordings once they are admitted into evidence.” The majority noted that its opinion did not hold that “district courts must routinely play

Judge Hartz wrote a lengthy dissent, highlighting the distinction between English-language and foreign-language recordings, and arguing that the Best Evidence rule does not mandate the admission of foreign-language recordings. He suggested that no other federal circuit court has ever reversed a district court for admitting an English transcript of a foreign-language recording without also admitting the recording itself.¹⁴ Judge Hartz explained that admitting an English transcript without the underlying foreign-language recording does not violate the Best Evidence rule because such a transcript constitutes an “expert” opinion. He noted that, unlike a transcript of an *English* recording, a translation of a *foreign language document or recording* requires “specialized knowledge” within the meaning of FRE 702 and that such a translation is necessary to help a lay jury in understanding what it otherwise would not.

Judge Hartz argued that a foreign-language recording itself may be excluded as irrelevant under FRE 402 because it may have no tendency – if presented in a foreign tongue – to make the meaning of any facts of consequence more or less likely. Further, Judge Hartz explained that exclusion of a foreign-language recording could be necessitated by FRE 403 if presentation could confuse or mislead the jury, particularly if the jury attempts to translate the recording on its own. Judge Hartz acknowledged that a foreign-language recording might be admissible in certain cases under FRE 402 and 403 if it had an important tendency to help jurors understand tone, inflection, or identity of the speakers. But absent such special circumstances, exclusion of the primary recording would be justified. That the original foreign-language recording might itself be inadmissible would not affect the admissibility of the expert’s translation – the English transcript – because FRE 703 permits experts to rely upon inadmissible basis so long as other experts in the field would reasonably rely on that source. In this manner, according to Judge Hartz, an English transcript could be admitted as an “expert opinion” without admission of the underlying foreign-language recording.

Judge Hartz pointed out that the Advisory Committee note to FRE 1002, the Best Evidence rule, references the use of original writings and recordings as the basis for expert opinion under FRE 703:

It should be noted, however, that Rule 703, *supra*, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application.¹⁵

Thus, Judge Hartz concluded that FRE 702 and 703 permit admission of the English transcript and that the Best Evidence rule does not foreclose admission of the transcript because FRE 1002 demands an original to prove content of a writing or recording “unless these rules or a federal statute provides otherwise.” Thus, in Judge Hartz’s view, FRE 703 overrides FRE 1002 when

the foreign -language audio-recordings in their entirety for the jury.” *Chavez*, 976 F.3d 1178 at n. 14. So, apparently foreign language recordings must be admitted before an English transcript may be, but the audio recordings need not be presented to the jury. It is difficult to see how the audio recordings are the “primary evidence” and the transcripts are merely “aids” to understanding in this scenario.

¹⁴ The federal cases regarding foreign-language recordings are voluminous. Consistent with Judge Hartz’s statement, I could not find such a reversal in reading numerous federal cases on this point. Should the Committee wish to pursue the issue of foreign-language recordings, an exhaustive case digest can be compiled.

¹⁵ Advisory Committee’s note to Fed. R. Evid. 1002 (1973).

the original recording is used as basis for an expert opinion translating a foreign-language recording.¹⁶

B. Cases Like Chavez: English Transcript Admitted Without Admission of the Original Foreign-Language Recording

Very few Circuit opinions address the precise issue raised in *Chavez*: whether an English-language transcript of a foreign-language recording may be admitted *in lieu of* the primary recording. In most federal cases, the foreign-language recordings have been admitted into evidence *in addition to* English language transcripts. There are a few cases, however, that uphold the admission of an English-language transcript without admission of the underlying foreign-language recording.

United States v. Grajales-Montoya out of the Eighth Circuit was such a case.¹⁷ Although he did not cite the Best Evidence rule, the defendant in that case argued that the trial court abused its discretion by admitting into evidence *only* the transcripts of translations of certain tape-recorded conversations in Spanish. At trial, the defendant requested that the trial court admit the tapes, as well as the transcripts, so that his counsel could play them before the jury to show the tone of the conversations' actual participants, rather than that of the government's actors who read the tapes' translations in court. But the trial court refused, expressing doubt that jurors would be able to discern relevant inflections and idiosyncrasies without understanding the language being spoken. The Eighth Circuit affirmed, holding that the trial court had not abused its discretion in refusing to admit the tapes themselves where it could discern no reliable means of enabling people who do not speak Spanish to interpret inflections and tone.¹⁸

Similarly, in *United States v. Estrada*, the Seventh Circuit upheld the district court's decision to admit English transcripts of Spanish-language recordings without admitting the recordings themselves.¹⁹ Like the defendant in *Chavez*, the defendant sought to have the government introduce the Spanish recordings at trial, though he did not cite the Best Evidence rule. When the defendant argued that the “transcript is merely an impression or an aid to the tape itself,” the district court responded, “It's more than an aid in this case because it's a translation from another language.” When the defense continued to press the point by saying “I know that, but the tape has to be in

¹⁶ See Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. Ill. L. Rev. 43, 66 (1986) (“For all purposes, Rule 703 creates an exception to the original writing rule, Rule 1002.”). Importantly, the majority declined to address the dissent's FRE 703 analysis because the parties had not raised or briefed it. *Chavez*, 976 F.3d at n. 17.

The Tenth Circuit noted that the defendant “appeared to raise” a Best Evidence objection to the admission of an English transcript of Spanish recordings in *United States v. Gomez*, 67 F.3d 1515, 1526 (10th Cir. 1995). There, however, the district court admitted *both* the foreign-language recordings and the English transcripts. The defendant argued that the trial court erred by not instructing the jury that the recordings were the primary evidence and that the recordings controlled in the case of any discrepancy between the two. Because the defendant failed to make this objection at trial, the Tenth Circuit reviewed for plain error, finding that “[t]he admission of transcripts to assist the trier of fact lies within the discretion of the trial court.” *Gomez* is thus distinguishable and does not resolve the question presented in *Chavez* whether English transcripts may be admitted without the original recordings.

¹⁷ 117 F.3d 356, 367 (8th Cir. 1997).

¹⁸ *Id.* at 367.

¹⁹ 256 F.3d 466 (7th Cir. 2001).

evidence for it to be an aid to the translation, because, clearly, the jury has to have the right to go back to the original evidence,” the trial judge replied “[w]ell, they can't. It's in Spanish.”²⁰ The Seventh Circuit declined to second-guess the trial court’s decision to admit only the English transcripts, noting that “the district court may have doubted whether a jury not proficient in Spanish would be able to properly comprehend from the tapes an individual's tone or inflection.”²¹

C. Cases in Which Both the Original Recording and Transcript Were “Admitted” But the Original Recording Was Not Given to the Jury

In some cases, the trial court purports to “admit” the original foreign-language recordings into evidence, while withholding them from jurors. Appellate opinions have affirmed this practice. Like *Chavez*, *United States v. Franco* was a drug prosecution involving recorded conversations between a confidential informant and the defendants in Spanish.²² In that case the Spanish-language audio recordings were admitted into evidence but were not played for the jury. The trial court refused to play representative recordings for the jury because the court found that the “tone or inflection of a foreign language would be meaningless or misleading.” Instead, 110 English translation transcripts were admitted into evidence and were sent to the jury room during deliberations.²³ The jury *was* instructed that it could listen to the audio recordings upon request, but no request was made. On appeal of their convictions, the defendants argued that the court erred in sending all 110 English transcripts to the jury room when only 18 were read in open court during trial. Once again, the defendants did not cite the Best Evidence rule in raising their objection to the use of the transcripts. In rejecting the defendants’ argument under a plain error standard of review, the Ninth Circuit explained the distinction between English-language and foreign-language recordings:

The district court also correctly held that the relation between tapes and transcripts changes when the tapes are in a foreign language. When tapes are in English, they normally constitute the actual evidence and transcripts are used only as aids to understanding the tapes; the jury is instructed that if the tape and the transcript vary, the tape is controlling. When the tape is in a foreign language, however, such an instruction is not only nonsensical, it has the potential for harm where the jury includes bilingual jurors.²⁴

²⁰ *Id.* at 473.

²¹ *Id.* The First Circuit also upheld the admission of English transcripts in *United States v. Kifwa*, explaining that: “[f]oreign-language recordings, however, are treated differently. For commonsense reasons, ‘play[ing] foreign language tapes endlessly to an uncomprehending jury’ is not required.” *United States v. Kifwa*, 868 F.3d 55, 60 (1st Cir. 2017). Thus, it appears that English transcripts were admitted without the underlying recordings in that case. The court suggested, however, that parties “may agree to forgo having jurors listen to foreign-language recordings they do not understand” though no agreement was apparent.

²² *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998).

²³ The defense was given an opportunity to seek corrections to the government transcripts, which they did with some success, or to submit alternate transcripts, which they did not do. Accordingly, the Ninth Circuit found that the defense failed to challenge the accuracy of the transcripts. *Id.* at 626.

²⁴ *Id.*

The Ninth Circuit further described the translated transcripts of foreign-language recordings as “primary evidence” that “substitute[s] for the tapes.” The Ninth Circuit concluded that the district court did not err in declining to play the foreign language recordings for the jury or in sending the English transcripts to the jury room without first having them read in their entirety in open court.

In *United States v. Valencia*, the trial judge in yet another drug prosecution “admitted” the recording of a Spanish conversation, but refused to allow it to be played for the jury after polling the jury and determining that one juror spoke and understood Spanish.²⁵ Instead, the judge allowed jurors to have copies of an English-language transcript of that recording, the accuracy of which was stipulated, as the transcript was read into the record. On appeal, the defendants argued that the trial judge erred in refusing to allow the actual Spanish-language recording to be played for the jury, alleging that the jury would have benefitted from the “oral demeanor” of the participants. Once again, the defendants did not cite the Best Evidence rule in making their argument.

On appeal, the Fifth Circuit noted that it was the first time the court “had to decide the propriety of admitting the English translation of a foreign language tape as evidence while excluding the tape itself.” The court concluded that “an English translation transcript can be introduced into evidence without admitting or playing the underlying foreign language tape for the jury.”²⁶ The court acknowledged that jurors are ordinarily instructed that the recording controls if there is any discrepancy between the recording and the transcript, but explained that such an instruction “*is only useful when the jury can understand the tape itself.*” Although it noted that “one could plausibly argue that the better, more consistent approach would have been to have the jury listen to the tape, just as the jury listened to the Spanish speaking witness,” the Fifth Circuit ultimately held that the trial court did not abuse its discretion in refusing to play the tape due to the risk of jury confusion.²⁷

The majority in *Chavez* expressed conflicting views about the use of the recording at trial. On the one hand, the majority held that foreign-language audio recordings are the “primary evidence” and that English transcripts are aids to understanding. It would seem that the original recordings would need to be played for the jury under this analysis. In a footnote, however, the majority appeared to endorse the “admission” of the original recordings without playing them for the jury as compliant with the Best Evidence rule, stating “What we do not address is how a district court ... may properly regulate the use of such foreign-language audio recordings once

²⁵ 957 F.2d 1189 (5th Cir. 1992), *overruling on other grounds recognized by United States v. Keith*, 230 F.3d 784, 786 (5th Cir. 2000).

²⁶ *Id.* at 1194.

²⁷ The Indiana Supreme Court endorsed this approach in *Romo v. State*, 941 N.E.2d 504 (Ind. 2011). In that case, the prosecution admitted the Spanish audio recordings into evidence and sought to play them for the jury, but the trial court refused to allow them to be played. The prosecution admitted three English translations as substantive evidence. The defendant challenged the trial court’s admission of the English transcripts as substantive evidence, claiming that transcripts were to be used only as aids to understanding of original recordings.

they are admitted into evidence.”²⁸ Judge Hartz questioned the distinction drawn in these cases between the “admission” of a recording if it is to prove content under the Best Evidence rule and provision to the jury:

[T]he majority opinion suggests that a court can admit into evidence the original recording of a foreign-language conversation but refuse to allow the jury to listen to it. Again, how can that be? What in the world does it mean, then, to admit something into evidence? Surely it has something to do with consideration by the jury. But if the jury is barred from listening to the recording, how can it consider that recording (as opposed to considering a translation or transcript) in reaching its verdict?²⁹

D. Cases in Which Both the Original Recording and Transcript Were Admitted and Given to the Jury: Question Whether Transcript is “Substantive Evidence”

As noted by the majority in *Chavez*, foreign-language recordings have been admitted into evidence *in addition to* English language transcripts in most of the federal appellate cases. In these cases, the issue is the proper status of the transcripts. Courts conflict as to whether the transcripts of foreign-language recordings should be treated solely as illustrative aids (as they are in the case of English-language recordings) or whether the transcripts should be treated as substantive evidence upon which jurors may rely in reaching a verdict. In tackling the status of the English-language transcripts of foreign language recordings, few courts expressly reference the Best Evidence rule.³⁰

1. Transcript is Substantive Evidence When Recording is in a Foreign Language

Most federal courts have acknowledged the important distinction between foreign-language recordings and English recordings and the status of transcripts as substantive evidence in this context. *United States v. Cruz* also involved a recorded Spanish conversation arranging a drug sale.³¹ The original Spanish language recording was itself admitted into evidence at trial, along with an English language transcript. The trial judge permitted the jury to consider *both* the original recording and the transcript during deliberations. On appeal of his drug conviction, the defendant argued that the trial court erred in allowing the jury to consider the English transcript during deliberations because the jury necessarily relied upon the transcript as “substantive evidence” where they did not understand the primary Spanish recording. The Eleventh Circuit

²⁸ *Chavez* 976 F.3d at n. 14. See also *State v. Rodriguez*, 386 P.3d 509, 511 (Idaho App. 2016) (“the State produced the original audio recordings, and the court admitted them as evidence. The best evidence rule requires production of the original, not presentation to the jury.”).

²⁹ *Chavez*, 976 F.3d at 1219. (Hartz, J. dissenting).

³⁰ In his dissent in *Chavez*, Judge Hartz made a tongue in cheek suggestion that trial courts might want to “explicitly cite the applicable Rules of Evidence” to avoid reversal. *Chavez* 976 F.3d at 1217 (“perhaps in the future it would be wise to cite Rule 802 when excluding hearsay.”) (Hartz, J.) (dissenting).

³¹ 765 F.2d 1020 (11th Cir. 1985); see also *United States v. Rengifo*, 789 F.2d 975, 983 (1st Cir. 1986) (holding that trial court did not abuse its discretion in sending English transcripts of Spanish recordings to jury room and in instructing jury to consider the transcripts “like any other evidence in the case;” government used readers to read transcripts to jury at trial and it is unclear whether recordings themselves were admitted).

described the “proper procedure” for admitting transcripts of foreign-language recordings, as follows:

Initially, the district court and the parties should make an effort to produce an ‘official’ or ‘stipulated’ transcript, one which satisfies all sides. If such an ‘official’ transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.

Because the defendant failed to take advantage of his opportunity to challenge the government’s transcript by presenting one of his own, the Eleventh Circuit found that he could not complain about the admission of the English transcript. The court further held that the jury properly considered the transcript as “substantive evidence” where the government played the original Spanish recordings in open court as the jury read along using the English transcript with an interpreter signaling to the jury when to turn the pages of the transcript. In this way, the jury was able to “detect changes in voice modulation and note any hesitations or other characteristics which might give meaning to the tape recording.”³²

In *United States v. Camargo*, the trial court in a drug prosecution again appears to have admitted both original Spanish recordings, as well as English transcripts of those recordings to the jury.³³ The trial court instructed the jury that the recordings constituted the “real evidence,” and that the transcripts were the translator's interpretation of the conversations which took place in Spanish. On appeal, the defendant objected to the admission of the transcripts. The Seventh Circuit upheld the trial court’s handling of the transcripts, explaining that “the transcripts were a virtual necessity because the recorded conversations took place in Spanish.” The court acknowledged that trial judges typically instruct juries to disregard transcripts if they vary from original recordings, but explained that “such an instruction would have been a throwaway here; the tapes were in Spanish whereas the jury was English-speaking.” Noting that the defendant had failed to object to the accuracy of the transcripts, the Seventh Circuit affirmed.

United States v. Ramirez was a drug prosecution in which the government introduced into evidence three recordings of conversations in Spanish and three transcripts that translated the recordings into English.³⁴ At trial, the defendant requested that the jury be instructed that the original Spanish recordings were the primary evidence and that they should resolve variations between the recordings and transcripts in favor of the recordings. The trial judge rejected the request, explaining that a different instruction is appropriate when the recording is in a foreign language. In those circumstances, the court explained, the recording must be translated into English, because court proceedings must be in English. Moreover, the English translation in the transcript is the official record that the jury should rely on for the contents of the recorded conversation. The court acknowledged, however, that the original recording may be considered by the jury for reasons other than assessing the contents of the conversation; for example, as an aid to determine that a particular person is speaking. The defendant challenged the admission of

³² *United States v. Cruz*, 765 F.2d at 1024.

³³ 908 F.2d 179 (7th C.ir. 1990).

³⁴ 576 Fed. App’x 385 (5th Cir. 2014).

the English transcript with this instruction on appeal. In an unpublished opinion, the Fifth Circuit affirmed, explaining that: “[t]ypically, the recording is the primary evidence, but when that recording captures a foreign language conversation the transcript controls.”³⁵

In *United States v. Placencia*, the trial court admitted both foreign-language recordings and English transcripts of them.³⁶ In so doing, the trial court instructed the jury that:

[A] recording itself is the primary evidence of its own contents. Where the discussions were in English, transcripts are not evidence. On the other hand, where the discussions were in Spanish, transcripts of the discussions as translated into English are evidence, and you may consider those transcripts like any other evidence during your deliberations.³⁷

The defendant argued that the district court erred in admitting the transcripts because it “resulted in the over-emphasis of the content of the transcripts.” On appeal, the Eighth Circuit affirmed, explaining that the district court properly allowed the translated transcripts of foreign-language tape recordings to be used as evidence during trial and jury deliberations where the defendant conceded the accuracy of the transcripts.³⁸

United States v. Morales-Madera involved a drug prosecution in Puerto Rico.³⁹ At trial, recordings of Spanish conversations were themselves introduced into evidence and played for the jury. The jury was given English-language transcripts of the recordings to use as aids while listening to the recordings. But the transcripts were not admitted into evidence and were not provided to the jury for use in deliberations. On the defendant’s appeal of his conviction, the admission of the original recordings was not at issue. Rather, the defendant argued that the court erred by *not requiring admission into evidence of the transcripts* too, due to a federal law requiring federal trials in Puerto Rico to be conducted in English. In affirming the defendant’s conviction, the First Circuit also acknowledged the difference between English-language recordings and Spanish-language recordings:

Providing an English-language transcript of wiretap evidence is more than merely useful when the recorded language is not English; for Jones Act purposes, it is necessary. The

³⁵ *Id.* at 388.

³⁶ 352 F.3d 1157 (8th Cir. 2003).

³⁷ *Id.* at 1165.

³⁸ *Id.* In *United States v. Gutierrez*, the trial court admitted Spanish-language audio recordings into evidence, and distributed English transcripts prepared by a testifying interpreter to the jury as an “aid,” but did not admit the transcripts into evidence or send them to the jury room. On appeal, the Eighth Circuit described this procedure as “unorthodox,” explaining that a jury “usually cannot understand the audio recording” where the evidence is a foreign-language recording and that “[t]ranscripts must be prepared and introduced as evidence so that the jury has a basis for considering the substance of the recording.” *United States v. Gutierrez*, 757 F.3d 785, 788 (8th Cir. 2014); See also *United States v. Cano-Flores*, 796 F.3d 83, 89 (D.C. Cir. 2015) (stating that “it generally makes little sense to say that accurate transcriptions do not qualify as evidence” when recordings are in a foreign language and that “jurors dealing with calls made in a foreign language are likely to take the vast majority of their understanding from the translations, turning to the recordings only for special issues”; recordings and transcripts admitted).

³⁹ 352 F.3d 1 (1st Cir. 2003).

language of the federal courts is English. Participants, including judges, jurors, and counsel, are entitled to understand the proceedings in English.⁴⁰

Because of this, the court found that English transcripts of foreign-language recordings *must be admitted* into the record and not used merely as “aids” and that in this context “an instruction that the jury should consider only what is on the tape and not what is in the English transcript would not be appropriate.” In holding that the transcripts should have been admitted into evidence, the court stated that “the best evidence rule requires that the tape recordings themselves must be furnished, absent agreement to the contrary, but does not require that English translations of those tapes be excluded from evidence.” Although the *Chavez* majority cited this quote for the proposition that the Best Evidence rule requires admission of the primary foreign-language recordings, that portion of the statement appears to be dicta given that the recordings were, in fact, admitted in that case and the court was instead considering whether transcripts should also have been admitted.

In *United States v. Ben-Shimon*, the foreign-language recording *was* admitted and played for the jury and the court admitted English transcripts to aid the jury as they listened.⁴¹ The defendant objected to the trial judge’s instruction to the jury that they could afford as much weight as they saw fit to the transcripts. On appeal, the Second Circuit affirmed the conviction and rejected the defendant’s argument that the instruction was erroneous, stating that when a recorded conversation is conducted in a foreign language “an English language transcript may be submitted to permit the jury to understand and evaluate the evidence.” The *Chavez* majority pointed out that the Second Circuit referred to the recording in this passage as “the evidence,” suggesting that the recording itself is the evidence that must be considered by the jury according to the Best Evidence rule. The question whether a transcript may be admitted *in lieu of the foreign language recording* was not raised in *Ben-Shimon*, however.

In *United States v. Rivera*, the Tenth Circuit rejected a defendant’s objection to the admission of the original Spanish recordings. In that case, the defense claimed that the trial court had erred in admitting the *original recordings* because they permitted a Spanish-speaking juror to translate and argued that *only* the transcripts should have been admitted. The Tenth Circuit affirmed, finding no abuse of discretion without mention of the Best Evidence rule.

2. Transcript is Merely an Aid to Jury’s Understanding of the Original Foreign-Language Recording

The Seventh Circuit’s decision in *United States v. Nunez* is the lone Circuit case that appears to support the Tenth Circuit’s reading of the Best Evidence rule as applied to foreign-language

⁴⁰ *Id.* at 7.

⁴¹ *United States v. Ben-Shimon*, 249 F.3d 98 (2d Cir. 2001); *see also United States v. Bahadar*, 954 F.2d 821, 829 (2d Cir. 1992) (“While the general, and preferred, practice in dealing with tape-recorded evidence is to play the tapes and allow transcripts only as an aid, we do not believe that Judge Bartels abused his discretion by utilizing the procedures that he did, especially since the tapes were mostly in foreign tongues”; tapes available and admitted and played, in part, with transcripts read into evidence after trial judge noted that jury could understand nothing on tapes as they played).

recordings.⁴² In *Nunez*, the prosecution played recordings of Spanish conversations purporting to reflect the defendant’s drug transactions at trial. The prosecution presented English transcripts of the conversations, including translations of alleged code words for money and narcotics, to the jury to use as aids in listening to the recordings. The defendant objected to the transcripts, but the trial judge allowed them, instructing the jury that it “could afford as much weight as it felt proper to the transcripts of the intercepted conversations.” Although it noted that “transcripts of recorded conversations are a virtual necessity when the conversations take place in Spanish and are admitted into evidence before an English-speaking jury,” the Seventh Circuit found that this instruction was erroneous and that the court should have instructed the jury that the recording itself was the “primary evidence,” that the transcript was available only to evaluate the recording, and that it should “disregard” the transcript and “rely on its own interpretation of the recording” if it found the transcript in any way incorrect. Although it did not explicitly reference the Best Evidence rule, the Seventh Circuit appeared to apply it to foreign-language recordings just as it applies to English-language recordings.⁴³ The court found the trial court’s error harmless and upheld the conviction, however.

III. Does the Best Evidence Rule Mandate Admission of an Original Foreign-Language Recording As the “Primary Evidence” and Should It Be Amended?

Judge Holmes’ plain language interpretation of the Best Evidence rule in *Chavez* rests to some extent on unassailable logic. An audio-recording of a foreign-language conversation is a “recording” within the meaning of Rule 1002. Seeking to prove the substance of the conversation that took place through the recording is an effort to prove the “content” of the recording within the meaning of Rule 1002. As the Advisory Committee note to Rule 1002 states: “If, however, the event is sought to be proved by the written [or recorded] record, the rule applies.” Rule 1002 demands “an original” to prove the content of a recording unless otherwise provided. The foreign-language recording itself would count as the “original” because an “original” “means the writing or recording itself.” “Other evidence of content” is admissible if otherwise provided by the Rules of Evidence or by a federal statute. None of the “exceptions” to the Best Evidence rule currently listed in Article X cover the circumstance presented by a foreign-language recording. Indeed, Judge Hartz acknowledged that FRE 1002 “on its face seems to require the original in the foreign language be admitted if the translation is to be presented to the jury.”⁴⁴

However, the clear policy and purpose of the Best Evidence rule is not served by the admission of an original *foreign-language* recording. The purpose behind the Best Evidence rule is to give the fact-finder the “original” writing or recording so that the fact-finder may examine it and determine “content” for themselves without risk of mis-transmission or mistranslation within secondary evidence. The risks of imprecision and mis-transmission

⁴² 532 F.3d 645 (7th Cir. 2008).

⁴³ Note that the Seventh Circuit upheld an instruction that English transcripts were “real evidence” in connection with foreign-language recordings in *United States v. Camargo*, 908 F.2d 179 (7th C.ir. 1990) and upheld admission of a transcript *in lieu of* an original recording in *United States v. Estrada*, 256 F.3d 466 (7th Cir. 2001), discussed *supra*.

⁴⁴ *Chavez*, 976 F.3d 1178, 1218 (10th Cir. 2020) (Hartz, J. dissenting).

underlying the Best Evidence rule are certainly present with English-language transcripts of foreign recordings. Faulty translation of a single word has the potential to alter meaning significantly. The problem is that the original recording fails to offer the protection against such mis-transmission contemplated by the Best Evidence rule *because it is in a foreign language that the jury does not understand*. Therefore, while the letter of the Best Evidence rule may appear to apply with equal force to foreign-language writings and recordings, its underlying policy does not. Indeed, one could argue that a foreign-language recording cannot prove “content” of conversations within the meaning of FRE 1002 in judicial proceedings conducted exclusively in English. The Indiana Supreme Court articulated this reasoning in finding that Indiana’s version of the Best Evidence rule does not apply to foreign-language recordings. In *State v. Romo*, the court stated that “under the reasonable assumption that the jury did not comprehend Spanish, the original recording, being solely in Spanish, would not likely convey to the jury the content of the recorded conversations.”⁴⁵ The court thus, held that “the admission into evidence of foreign language translation transcripts is not governed by Evidence Rule 1002.”⁴⁶

Further, as Judge Hartz points out, it defies common sense to instruct the jury that English transcripts are “not evidence” and that they constitute only aids to be used in evaluating the primary foreign-language recordings. If the primary recordings are played for the jury in a foreign language and the English transcripts are “not evidence,” the English-speaking jury is left with *no evidence* of the content of the recordings. Judge Hartz illustrated the inanity of such an instruction with the following example:

Consider a defendant being prosecuted for fraud based on false statements in a document written in a foreign language. If the translation of the document is not evidence, then the jury verdict cannot be based upon it. The jury would have to base its verdict on a foreign-language document that no juror could understand. How is that possible? How could the jury know that the defendant uttered a falsehood when it does not know the meaning of what the defendant said?⁴⁷

Rigidly applying a plain language analysis of the Best Evidence rule to mandate admission of foreign-language recordings as “primary evidence” could be said to lead to “absurd” results. The Supreme Court has expressly refused to interpret the Federal Rules of Evidence according to their plain language if such an interpretation would lead to absurd results.⁴⁸

Finally, Judge Hartz’s analysis of an English transcript of a foreign-language recording as expert testimony, with the original recording serving as basis for the expert’s opinion, makes

⁴⁵ *State v. Romo*, 941 N.E.2d 504 (Ind. 2011) (written English translations of foreign language recordings may be admitted as substantive evidence; the recordings themselves generally should be admitted and played as well, but under the circumstances presented here, the failure to play the Spanish recordings is not reversible error.)

⁴⁶ *Id.* at 508. The recordings were “admitted” into evidence but not played for the jury.

⁴⁷ *Chavez*, 976 F.3d at 1219 (Hartz, J. dissenting).

⁴⁸ *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) (“no matter how plain the text of the rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary’s testimony that it grants to a civil defendant.”).

sense and finds support in the Advisory Committee’s note to Rule 1002. The Advisory Committee note acknowledges that Rule 1002 is “limited in application” by Rule 703:

It should be noted, however, that Rule 703, *supra*, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.⁴⁹

Judge Hartz also cites Evidence treatises supporting the substantive use of English transcripts of foreign-language recordings as expert opinion testimony:

Where the audible record captures statements or conversations in a language other than English, a transcript in translation is indispensable as a practical matter ... The problem of assuring accuracy is compounded, and careful pretrial work by the parties under judicial supervision is essential. Neither the court nor the jury is likely to be qualified to determine the accuracy of the translation by comparing it with the audible record, and both depend heavily on persons fluent in English and the other language. In this instance, the transcript (or transcripts, if competing versions must be offered because of the failure of the parties to agree) must be received as independent evidence, supported by the testimony of the translator, who must qualify as an expert, and if the parties cannot agree on translation issues, competing transcripts should be allowed.⁵⁰

In light of these considerations, and taking into account the federal caselaw, the Committee could decide to leave the Best Evidence rule alone. As currently drafted, the Rule could be interpreted to allow for the substantive admissibility of English-language transcripts without admission of and publication of the original foreign-language recordings to the jury – particularly when interpreted in light of the Advisory Committee’s note. A foreign-language recording cannot prove “content” in an English-speaking court system, as required by Rule 1002, and expert opinion testimony based upon “originals” is permitted through Rules 702 and 703. The majority of federal courts are admitting English-language transcripts of foreign-language recordings (often in addition to the recordings). Many federal courts have acknowledged the trial judge’s discretion to keep foreign-language recordings from the jury in appropriate

⁴⁹ Advisory Committee’s note to Rule 1002. Distinctions could be drawn between the example given in the Advisory Committee’s note -- medical records containing a radiologist’s interpretation of an Xray -- and an English-language transcript of a foreign-language recording. Such medical records likely contain opinions and information beyond the mere reading of an Xray and, therefore, beyond the “content” of the original Xray. An English transcript of a foreign-language recording is an opinion solely as to the “content” of the original recording. *See* Mueller, Kirkpatrick & Richter, Evidence § 10.3 (6th ed. Wolters Kluwer 2018) (“The Advisory Committee apparently intended that production of an X-ray be excused, even where the expert’s opinion is based *in part* on the X-ray ... If the witness testifies specifically about the content of the X-ray or to knowledge derived solely from examination of the X-ray, the party calling the witness is normally required to produce the X-ray or explain its absence.”). Further, an X-ray is as Greek to a lay jury as is a foreign-language recording and yet federal opinions require the admission of the original X-ray to prove content. *See id.* (“If the content of the X-ray is directly at issue, ... the Best evidence Doctrine applies.”).

⁵⁰ Christopher B. Mueller & Laird C. Kirkpatrick, 5 Federal Evidence § 1015 (4th ed. 2019 Thompson West).

circumstances under Rule 403. Finally, many federal courts are admitting English transcripts of foreign language recordings as “substantive evidence” – all without reference to the plain language of the Best Evidence rule.

On the other hand, many federal appellate opinions raise the proper treatment of foreign-language recordings and English transcripts and reflect varying approaches at the trial level. A few federal opinions apply the same rules to English transcripts of foreign-language recordings that they do to transcripts of original English recordings and hold that English transcripts are to be used merely as “aids” to the jury’s understanding. This could justify a clarification of the operation of the Best Evidence rule with respect to foreign-language recordings. Arguably, the Tenth Circuit’s recent opinion in *Chavez* squarely interpreting Rule 1002 as requiring admission of original foreign-language recordings as the “primary evidence” in all cases in which their content is to be proved creates more urgency in this regard.

An amendment removing foreign-language recordings from the ambit of the Best Evidence rule would be a narrow one. It would simply mean that a party (most often the government in a criminal case) seeking to prove the content of a foreign-language recording would not *be required to* admit the original recording as evidence of that content under Rule 1002. The parties could still seek admission of the original recording under Rule 402 to the extent that the recording might assist the fact-finder in resolving issues other than content, such as the identity of speakers, the tone of a conversation, or the timing of a recorded conversation. Judge Hartz in his *Chavez* dissent acknowledged that admission of foreign-language recordings themselves could be important in certain cases for purposes such as these.⁵¹ A request to admit an original foreign-language recording for such purposes would be subject to a Rule 403 objection to the extent that hearing the foreign conversation could prejudice the jury or cause confusion. This could be especially important in cases where jurors possess some knowledge of the foreign language at issue and might attempt to translate for themselves or for other jurors.⁵² Thus, an amendment to Rule 1002 to remove foreign-language recordings would make their admission *discretionary* rather than *mandatory*.

Such an amendment could effect a change in existing trial practice, however. In almost all of the federal cases, the original foreign-language recordings were admitted into evidence along with English language transcripts. Very few federal cases involved the circumstance in *Chavez* where the English transcript was admitted without the underlying original recording. Although the appellate cases do not commonly cite the Best Evidence rule, it is the Best Evidence rule that is responsible for the routine admission of the original recordings (most often by the government in criminal cases). An amendment clarifying that admission of an original foreign-language recording is *not* required by the Best Evidence rule could lead to fewer prosecutors seeking to

⁵¹ See also *United States v. Cruz*, 765 F.2d 1020, 1024 (11th Cir. 1985) (explaining that playing a Spanish recording could permit the jury “to detect changes in voice modulation and note any hesitations or other characteristics which might give meaning to the tape recording.”).

⁵² See, e.g., *United States v. Valencia*, 957 F.2d 1189 (5th Cir. 1992), *overruling on other grounds recognized by United States v. Keith*, 230 F.3d 784, 786 (5th Cir. 2000) (court kept recording from jury after polling the jury and learning that one juror spoke Spanish).

admit them, in which case original foreign-language recordings may more frequently be omitted from the trial record. This is precisely what happened in *Chavez*.⁵³

Another challenging issue under an amended Best Evidence rule could be recordings that mix English with other languages. The original recordings in *Chavez* were mostly in Spanish, but had some English words mixed in. Rule 1002 clearly applies to original recordings of English-language conversations. If Rule 1002 is amended to exclude foreign-language recordings, trial courts will have to apply the Best Evidence rule to portions of a recording. Judges could require admission of English portions of original recordings under Rule 1002 and could exercise discretion with respect to redaction of foreign-language remainders under Rule 403. While managing mixed recordings could prove to be a sticky wicket, federal courts already have experience in handling such issues.⁵⁴

Lastly, *many* evidentiary problems remain with the admission of English translation transcripts that would *not* be addressed by an amendment to the Best Evidence rule. Should the Committee ultimately choose to proceed with a proposal to amend the Best Evidence rule, an Advisory Committee note probably should acknowledge the many remaining issues surrounding the admissibility of English language transcripts that are simply not addressed under Article X of the Evidence Rules. For example, Judge Hartz is correct that a transcript translating a foreign-language recording into English constitutes an “expert opinion” that requires “specialized knowledge” with the meaning of Rule 702. This means that the proponent of such a transcript must comply with all pre-trial expert disclosure requirements and should properly qualify the testifying translator under Rule 702. Because the government in *Chavez* did not do this, the majority was unwilling to address this avenue of admissibility. The transcripts themselves need to be properly authenticated under Article IX of the Rules. And, of course, if the transcript itself is offered as evidence of the expert’s translation, issues of hearsay and confrontation also arise. An amendment to the Best Evidence rule would not affect or control any of these requirements and the Advisory Committee note should make that clear.

IV. Amendment Options

If the Committee were inclined to pursue an amendment to exclude foreign-language recordings from the Best Evidence rule, there are two possible approaches.

A. Amending the “Definitions” that Apply to Article X in Rule 1001

One possible way to remove foreign-language recordings from the Best Evidence rule would be to amend the “Definitions” provision found in Rule 1001. Rule 1001 provides the definitions “that apply to this article.” Of course, the Best Evidence problem with respect to foreign-

⁵³ Of course, the defense would remain free to offer the original recording into evidence as part of a challenge to the accuracy of the government’s English transcript. But this shift away from mandatory admission of the original foreign-language recording could have an impact. For example, omission of the original foreign-language recording could affect ineffective assistance of counsel claims by criminal defendants relating to defense failures to challenge the accuracy of an English translation transcript.

⁵⁴ See, e.g., *United States v. Taghipour*, 964 F.2d 908 (9th Cir.), *cert. denied*, 506 U.S. 899 (1992) (recordings were partly in English and partly in Farsi and trial court instructed jury that the tape was evidence for the English portion and that the transcript was evidence for the portion in Farsi).

language recordings applies equally to foreign-language writings and the definition of both “writings” and “recordings” would need to be amended to include only English-language writings and recordings. Such an amendment might read as follows:

Rule 1001. DEFINITIONS THAT APPLY TO THIS ARTICLE

In this article:

- (a) A “writing” consists of English-language letters, or words, and numbers or their equivalent of any of these set down in any form.
- (b) A “recording” consists of English-language letters, or words, and numbers or their equivalent of any of these recorded in any manner.
- (c) A “photograph” means a photographic image or its equivalent stored in any form.
- (d) An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout – or other output readable by sight – if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.
- (e) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Because the references to “writings” and “recordings” in Rule 1002 and throughout Article X track the definitions in Rule 1001, this amendment would limit the operation of the Best Evidence rule to English-language writings and recordings.

There could be some unanticipated consequences to amending the “Definitions” provision, however. For example, removing foreign-language writings and recordings from the ambit of Article X altogether could present problems for a proponent trying to offer a Rule 1006 summary of voluminous foreign-language recordings. Further the existing language of Rule 1001 that defines writings and recordings as letters or words “or their equivalent set down in any form” could undermine an amendment if courts interpret foreign-language recordings as “an equivalent” to an English-language writing or recording. An Advisory Committee note could make the intent to exclude foreign-language recordings and writings clear, but it would be problematic if the plain language were at war with the intent.

B. A Freestanding Exception for Foreign Language Recordings: New Rule 1009

Another amendment alternative that might present fewer problems would be the addition of a new rule at the end of Article X. Such a rule should not prescribe the method for proving a foreign-language writing or recording with any precision to avoid treading into the areas of expert testimony, authentication, hearsay, and confrontation that could be implicated by use of a transcript at trial. Instead, a new rule might briefly provide that an original is *not required* in the case of foreign-language writings or recordings, leaving the proper method of proof to other rules. In so doing, Rule 1009 might borrow language from Rule 1004 and read:

RULE 1009 FOREIGN-LANGUAGE WRITINGS AND RECORDINGS

An original is not required, and other evidence of the content of a writing or recording is admissible, if the writing or recording was made in a language other than English.

As discussed above, an Advisory Committee note to either of these amendment alternatives would need to explain the intent and purpose of the amendment. Importantly, the note would need to emphasize the many thorny problems of proof surrounding foreign-language recordings and English transcripts outside the purview of the Best Evidence rule that would remain for courts and litigants to resolve.

TAB 7

TAB 7A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to Rule 611(a)
Date: April 1, 2021

Rule 611(a) provides trial courts with discretion to manage evidence presented at trial. The rule provides as follows:

- (a) Control by the Court; Purposes.** 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 determining the truth;
 - (2) avoid wasting time; and
 - (3) protect witnesses from harassment or undue embarrassment.

Rule 611(a) thus sets forth two permissible types of actions: control of (1) mode and (2) order. And there are three goals to which the court's actions can be directed: (1) determining the truth, (2) avoiding waste of time, and (3) protecting witnesses from harassment or embarrassment.

Courts appear to invoke Rule 611(a) whenever they deal with an evidence question that is not covered by another rule --- and sometimes even when another rule applies. While any particular action in the name of Rule 611 may be reasonable and appropriate, there is a possibility that some actions taken by a court under the rubric of Rule 611(a) may not actually be within the text of the rule. It appears that some actions taken in the name of Rule 611(a) involve neither "mode" or "order." And even when a court's action involves "mode" or "order", the court invoking Rule 611(a) might be pursuing a goal that is not described in subdivisions (1), (2), and (3).

The Chair asked the Reporter to determine whether courts have, in the name of Rule 611(a), undertaken actions that are outside the text of the rule. If so, then the Committee might consider an amendment to Rule 611(a) to allow those actions (assuming such actions are proper on the merits). The Supreme Court Fellow to the Administrative Office, Kathleen Foley, conducted extensive research into the uses of Rule 611(a) over the past five years.¹ This memo sets forth that research and analyzes whether the invocations of Rule 611(a) have ever gone beyond the language of the Rule.

¹ The Reporter is very grateful for Ms. Foley's outstanding work.

Part One of this memo sets forth the research on court invocations of Rule 611(a), and analyzes whether these actions fit within the language of Rule 611(a).² Part Two discusses possible amendments that would 1) broaden the language of Rule 611(a), and 2) add protective provisions on a particular practice that has been sanctioned under Rule 611(a) --- allowing jurors to ask questions during the trial.

It should be emphasized that this memo is not making a recommendation that Rule 611 should be amended. In fact there are a number of questions that would be raised by an amendment expanded to cover some of the current actions that appear to be outside the text of the rule. Here are two questions that might give one pause:

1. While it appears to be true that Rule 611(a) has been used beyond the textual grant of discretion, if nobody is having a problem with that, why amend the rule? Usually a rule is amended because the language of the rule has created a problem in practice, or there is a conflict in the courts. But there doesn't appear to be a problem in practice from courts interpreting Rule 611(a) in the broadest fashion --- essentially as a tool to manage the trial. Nor does there appear to be a conflict in the courts about a broad interpretation of the rule.³ This is not at all to say that there is no value in codifying the Rule 611(a) case law that goes beyond the current text. But there is a question of what problem that codification would solve.

2. Besides the authority granted in Rule 611(a), the trial court has inherent authority to control the courtroom and the court proceedings in the interests of justice. It is hard to know where Rule 611(a) ends and inherent authority begins. Obviously there is an overlap. It is hard to know what will be gained by amending Rule 611(a), given the court's inherent authority, in any event, to run the courtroom. In many of the cases below, the court invokes both Rule 611(a) and its inherent authority, to do what it needs to do.

I. How Has Rule 611(a) Been Used by the Courts?

The following is a list of actions that courts have taken under the authority of Rule 611(a). After each action, an analysis is provided on whether it fits within the language of the Rule. The actions are divided into parts --- those that are clearly within Rule 611(a) and those that might not be.

It should also be noted that the research indicates a number of examples in which the invocation of Rule 611(a) has resulted in tension (if not outright conflict) with another Evidence Rule. Where that has occurred, the analysis points that out.

² Of course a look into the reported case law will undercount the uses of Rule 611(a) by a trial court. One possible way to supplement the information provided by the reported case law is to prepare a survey for federal judges. This Committee has twice before conducted a survey of federal judges on the use of an evidence rule --- with the substantial assistance of the FJC. Both times, however, the Committee was pretty far along in the amendment process, so that the costs of a survey could be more easily justified.

³ Of course it is true that a court might abuse its discretion under Rule 611(a). For example, a court that, without any reason, excludes a witness or bars cross-examination or reverses the order of proof would probably violate Rule 611(a). But the goal of an amendment to Rule 611(a) could not possibly be intended to describe when an abuse of discretion occurs in any particular case. Rather the goal would have to be the kinds of acts that the court can do, subject to an abuse of discretion standard that is inherent in the rule.

A. Actions within the textual authority of Rule 611(a)

1. Controlling the order of presentation

Many courts invoke Rule 611(a) when they find it appropriate to alter the parties' order of proof. Some examples are:

- Taking witnesses out of order.⁴
- Directing a specific order for calling witnesses.⁵
- Allowing the anticipation of the opposing party's arguments on direct, in opening statement, or in the case-in-chief.⁶
- Changing the order of proof.⁷
- Sequencing the questioning of a witness.⁸

⁴ *United States v. Robertson*, 2016 WL 3397725, at *15 (D. Ariz. June 21, 2016) (taking witnesses out of order to accommodate one witness's medical emergency); *Accident Ins. Co., Inc. v. U.S. Bank Nat'l Ass'n*, 2020 WL 1910096, at *1 (D.S.C. Apr. 20, 2020); *Phillips & Jordan, Inc. v. McCarthy Improvement Co.*, 2020 WL 5793377, at *2 (D.S.C. Sept. 29, 2020).

⁵ *Hassoun v. Searls*, 467 F. Supp. 3d 111, 124 (W.D.N.Y. 2020) (ordering Respondent to call Petitioner last, if it called him at all, so he could assess if and how to invoke his Fifth Amendment privilege); *United States v. Okoroji*, 2018 WL 9708257, at *2 (N.D. Tex. June 6, 2018) (allowing expert to testify on a date certain, potentially after the rest of the trial had concluded).

⁶ *United States v. DeLeon*, 2018 WL 4184235, at *1 (D.N.M. Apr. 12, 2018) ("Nothing in the Federal Rules of Evidence requires parties to wait to introduce impeachment evidence until after a witness testifies; on the contrary, those rules commit "the mode and order of examining witnesses and presenting evidence" to the Court's discretion. Fed. R. Evid. 611. Accordingly, the Court will permit J. Gallegos to use the Lujan recordings and transcripts in his opening if he intends to offer them as impeachment evidence. The Court will reconsider this determination, however, if the United States represents to the Court that it will not call Lujan as a witness."); *Brooks v. Caterpillar Glob. Mining Am., LLC*, 2017 WL 3401476, at *7 (W.D. Ky. Aug. 8, 2017); *Krakauer v. Dish Network L.L.C.*, 2017 WL 2455095, at *11 (M.D.N.C. June 6, 2017);.

⁷ *Cammeby's Mgmt. Co., LLC v. Affiliated FM Ins. Co.*, 2016 WL 10570966, at *4 (S.D.N.Y. Dec. 28, 2016) ("The trial court has the broadest sort of discretion in controlling the order of proof at trial, ; see Fed. R. Evid. 611, and . . . the Court changed the order of evidence because the jury would find this case clearer to have the plaintiff go first and Alliant go second, and, since Alliant bore the burden of proof, it made more sense for that to be fresher in the jurors' minds when they get the case for deliberations."); *Ulbricht v. United States Fid. & Guar. Co.*, , 2020 WL 5632104, at *2 (W.D. Wash. Sept. 21, 2020); *Fontenot v. Safety Council of Sw. Louisiana*, 2017 WL 3122607, at *4 (W.D. La. July 21, 2017); *Jun Yu v. Idaho State Univ.*, 2019 WL 501457, at *2 (D. Idaho Feb. 8, 2019); *Walker v. Corr. Corp. of Am.*, 2016 WL 865295, at *3–4 (N.D. Miss. Mar. 2, 2016) (declining to allow defendant to open and close argument or to present its evidence first).

⁸ *United States v. French*, 2019 WL 289803, at *3–4 (D. Me. Jan. 22, 2019) (providing for sequencing of questioning a juror in a hearing on juror misconduct).

Analysis: All of the above actions seem well within the grant of authority over the “mode and order” of questioning witnesses and presenting evidence. Moreover, they can all be justified (depending on the circumstances) as having a proper designated purpose listed under Rule 611(a): they are procedures “effective for determining the truth.”

2. Controlling the number of times a witness can be called or questioned.

Courts invoke Rule 611(a) in determining whether a witness who has testified may or should be recalled.⁹ And if the court allows a witness to be recalled, it may invoke Rule 611(a) to impose a limit on what questions may be posed to the witness.¹⁰

Analysis: These actions clearly are within “mode and order” and, if proper, they would have the justified purpose of “protecting witnesses from harassment.”

3. Controlling the presentation of testimony

Courts invoke Rule 611(a) on a variety of issues related to how witness testimony is to be presented. Examples include:

- Structuring *pro se* testimony, ordinarily by allowing it in narrative form.¹¹

⁹ *United States v. Bailey*, 973 F.3d 548, 563–64 (6th Cir. 2020) (proper use of Rule 611(a) to allow a witness to testify three separate times in the prosecution’s case-in-chief --- in part caused by the need for lengthy continuances); *United States v. Smith*, 659 F. App’x 908, 912 (9th Cir. 2016); *United States v. Choudhry*, 649 F. App’x 60, 61 (2d Cir. 2016); *Thomas v. Concerned Care Home Health, Inc.*, 2016 WL 930943, at *4 (E.D. La. Mar. 11, 2016); *United States v. Haig*, 2019 WL 3577647, at *5 (D. Nev. Aug. 6, 2019); *United States v. Jinhuang Zheng*, 2017 WL 3434228, at *2 (N.D. Ill. Aug. 10, 2017); *Kirkland v. Cablevision Sys.*, 2020 WL 7321358, at *3 (S.D.N.Y. Dec. 11, 2020); *One Way Apostolic Church v. Extra Space Storage Inc.*, 792 F. App’x 402, 404 (7th Cir. 2019); *United States v. Ageyev*, 2019 WL 8989871, at *2 (E.D. Wash. Sept. 30, 2019).

¹⁰ *United States v. Woods*, 2018 WL 8997508, at *1–2 (W.D. Ark. Apr. 8, 2018) (relying on Rule 611(a), the court states in a pretrial ruling that “a witness that was previously called in one party’s case-in-chief may be recalled by another party in its own case-in-chief. However, the general rule will be that when a witness is recalled under such circumstances, the party recalling that witness must restrict the scope of his direct examination to matters that were not within the scope of that witness’s prior testimony.”).

¹¹ *United States v. Rodriguez-Aparicio*, 888 F.3d 189, 196 (5th Cir. 2018) (upholding a ruling directing *pro se* criminal defendant to ask himself questions on the stand); *Chichakli v. Gerlach*, 2018 WL 3625840, at *3 (W.D. Okla. July 30, 2018) (allowing *pro se* plaintiff to testify in narrative form, both on direct and on redirect; requiring him to file beforehand the subjects he intends to cover); *DeBose v. Univ. of S. Fla. Bd. of Trustees*, 2018 WL 8919981, at *7 (M.D. Fla. Sept. 9, 2018) (*pro se* plaintiff may testify in narrative form); *Duverge v. United States*, 2018 WL 619497, at *1, *2–3 (D. Conn. Jan. 30, 2018) (prohibiting *pro se* plaintiff from testifying in narrative form); *United States v. Rankin*, 2017 WL 3096177, at *4 (S.D. Ohio July 20, 2017) (allowing *pro se* defendant to testify in “modified narrative format”—arranged by topic, with a summary description preceding each topic).

- Allowing or directing testimony of experts in narrative form.¹²
- Ordering submission of direct testimony by deposition, while requiring live cross and redirect.¹³

Analysis: These actions are well within mode and order and, when proper, are for the proper purpose of determining the truth.

4. Allowing and regulating the use of illustrative aids.

As discussed in another memo in this agenda book, illustrative aids --- which are not evidence, but rather offered to allow the fact finder to better understand the evidence --- are reviewed, and regulated, under Rule 611(a). Actions by courts under Rule 611(a) include:

- Assuring that illustrative aids are helpful and not misleading.¹⁴
- Admitting “summary” charts that are illustrative (and distinct from evidence summaries offered under Rule 1006).¹⁵

¹² *In re Depakote v. Abbott Labs., Inc.*, 2017 WL 11438794, at *4 (S.D. Ill. May 24, 2017) (allowing an expert to testify in narrative form); *In re: Tylenol (Acetaminophen) Mktg., Sales Practices & Prod. Liab. Litig.*, 2016 WL 807377, at *9 & n.28 (E.D. Pa. Mar. 2, 2016) (same).

¹³ *United States v. Brown*, 2017 WL 219521, at *2 (N.D. Ill. Jan. 19, 2017) (order in a bench trial requiring the parties to “submit the direct testimony of all witnesses by declaration prior to trial,” while also requiring they “make their witnesses available live for cross-examination and re-direct during trial.”). *See also, In re Gergely*, 110 F.3d 1448, 1452 (9th Cir. 1997) (“The pretrial order required written declarations in lieu of direct oral evidence. It was a valid order.”).

¹⁴ *United States v. Kaley*, 760 F. App'x 667, 681–82 (11th Cir. 2019) (finding that the illustrative aid fairly represented the evidence); *Boykin v. W. Express, Inc.*, 2016 WL 8710481, at *4–5 (S.D.N.Y. Feb. 5, 2016) (“Here, Mr. Hennan's testimony compares the diagram of the accident to the accident as he recalls it occurring. Without the ability to view the diagram, this testimony lacks probative value. The diagram will aid the jurors in their attempt to understand Mr. Hennan's description of the accident and will clarify his statements as to the accuracy of the illustration. Therefore, the diagram can be used for the limited purpose of illustrating Mr. Hennan's testimony to the jury and can be displayed to the jury, but, to the extent it is offered for its truth, the diagram is inadmissible hearsay and cannot be submitted as substantive evidence.”); *United States v. Crinel*, 2017 WL 490635, at *11–12 & Att.2 (E.D. La. Feb. 7, 2017) (directing modification to pedagogical aid so that it is not misleading); *Core Labs. LP v. AmSpec*, 2018 WL 6200758, at *7 (S.D. Ala. May 10, 2018) (striking summary judgment exhibits that purported to be pedagogical aids, but that made arguments in violation of page limits, as they “would waste the Court’s time and be an ineffective means for determining the truth”).

¹⁵ *United States v. Mendez*, 643 F. App'x 418, 423–24 (5th Cir. 2016) (“The photographs were part of a demonstrative aid to assist the jury in following along during the foreign language conversations. They are thus subject to Fed.R.Evid. 611.”); *United States v. Georgiou*, 2018 WL 9618008, at *41–42 (E.D. Pa. June 19, 2018) (habeas claimant argues that FRE 1006 summaries were in fact FRE 611(a) pedagogical aids; court disagrees); *United States v. Gordon*, 2019 WL 4308127, at *4–5 & n.1 (D. Me. Sept. 11, 2019) (explaining the difference between an FRE 1006 summary chart and an FRE 611(a) pedagogical aid); *United States v. Ojimba*, 2018 WL 1884822, at *2 (W.D. Okla. Apr. 19, 2018); *Holmes v. Godinez*, 2016 WL 4091625, at *6–7 (N.D. Ill. Aug. 2, 2016) (deposition summaries); *Monaghan v.*

- Allowing witnesses to summarize documents that have been admitted.¹⁶

Analysis: The distinction between demonstrative evidence and illustrative aids is discussed in Professor Richter’s memo in the agenda book. As indicated in that memo, illustrative aids are not evidence. Rather they are devices used to help the factfinder understand the evidence.

Because illustrative aids (including summary charts) are not evidence, it can be argued that there is no authority to regulate them --- or even to allow them --- under Rule 611(a), because the power granted there is to control the mode and order of witness testimony or the presentation of “evidence.”

But while illustrative aids are technically not evidence, they surely have evidentiary impact, because they help the jury understand the evidence that is presented. That is probably close enough to be within the broad language of Rule 611(a). Certainly the courts and treatises are clear that Rule 611(a) provides authority for the court to regulate the use of illustrative aids. If the Committee disagrees, then regulation of illustrative aids can be specified in an amendment that would broaden the language of Rule 611(a).

Note that the other memo on illustrative aids considers a different amendment to Rule 611, that would provide guidelines for distinguishing between illustrative aids and demonstrative evidence. If that amendment is pursued, then there would be no reason to amend Rule 611(a) to grant specific authority to authorize and regulate illustrative aids.

5. Admitting oral statements when necessary for completion.

As the Committee is aware --- and as indicated in a memo in this agenda book --- Rule 106 does not on its face allow completion with oral, unrecorded statements. But most courts have admitted such statements when necessary to compete --- invoking Rule 611(a) to do so.¹⁷

Telecom Italia Sparkle of N. Am., Inc., 647 F. App'x 763, 767 (9th Cir. 2016) (summary of expert report); *United States v. Cadden*, 2017 WL 758461, at *2 (D. Mass. Feb. 27, 2017) (summary testimony); *United States v. Franco*, 2017 WL 11466631, at *4 (D. Ariz. June 22, 2017) (summary extraction of selected text messages); *United States v. Joyce*, 2017 WL 895563, at *3 (N.D. Cal. Jan. 20, 2017) (non-argumentative charts properly offered as illustrative aids).

¹⁶ See, e.g., *Does I-XIX v. Boy Scouts of Am.*, 2019 WL 2448318, at *2 (D. Idaho June 11, 2019) (noting that “a summary prepared by a witness from his own knowledge to assist the jury in understanding or remembering a mass of details is admissible, not under Rule 1006, but under such general principles of good sense as are embodied in Rule 611(a)”) (quoting the Weinstein treatise).

¹⁷ See, e.g., *United States v. Bailey*, 322 F. Supp. 3d 661 (D. Md. 2017); *United States v. Cooper*, 2019 WL 5394622, at *7 (E.D.N.Y. Oct. 22, 2019); *United States v. Baca*, 403 F. Supp. 3d 1181, 1184–85 (D.N.M. 2019). See also the many cases discussed in the Rule 106 memo.

Analysis: While using Rule 611(a) is not ideal (because all completeness issues should be located in one rule), it is clear that using the Rule for completion concerns both the mode and order of the presentation of evidence --- and it has the proper purpose of furthering the search for truth.

6. Excluding time-wasting, cumulative, or irrelevant evidence.

Courts often cite Rule 611(a) in precluding redundant or repetitive questioning, excluding multiple witnesses from testifying to the same point, and the like.¹⁸ Similarly, courts have invoked the rule to limit cross-examination of witnesses when it gets to be unproductive, overly lengthy, etc.¹⁹ And Rule 611(a) has been invoked when the court decides that allowing certain inquiries would lead to minitrials or sideshows, that are not justified under the circumstances.²⁰

¹⁸ *United States v. Schlosser*, 749 F. App'x 145, 146–47 (3d Cir. 2019) (no error in prohibiting introduction of documentary evidence cumulative of testimony); *United States v. Ulbricht*, 858 F.3d 71, 118–20 (2d Cir. 2017) (no error in striking speculative testimony as irrelevant); *Miller v. Greenleaf Orthopedic Assocs., S.C.*, 827 F.3d 569, 572–73 (7th Cir. 2016) (finding no error in barring repetitive impeachment); *Watkins v. Broward Sheriff's Office*, 771 F. App'x 902, 911 (11th Cir. 2019) (trial court had discretion under Rule 611(a) to prevent continuation of repetitive questioning); *Igwe v. Skaggs*, 2017 WL 5067496, at *1, 2 (W.D. Pa. July 7, 2017) (prohibiting seven witnesses from testifying on matter not at issue); *Pender v. Bank of Am. Corp.*, 2016 WL 7320894, at *1 (W.D.N.C. Dec. 15, 2016) (excluding expert reports of testifying experts); *Sanchez v. Duffy*, 416 F. Supp. 3d 1131, 1154, 1174 (D. Colo. 2018) (excluding testimony of little or no relevance); *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 2017 WL 2602332, at *5, 8 (Bankr. S.D.N.Y. June 15, 2017) (excluding witness whose testimony would be duplicative); *Gucker v. U.S. Steel Corp.*, 2016 WL 379553, at *6 (W.D. Pa. Jan. 31, 2016) (excluding witness whose testimony would be cumulative); *Hinds v. Cty. Of Westchester*, 2020 WL 7046843, at *4 (S.D.N.Y. Dec. 1, 2020) (instructing counsel to stop asking redundant questions); *United States v. Chow*, 2016 WL 3098238, at *9–15 (N.D. Cal. June 2, 2016) (excluding witnesses as cumulative or irrelevant); *United States v. Odiase*, 312 F. Supp. 3d 432, 437 (S.D.N.Y. 2018) (prohibiting playing of hour-long, nonprobative video to jury); *Jarzyna v. Home Properties, L.P.*, 2018 WL 4090498, at *1 & n.1 (E.D. Pa. Aug. 27, 2018) (denying request to call witness, large portions of whose deposition had already been read into the record); *Jun Yu v. Idaho State Univ.*, 2019 WL 346390, at *1 (D. Idaho Jan. 28, 2019) (excluding illustrative aids, in part because case was not “complex”); *United States v. Evans*, 2018 WL 8334950, at *17 (E.D. Ky. June 1, 2018) (barring criminal defendant from testifying on theory that had no basis in evidence); *Watkins v. Pinnock*, 802 F. App'x 450, 458 (11th Cir. 2020) (prohibiting questioning in violation of FRE 404(b)); *Bosby v. Hydratech Indus. Fluid Power, Inc.*, 2018 WL 2994382, at *3 (S.D. Ala. June 14, 2018) (striking *pro se*'s voluminous, unexplained summary judgment exhibit of uncertain relevance, because admission “would waste the Court’s time and be an ineffective means for determining the truth”).

¹⁹ *United States v. Vargas*, No. 14 CR 579, 2016 WL 4059190, at *5 (N.D. Ill. July 27, 2016), *aff'd*, 915 F.3d 417 (7th Cir. 2019) (curtailing cross-examination after hours of largely irrelevant questioning of witness); *United States v. Browne*, No. SACR 16-00139-CJC, 2017 WL 1496912, at *6 (C.D. Cal. Apr. 24, 2017) (ending cross when it became “excessively cumulative and argumentative”); *United States v. Pinchotti*, 2019 WL 1547264, at *3 (D. Md. Apr. 9, 2019) (curtailing cross on irrelevant matter); *United States v. Atias*, 2017 WL 6459477, at *14, 18 (E.D.N.Y. Dec. 18, 2017) (curtailing cross on “problematic” impeachment ground); *United States v. Hamlett*, 2019 WL 3387098, at *13–14 (D. Conn. July 26, 2019) (prohibiting cross of alleged sex trafficking victim on prior sexual history, in conjunction with FRE 412(b)(1)); *United States v. Lee*, 660 F. App'x 8, 18–19 (2d Cir. 2016) (prohibiting further irrelevant cross).

²⁰ *Angelopoulos v. Keystone Orthopedic Specialists, S.C.*, 2017 WL 2178504, at *13, 15 (N.D. Ill. May 16, 2017) (“The Court will not permit a lengthy sideshow on these issues or time consuming mini-trials regarding the merits of these other allegations.”) (citing Rule 611(a) and Rule 403); *Crew Tile Distribution, Inc. v. Porcelanosa Los Angeles, Inc.*, 2017 WL 633044, at *13 (D. Colo. Feb. 16, 2017); *Holmes v. City of Chicago*, 2016 WL 6442117, at *8, 14, 15,

Analysis: Preventing cumulative questioning and irrelevant or prejudicial testimony is pretty comfortably within the mode of presenting witness testimony. And it is properly purposed as it avoids wasting time and protects witnesses from harassment.

But it is not clear why Rule 611(a) is doing any work here --- because cumulative or irrelevant evidence is already regulated under Rules 401-403. If the Committee decides to further consider an amendment to Rule 611(a), it might consider the question of how that Rule 611(a) interfaces with Rules 401-403, and whether that relationship needs to be set forth in a rule or a committee note. Generally speaking, it would not be good if Rule 611(a) is somehow read to exclude evidence that is specifically permitted by another rule, nor to admit evidence that is specifically excluded by another rule. It is less offensive if Rule 611(a) is merely cited as support for applying another rule --- or as support for a ruling within the spirit of that other rule.

7. Objecting to Evidence.

In *United States v. Woods*, 978 F.3d 554, 571 (8th Cir. 2020), the court, relying on Rule 611(a), found no error in the trial court’s objection to a question asked by counsel. The court found that “the objection at issue was in response to defense counsel’s introduction of facts not in the record through the means of a question, and was not an improper objection.”

Analysis: Objecting to a problematic question appears sufficiently related to the mode and order of witness testimony and presentation of the evidence. And if the objection is valid, it is properly purposed as protecting the search for truth.

8. Judicial questioning of witnesses and commenting on the evidence.

In *United States v. Rivera-Carrasquillo*, 933 F.3d 33, 44–46 (1st Cir. 2019), the court held that judges can “question witnesses” and “analyze, dissect, explain, summarize, and comment on the evidence” --- and otherwise extract facts to clarify misunderstandings. However, the judge’s powers “are not boundless — for they cannot become advocates or otherwise use their judicial powers to advantage or disadvantage a party unfairly.” The court found no abuse of discretion in this case as the comments and questions were fair and not especially intrusive, and the trial court instructed the jury that it should not give undue weight to the judicial comments and questions.²¹

17, 18 (N.D. Ill. Nov. 1, 2016); *Lawton-Davis v. State Farm Mut. Auto. Ins. Co.*, 2016 WL 1383015, at *3 (M.D. Fla. Apr. 7, 2016); *Owens v. Ellison*, 2017 WL 1151046, at *8, 9 (N.D. Ill. Mar. 28, 2017).

²¹ See also *Cain v. United States*, 2017 WL 3840258, at *9–10 (D. Md. Sept. 1, 2017); *Meyers v. Hall*, 2020 WL 1482561, at *7 (W.D. Va. Mar. 27, 2020).

Analysis: Questioning witnesses and commenting on the evidence seem well within mode and order, and if proper, they are done for the permissible purposes of streamlining the proceedings and promoting the search for truth.

But one wonders why Rule 611(a) is being used in light of Rule 614(b), which specifically grants the court discretion to examine witnesses. There would appear to be no reason to have two rules applicable to the same situation --- this problem of overlap is similar to the overlap with Rules 401-403 when the court invokes Rule 611(a) to exclude irrelevant or prejudicial evidence. Again the question is whether Rule 611(a) is somehow negatively affecting the existing rule, or rather that it is just being cited in passing in support for the more explicit rule.

9. Calling a recess in the middle of a witness examination.

In *Thompson v. Afamasaga*, 2019 WL 1290856, at *3 (D. HI. Mar. 20, 2019), the court relied on Rule 611(a) in declaring a recess in the middle of the plaintiff's direct testimony. The court noted that it did nothing to prevent questions from resuming after the recess.²²

Analysis: Controlling the pace and timing of testimony is clearly within mode and order, properly purposed for the search for truth.

²² See also *United States v. Boggs*, 737 F. App'x 243, 253–54 (6th Cir. 2018); *Castro v. Tanner*, 2014 WL 2938355, at *30-31 (E.D. La. June 27, 2014) (finding no error or prejudice where the court called a recess during cross-examination, allowed counsel to continue questioning witness after recess, and excused witness after counsel for both parties said they had no more questions, even though witness stated that he had more to say).

10. Allowing and managing rebuttal,²³ surrebuttal,²⁴ redirect,²⁵ and recross²⁶

Analysis: *There is little doubt that managing these issues are regulating the mode and order of witness testimony and the presentation of the evidence and, if proper, they promote the search for truth.*

11. Regulating the form of questions:

Objections such as “compound question”, “argumentative”, “assumes facts that aren’t in evidence” and so forth are routinely handled by courts under Rule 611(a).²⁷

Analysis: *Ruling as to form goes directly to the mode of witness testimony and is done with the proper purposes of effectuating truth and, in some cases, protecting witnesses.*

²³ **Allowing:** See, e.g., *United States v. Valas*, 822 F.3d 228, 240, 242 (5th Cir. 2016) (“The Federal Rules of Evidence grant the district court the discretion to control the mode and order of interrogating witnesses. Fed. R. Evid. 611(a). This grant of discretion includes broad authority to control the scope of rebuttal.”); *United States v. Wheeler*, 745 F. App’x 643, 644 (7th Cir. 2018); *Fed. Trade Comm’n v. Innovative Designs, Inc.*, 2020 WL 5701925, at *13 n.29 (W.D. Pa. Sept. 24, 2020); *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, 2018 WL 6335781, at *5 (E.D. La. Dec. 5, 2018); *United States v. Loftis*, 2018 WL 3193196, at *12 (D. Mont. June 27, 2018); *United States v. Pon*, 963 F.3d 1207, 1222 (11th Cir. 2020); *Wickersham v. Ford Motor Co.*, 2017 WL 3783122, at *10–11 (D.S.C. Aug. 30, 2017).

Restricting: See, e.g., *In re Petition of Frescati Shipping Co., Ltd.*, 2016 WL 4035994, at *7 n.15 (E.D. Pa. July 25, 2016) (“Rule 611 of the Federal Rules of Evidence mandates that the Court exercise reasonable control over the mode and order of examining witnesses and presenting evidence. This includes controlling the scope of rebuttal and surrebuttal. . . . Rebuttal testimony was limited to only new matters that the defense raised in its case-in-chief.”).

²⁴ **Allowing:** *Meinert v. Praxair Inc.*, 2016 WL 5219746, at *1, *2–3 (N.D. Ind. Sept. 21, 2016) (allowing two surrebuttal experts due to change in circumstances).

Restricting: *United States v. Chow*, 2016 WL 3098238, at *14–15 (N.D. Cal. June 2, 2016).

²⁵ *Waterman v. McKinney Indep. Sch. Dist.*, 642 F. App’x 363, 372 (5th Cir. 2016) (“With regard to preventing redirect examination of Strickland, the district judge has ‘reasonable control over the mode and order of examining witnesses and presenting evidence.’ The district judge’s disallowance of redirect examination was in his discretion, and regardless, Waterman does not explain how he was prejudiced by the ruling.”); *United States v. Mejia-Ramos*, 798 F. App’x 749, 751–52 (4th Cir. 2019) (no error in reopening redirect and allowing inquiry into new subject) *Reynolds v. Am. Airlines, Inc.*, 2017 WL 6017355, at *4–5 (E.D.N.Y. Dec. 4, 2017) (managing scope of redirect);

²⁶ *Nowlan v. Nowlan*, 2021 WL 217139, at *1 (W.D. Va. Jan. 21, 2021) (allowing recross “to mitigate any potential limitations” of videoconference format).

²⁷ *Burley v. Gagacki*, 834 F.3d 606, 617 (6th Cir. 2016) (no error in instructing plaintiffs’ counsel to use the question and answer format during cross-examination); *Hinds v. Cty. of Westchester*, 2020 WL 7046843, at *4 (S.D.N.Y. Dec. 1, 2020) (advising counsel not to use questioning as argument and not to ask inflammatory questions); *Gobert v. Atl. Sounding*, 2017 WL 479215, at *4 (E.D. La. Feb. 6, 2017) (ruling on objections as to form); *In re USA Promlite Tech. Inc.*, 2020 WL 4384218, at *7–12, 15, 16, 20, 24, (Bankr. S.D. Tex. July 30, 2020).

12. Preventing harassment or embarrassment of witnesses.

Some of the actions taken under Rule 611(a) to protect witnesses are:

- Prohibiting offensive questions.²⁸
- Prohibiting attacks and questions when the point has already been made.²⁹
- Entering a protective order.³⁰
- Taking measures to protect the witness from emotional trauma.³¹

Analysis: All the above actions are clearly undertaken for a permissible purpose under Rule 611(a): to protect witnesses from harassment or embarrassment. And limiting the questions that can be asked would appear to go to the “mode” of questioning witnesses. Protective orders under this rule are also related to the “mode” of questioning witnesses, because they regulate the conditions under which testimony is given.

13. Imposing sanctions.

In *Burnett v. Ocean Properties, Ltd.*, 422 F. Supp.3d 369, 391–92 (D. Me. 2019), the trial judge had a pending motion *in limine* on, of all things, a question of moose-hunting. The judge instructed counsel that the hunting could not be raised before the jury, pending the court’s decision. But defense counsel asked a witness about moose-hunting, without approaching the bench to determine whether the testimony would be admissible. The Court viewed defense counsel’s

²⁸ *Crew Tile Distribution, Inc. v. Porcelanosa Los Angeles, Inc.*, 2017 WL 633044, at *10 (D. Colo. Feb. 16, 2017) (prohibiting “prejudicial or inflammatory phrasing of questions”); *Meyers v. Hall*, 2020 WL 1482561, at *8 (W.D. Va. Mar. 27, 2020) (striking harassing questions); *United States v. Streb*, 477 F. Supp. 3d 835, 869–70 (S.D. Iowa 2020); *Hurt v. Vantlin*, 2019 WL 8267074, at *17 (S.D. Ind. Sept. 26, 2019); *Martinez v. City of Chicago*, 2016 WL 3538823, at *9 (N.D. Ill. June 29, 2016).

²⁹ *Miller v. Greenleaf Orthopedic Assocs., S.C.*, 827 F.3d 569, 572–73 (7th Cir. 2016) (no error in judge refusing to allow a witness to be attacked where it was “an attempt to bang away at a witness who has already been adequately impeached”).

³⁰ *Planned Parenthood Arkansas & E. Oklahoma v. Jegley*, 2016 WL 7487914, at *2 (E.D. Ark. Feb. 1, 2016) (noting that “in extraordinary circumstances where the safety of a witness might be jeopardized by compelling testimony to be given under normal conditions, the courts have permitted testimony to be given in camera, outside the courtroom, or under other circumstances that afford protection.”).

³¹ *United States v. Counts*, 2020 WL 598526, at *4 (D.N.D. Feb. 7, 2020) (allowing child witnesses to hold “comfort objects” while testifying); *In re Ptacek*, 2019 WL 4049842, at *18–20 (Bankr. N.D. Ohio Aug. 27, 2019) (declining to stay proceedings to procure testimony because, *inter alia*, debtor-witness would be traumatized by the process and proceedings).

blurting out the issue of hunting as “an egregious violation of the clear implication of its instruction to defense counsel that there would be no reference to hunting until the Court ruled on its admissibility.” As a sanction, the court held that evidence of moose-hunting was inadmissible. (In other words, the judge decided the *in limine* issue as a sanction rather than on the merits.) The court relied on Rule 611(a).

Analysis: Sanctions would seem to be within the language of Rule 611 if the order that is violated is itself within the rule. And in this case, the court’s decision to exclude evidence pending its decision on the evidence was pretty clearly within the confines of “mode” and “order.” But sanctions can also be grounded in the court’s inherent authority; so once again the question is raised of the complicated relationship between Rule 611(a) and the court’s inherent power.

14. Admitting electronic duplicates rather than originals.

In *United States v. Hofstetter*, 2019 WL 5256883, at *4 (E.D. Tenn. Oct. 16, 2019), a case involving opioid prescriptions by doctors, the defendants argued that original patient files needed to be introduced to comply with the best evidence rule. The court, citing Rule 611(a), came to the following solution:

The Court finds that introducing photographs of hundreds of original patient files, when scanned copies of those files already exist, would waste time and resources. Accordingly, the Court finds that whenever an original patient file is used by either party in evidence, the parties may produce to the jury through the JERS system, the electronic duplicate. If a party seeks to emphasize a particular color of ink or tab that is not depicted on the electronic file, *the party* may introduce a photograph of that one page of the original paper file. The Court will ask the jury, before they retire to deliberate, if they desire to view any physical evidence, including particular original patient files.

Analysis: This ruling definitely deals with the mode of presenting evidence. And it is furthering a purpose articulated in the rule: time-saving. But on the other hand, this use of authority runs up against the best evidence rule. Once again, it should be inappropriate to use the Rule 611(a) authority where the matter is already covered by another rule of evidence --- and especially so if Rule 611 is used to authorize an action that is prohibited by another rule.

15. Requiring that deposed witnesses must testify if called in the opponent’s case-in-chief or not at all.

In *CGC Holding Co., LLC v. Hutchens*, 2016 WL 6778853, at *2 (D. Colo. Nov. 16, 2016), the plaintiff had deposed certain defendants, and sought a ruling that if these defendants made themselves unavailable during the plaintiff’s case-in-chief, they would not be permitted to testify in court as defense witnesses. The court, citing Rule 611(a), agreed with the plaintiff. It noted that there is nothing unusual about a party calling an opponent in its case-in-chief, and that “defendants’ refusal to commit to the presence of the three Hutchens, each of whom is a defendant in the case, during plaintiffs’ case in chief while reserving the option to call them as live witnesses during defendants’ case in chief strikes me as unjustified gamesmanship.” The court, citing Rule 611(a), concluded that “[i]f these individuals will appear live, then they must appear live during plaintiffs’ case in chief so that they can be called by the plaintiffs if they so desire.”³²

Analysis: This ruling is grounded in fairness and truth-seeking, and is clearly a ruling about both mode and order of witness testimony.

16. Requiring, contrary to Rule 613(b), that a prior inconsistent statement must be presented to the witness before extrinsic evidence is admissible.

Rule 613(b) addresses whether a party can introduce extrinsic evidence of a prior inconsistent statement. It departs from the common law rule, which required the cross-examiner to confront the witness with the inconsistent statement, before extrinsic evidence of the prior statement could be permitted. Rule 613(b) provides that the witness is not required to confront the witness with the prior statement, so long as the witness has an opportunity, *at some point in the trial*, to explain, repudiate, or deny the statement.

But many federal courts have held that despite the text of Rule 613(b), a court can exercise its powers under Rule 611(a) to require that the witness be confronted with the statement before extrinsic evidence can be admitted. As the First Circuit stated in *United States v. Hudson*, 970 F.2d 948, 956 n.2 (1st Cir. 1992): “Rule 611(a) allows the trial judge to control the mode and order of interrogation and presentation of evidence, giving him or her the discretion to impose the common-law prior foundation requirement when such an approach seems fit.” The *Hudson* Court concluded that Rule 613 “was not intended to eliminate trial judge discretion to manage the trial in a way designed to promote accuracy and fairness.” See also *United States v. Marks*, 816 F.2d 1207, 1211 (7th Cir. 1987) (trial judge is entitled despite Rule 613(b) “to conclude that in particular

³² See also *Iorio v. Allianz Life Ins. Co. of North America*, 2009 WL 3415689, at *18 (D. D. Cal. Oct. 21, 2009) (“If Plaintiffs are forced to show the videotaped depositions or read the transcript into the record of any of the movants in this action because Defendants have failed to produce them, Defendants will thereafter be precluded from producing the same witnesses in person.”); *Niebur v. Town of Cicero*, 212 F. Supp. 2d 790, 806 (N.D. Ill. 2002) (invoking district court’s authority under Fed. R. Evid. 611(a) to exercise reasonable control over the mode and order of examining witnesses to preclude live testimony of a witness during the defense case after the witness refused to appear during plaintiffs’ case and forced plaintiff to read his deposition into the record).

circumstances the older approach should be used in order to avoid confusing witnesses and jurors”).

Analysis: Requiring a prior foundation before introducing an inconsistent statement clearly goes to the mode and order of presenting evidence. It also has a proper purpose: it can avoid the time and effort necessary to admit extrinsic evidence. The time-saving would occur if the witness, when confronted, admits the statement she made. That could make the extrinsic evidence cumulative. Moreover, it can be confusing to have the prior inconsistent statement admitted, and then sometime after that the witness is given an opportunity to explain or deny it.

Yet it is troubling that courts are using Rule 611(a) as an authority to override the requirements of another rule. The Federal Rules of Evidence give judge lots of discretion, but it is rulemakers that make the rules, not judges. If Rule 613(b) is ill-conceived --- as many have argued --- the solution is to amend Rule 613(b) --- not to allow judges the discretion to abrogate it under Rule 611(a).

If the Committee decides to continue its consideration of a possible amendment to Rule 611(a), it might consider whether something needs to be added (to new text or note) that would caution against relying on Rule 611(a) to override a limitation imposed in another rule.

17. Allowing jurors to ask questions.

Occasionally trial judges have invoked Rule 611(a) to permit questioning by jurors. Appellate courts have mostly been skeptical about the practice. As the court noted in *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995), questioning by jurors “risks turning jurors into advocates” and “creates the risk that jurors will ask prejudicial or other improper questions.” The *Bush* court observed that prejudicial lines of questioning could not easily be remedied by the trial judge, because “remedial measures taken by the court to control jurors’ improper questions may embarrass or even antagonize the jurors if they sense that their pursuit of the truth has been thwarted by rules they do not understand.” Finally, the court expressed concern that juror questioning “will often impale attorneys on the horns of a dilemma” because an attorney, by objecting to a question from a juror, risks alienating the jury. The *Bush* court concluded that the balance of the prejudicial effect arising from juror questioning, against the benefits of issue-clarification, will “almost always lead trial courts to disallow juror questioning, in the absence of extraordinary or compelling circumstances.”

Other courts are more embracing of the practice. For a more positive view on juror questioning, see *SEC v Koenig*, 557 F.3d 736 (7th Cir. 2009) (while prior decisions had expressed skepticism about juror questioning, “[n]ow that several studies have concluded that the benefits exceed the costs, there is no reason to disfavor the practice”). See also Third Circuit Pattern Jury Instruction for Civil Cases 1.8, Option 2 (recognizing that certain judges routinely allow juror questions). Compare Ninth Circuit Instruction 1.15 (comment) (recommending that no questions

by jurors be permitted).

Assuming that the court decides to allow jurors to ask questions, it is clear that the trial judge must maintain strict control over the procedure, or else the discretion granted by Rule 611(a) will be abused. *See, e.g., United States v. Sykes*, 614 F.3d 303 (7th Cir. 2010) (error to permit jurors to question witnesses directly, without reducing the questions to writing or submitting them first to the judge); *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999) (allowing jury questions is within the trial court's discretion, but the judge should ask any juror-generated questions and should only do so after allowing attorneys to raise any objection out of the hearing of the jury). *See also United States v. Ricketts*, 317 F.3d 540 (6th Cir. 2003) (error for the trial court to permit jurors to submit questions to witnesses without counsel first being allowed to review those questions).

The court in *United States v. Collins*, 226 F.3d 457, 463–464 (6th Cir. 2000), set forth the following procedural safeguards that should be undertaken before jurors' questions are permitted:

When a court decides to allow juror questions, counsel should be promptly informed. At the beginning of the trial, jurors should be instructed that they will be allowed to submit questions, limited to important points, and informed of the manner by which they may do so. The court should explain that, if the jurors do submit questions, some proposed questions may not be asked because they are prohibited by the rules of evidence, or may be rephrased to comply with the rules. The jurors should be informed that a questioning juror should not draw any conclusions from the rephrasing of or failure to ask a proposed question. Jurors should submit their question in writing without disclosing the content to other jurors. The court and the attorneys should then review the questions away from the jurors' hearing, at which time the attorney should be allowed an opportunity to present any objections. The court may modify a question if necessary. When the court determines that a juror question should be asked, it is the judge who should pose the question to the witness.

Other circuits impose similar requirements on juror questioning.¹⁹

¹⁹*See e.g., United States v. Douglas*, 81 F.3d 324 (2d Cir. 1996) (the trial judge employed proper procedure by requiring juror questions to be in writing, and by asking the questions himself, after reviewing them with counsel; however, the judge exceeded his allowable discretion by inviting questions both at the start of the trial and at the end of each witness' testimony; this error was harmless, however, because the juror questions were directed at only two witnesses, neither of whom was the defendant, and the questions were few in number and of slight significance); *United States v. Sykes*, 614 F.3d 303 (7th Cir. 2010) (error to permit jurors to question witnesses directly, without reducing the questions to writing or submitting them first to the judge); *United States v. Hernandez*, 176 F.3d 719 (3d Cir. 1999) (allowing jury questions is within the trial court's discretion, but the judge should ask any juror-generated questions and should only do so after allowing attorneys to raise any objection out of the hearing of the jury).

For a jury instruction to be used if the trial judge decides to allow juror questions, see Third Circuit Pattern Instruction for Civil Cases 1.8, Option 2 (written by Capra and Struve):

Analysis: Assuming that the court is within its discretion in permitting juror questions, such a ruling concerns the mode of witness testimony and the presentation of evidence. And if properly employed, juror questioning can be justified for a purpose articulated in the rule --- the pursuit of truth.

But a broader point to consider is that an amendment to Rule 611(a) could go beyond covering actions of trial courts and deal specifically with juror questioning. The safeguards required for juror questioning can be found in the case law, but it might well be useful to set forth a list of requirements in the Evidence Rule. If this were to be done, it would of necessity be placed in a later subsection of Rule 611: a new Rule 611(d) --- as it would be dealing with a specific problem.

Whether to allow juror questioning is controversial. It would be very problematic for an amendment to take sides --- to prohibit or to encourage the practice. What is not controversial is that, if juror questioning is allowed, safeguards must be imposed. A rule setting forth those safeguards is something for the Committee to consider. A “thought experiment” draft Rule 611(d) is set forth in the next section.

B. Actions Possibly Outside the Text of Rule 611(a)

1. Realigning the parties

In *In re Quality Lease & Rental Holdings, LLC*, 2020 WL 1975349, at *1 (S.D. Tex. Apr. 25, 2020), the court changed plaintiffs into defendants and defendants into plaintiffs, citing Rule 611(a). It stated that “QLRH was the first party to file claims that are to be tried in this case. Claims on which the Debtor Parties’ bear the burden of proof predominate, both numerically and substantively. Therefore, the Court exercises its discretion to realign the parties such that the Debtor Parties are Plaintiffs and the Mobley Parties are Defendants. The Court will, however, allow the Mobley Parties to cross-examine fully any witness called by the Debtor Parties in their case-in-chief, not limited by the scope of direct examination.” The court stated that “a court normally will not realign the parties from their original designations unless the plaintiff no longer

You will have the opportunity to ask questions of the witnesses in writing. When a witness has been examined and cross-examined by counsel, and after I ask any clarifying questions of the witness, I will ask whether any juror has any further clarifying question for the witness.

If so, you will write your question on a piece of paper, and hand it to my Deputy Clerk. Do not discuss your question with any other juror. I will review your question with counsel at sidebar and determine whether the question is appropriate under the rules of evidence. If so, I will ask your question, though I might put it in my own words. If the question is not permitted by the rules of evidence, it will not be asked, and you should not draw any conclusions about the fact that your question was not asked. Following your questions, if any, the attorneys may ask additional questions. If I do ask your question you should not give the answer to it any greater weight than you would give to any other testimony.

retains the burden to prove at least one of its claims or if subsequent events in the case significantly shift the ultimate burden of proof from the plaintiff to the defendant.”

Analysis: Realigning parties seems to be beyond the “mode and order” of witnesses. It actually seems to be an action that is not grounded in an evidence rule at all --- rather more like a rule of civil procedure. Assuming that realigning parties might be appropriate in some cases, it is not apparent that the grant of authority to do so should be placed in Rule 611(a).

2. Excluding designated party representatives from the courtroom

Some courts have relied on Rule 611(a) to exclude party representatives who are immune from sequestration under Rule 615(b). They reason that “Rule 615 does not bar the Court from excluding party representatives; it merely withholds authorization for their exclusion. This is a subtle difference that suggests the Court may still have discretion to exclude these individuals so long as that power derives from a source other than Rule 615” --- such as Rule 611(a). *United States ex rel. El-Amin v. George Washington Univ.*, 533 F.Supp.2d 12, 48 (D.D.C. 2008). *See also United States v. Mosky*, No. 89-0669, 1990 WL 70819, at *3 (N.D. Ill. May 14, 1990) (invoking Rule 611 to exclude government's Rule 615 case agent from the courtroom until after he had testified); *Bradshaw v. Purdue*, 319 F. Supp. 3d 286 (D.D.C. 2018) (“The Court finds that the circumstances of this case warrant limited sequestration of [the designated representative] pursuant to the Court's general powers to manage the conduct of trial and to control the mode and order of witness presentation under Rule 611.”). Courts have also held that if two government witnesses are exempt from sequestration, Rule 611(a) may be invoked to require the second witness to be excluded while the first testifies.³³

Analysis: The goal of exclusion is certainly within the truthseeking purpose of Rule 611(a). But query whether exclusion of a witness from the courtroom is regulating the “mode” or “order” of witness testimony. Moreover, it is concerning that Rule 611(a) is used in a way that undermines the exemption from sequestration that is provided in Rule 615.

3. Allowing “non-testifying experts” to authenticate exhibits.

In *Hart v. BHH, LLC*, 2019 WL 1494027, at *3 (S.D.N.Y. Apr. 4, 2019), the court relied on Rule 611(a) to order that expert witnesses who were non-testifying experts under Rule 26 could nonetheless be allowed to testify to authenticate certain documents. The non-testifying experts were the only ones with personal knowledge about the preparation of the documents.

Analysis: Determining WHO can testify is not comfortably within “mode” or “order” of witness testimony or presenting evidence. Maybe the identity of a witness is somehow related to the “mode” of testimony, but it is a stretch. If the Committee decides to pursue an amendment

³³ *United States v. Vaughn*, No. CR 14-23 (JLL), 2016 WL 450163, at *4 (D.N.J. Feb. 4, 2016) (supplementing the court’s FRE 615 sequestration powers, by limiting the exemptions in Rule 615).

to Rule 611(a), it might consider adding something about the identity of the witness to the list of authorized actions.

4. Allowing a witness to speak to an attorney between direct and cross.

In *United States v. Campuzano-Benitez*, 910 F.3d 982 (7th Cir. 2018), the defendant complained that the trial court erred in allowing a prosecution witness to consult with counsel between direct and cross-examination. The court held that the broad discretion set forth in Rule 611(a) “certainly includes deciding whether to allow a non-party witness to speak with his attorney between direct and cross-examination.”

Analysis: Allowing a witness to consult with counsel does not itself relate to the mode of the testimony, nor does it speak to the order of testifying or presenting evidence --- though the decision certainly does impact the effectiveness of cross-examination and thus the search for truth. So if the Committee decides to proceed on an amendment, language might be added to cover practices such as declaring a recess during testimony (or something more general than that).

5. Allowing non-live testimony

Examples include allowing the use of taped deposition testimony at trial;³⁴ allowing testimony by submission of sworn declarations at a bench trial;³⁵ allowing a witness to testify by telephone;³⁶ and of course allowing a witness to testify by videoconference (as in the pandemic).³⁷

Analysis: Videoconferencing, sworn declarations, telephone, etc. are all about the “mode” in which testimony is provided. And if such modes are reasonable in light of the circumstances, they could be supportable as procedures “effective for determining the truth.”

That said, all these forms of remote testimony are often justified because of the inability

³⁴ *Botey v. Green*, 2018 WL 5985694, at *33 n.30 (M.D. Pa. Nov. 14, 2018) (ordered to limit burdens on a witness, and as a sanction against the opposing party for conduct that led to the need for introducing the deposition).

³⁵ *Cabrera v. United States*, 2020 WL 5992929, at *10 (S.D.N.Y. Oct. 9, 2020) (“At trial, Defendant's witnesses presented their testimony by sworn declarations which were accepted into evidence. In addition, Defendant's two experts gave live direct testimony about MRIs and other images of Plaintiff's knees and spine. Plaintiff's counsel thereafter cross-examined Defendant's expert witnesses. I find that this procedure, which was efficient and also offered me ample opportunity to assess the credibility of Defendant's witnesses, was appropriate in the circumstances of this case where I am the trier of fact.”).

³⁶ *Carroll v. United States*, 703 F. App'x 615 (9th Cir. 2017).

³⁷ *In re RFC & ResCap Liquidating Tr. Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020) (invoking Rule 611(a) in order remote testimony during the pandemic); *Meirs v. Cashman*, 2018 WL 9815834, at *1–2 (W.D. Mich. Aug. 3, 2018).

to conduct live testimony (like during the pandemic), or to otherwise avoid inconvenience to the witness. And with respect to witnesses, the articulated purposes in Rule 611(a) are to avoid harassment or undue embarrassment. If the Committee decides to pursue an amendment to Rule 611(a), it might consider adding another purpose for protecting witnesses --- such as protecting witnesses from substantial hardship. And it might consider more broadly, as a proper purpose for court orders, “preserving the health and safety of participants.” Changes to Rule 611(a) that would cover these concerns are set forth in the next section.

6. Streamlining proceedings

There are a grab bag of tactics that courts have used to promote a more efficient proceeding. Here are some examples:

- Making counsel provide to opposing counsel a list of witnesses and exhibits intended to be offered the next day, as a precondition of their admission.³⁸
- Setting time limits for witness examinations³⁹ or for each party’s presentation of its case.⁴⁰
- Allowing the trial to go forward while delaying ruling on a disputed issue.⁴¹
- Ordering that the proceedings continue rather than waiting for a tardy witness.⁴²

³⁸ *ACT Grp., Inc. v. Hamlin*, 2016 WL 7634679, at *10–11 (D. Ariz. May 11, 2016) (“The Court’s ruling was made for purposes of controlling the examination of witnesses and was an attempt to minimize objections during testimony so that the jury’s time would not be wasted with numerous objections. The Court disagrees that its exercise of reasonable control over the trial unduly prejudiced ACT.”).

³⁹ *United States v. Morrison*, 833 F.3d 491, 503–06 & n.3 (5th Cir. 2016) (“The authority to set limits stems from a district court’s authority to oversee the presentation of evidence. Fed.R.Evid. 611(a.)”); *Garber v. Mohammadi*, 714 F. App’x 749 (9th Cir. 2018); *Watkins v. Broward Sheriff’s Office*, 771 F. App’x 902, 911 (11th Cir. 2019); *Guerrero v. Meadows*, 646 F. App’x 597, 601–02 (10th Cir. 2016); *Branch v. Brennan*, 2019 WL 6037009, at *7 (W.D. Pa. Nov. 13, 2019); *Grewal v. Cuneo Gilbert & LaDuca LLP*, 2018 WL 4682013, at *3 (S.D.N.Y. Sept. 28, 2018).

⁴⁰ *Ma v. Am. Elec. Power, Inc.*, 647 F. App’x 641, 645 (6th Cir. 2016) (“Ma fails to demonstrate that the court abused its discretion in scheduling each side eleven hours of trial time. Though it permitted but modest extensions for cross-examination, the court noted that excessive and duplicative evidence spurred its adherence to the allotted time. See Fed.R.Evid. 403, 611(a). A judge has special latitude in applying time limits in a bench trial, since the court often has become familiar with the case long before trial begins and can readily comprehend the evidence presented.”); *Raynor v. G4S Secure Sols. (USA) Inc.*, 327 F. Supp. 3d 925, 938 n.5, 939–42 (W.D.N.C. 2018) (court used a chess clock); *Jun Yu v. Idaho State Univ.*, 2019 WL 501457, at *2 (D. Idaho Feb. 8, 2019).

⁴¹ *Madison v. Courtney*, 2019 WL 3802025, at *3 (N.D. Tex. June 5, 2019) (delaying a ruling on judicial notice: “Given the timing of Madison’s request, and the need to permit AA an opportunity to respond, deferring ruling on the request and taking it up later in the trial was a reasonable approach to efficiently presenting the evidence that also permitted AA an opportunity to respond.” (citing Rule 611(a)).

⁴² *United States v. Larch*, 2020 WL 998757, at *9–10 (W.D.N.C. Mar. 2, 2020) (citing Rule 611(a) as authority for rulings that avoid wasting time: “Here, the Court properly determined that it could not hold this matter open

- Deciding on admissibility of prior sexual offenses under Rule 414/403 before all the government’s evidence is admitted.⁴³

- Urging the parties to move it along.⁴⁴

Analysis: All the above examples are in pursuit of a goal set forth by the Rule: saving time. It is less clear that all of them deal with the mode and order of presenting evidence. Certainly some do: timing of an admissibility ruling, for example, is about the order of proof. But what about time limits, and continuing the trial instead of waiting for a witness? These orders can end up excluding certain evidence, and there is at least an argument that this goes beyond “mode” and “order.”

Perhaps the language should be expanded to “mode, order and admissibility.” But that might be problematic because there are many other rules of admissibility and it would not be ideal to have Rule 611(a) swallow them up. Another possibility is “mode, order, and timing.”

7. Allowing victorious defendants to stay at the defense table with a remaining defendant.

In *Green v. City of Chicago*, 2017 WL 5894203, at *6 (N.D. Ill. Mar. 17, 2017), a civil rights action against four police officers and the City, three officers were dismissed from the case mid-trial. The remaining officer asked the court to allow the dismissed defendants to remain at the defense table. The court allowed them to remain, stating that “the Court has explicit authority to control the mode evidence is presented at trial, Fed. R. Evid. 611.” It noted that “[t]he jury would have been confused as to why the three officers were suddenly gone before deliberations. Instead of considering the evidence to render a verdict, jurors may have deduced that [the remaining officer] must be guilty of something simply because he was the only defendant remaining at defense table.” It also noted that “the mere presence of all four officers at the defense table at the conclusion of the trial did nothing to prejudice Plaintiff.”

indefinitely while it waited for the arrival of [the defendant’s witness who] was supposed to have arrived at the beginning of the Defendant’s case. [The witness still had not arrived after the Defendant had called two witnesses, examined them, and allowed the Government to cross-examine them. Moreover, [the witness] still had not arrived after the Court handled the pending administrative matters in this case or after the Court recessed to give him more time to arrive. In light of those facts, the Court could not continue to hold the jury and delay the trial while it waited for [the witness] to arrive at some time in the future.”)

⁴³ *United States v. Thornhill*, 940 F.3d 1114, 1121 (9th Cir. 2019) (“Forcing judges to wait until the end of testimony at trial to make such an evidentiary decision . . . would be an unwelcome constraint when we have otherwise long trusted trial judges to moderate and run their courtrooms effectively.” (citing Rule 611(a)).

⁴⁴ *United States v. McQueen*, 636 F. App’x 652, 667 (6th Cir. 2016) (no error in urging parties to move cases along efficiently; court was simply exercising the authority it had under Rule 611(a)); *Watkins v. Broward Sheriff’s Office*, 771 F. App’x 902, 911 (11th Cir. 2019) (telling *pro se* plaintiff to move things along); *United States v. Johnson*, 2016 WL 4087351, at *8–9 (D. Utah July 28, 2016) (telling parties to move on; correcting them when they asked improper questions).

Analysis: The ruling allowing the dismissed defendants to remain seems eminently sensible, though it is hard to see how it is about the “mode” or “order” of presenting evidence. Rather it is more about regulating the courtroom in a way to avoid a possible injustice. It can be argued that the authority to issue this order rests not in Rule 611(a), but in the trial court’s inherent power to control the courtroom proceedings in a way that furthers the interest of justice.

If the Committee decides to proceed with an inquiry into Rule 611(a), an issue it may wish to consider is whether to tease out the relationship between Rule 611(a) and the trial court’s inherent authority. Or maybe it is not worth the effort to distinguish between the two.

8. Permitting hearsay testimony in order to minimize unduly cumulative evidence.

In *Warren v. Main Indus. Inc.*, 2018 WL 10562387, at *9 (E.D. Va. June 19, 2018), an employment discrimination action, the court admitted hearsay evidence concerning Lunsford’s intentions before getting into a fight with Warren. The court allowed the testimony “to minimize unduly cumulative evidence based on Defendant’s intention to call Mr. Lunsford as a witness and Plaintiff’s anticipated rebuttal.” The court stated that “such a course of action is consistent with the discretion of district courts to ‘exercise reasonable control over the mode and order of examining witnesses and presenting evidence,’ and to regulate the admission of evidence.”

Analysis: Rule 611(a) allows the courts to do many things, but it would be surprising if it allowed courts to admit testimony that was clearly excluded under another rule of evidence. Certainly Rule 611(a) cannot be used as a roving hearsay exception, especially when the fact to be proven is what will be the subject of witness testimony. Such a ruling turns the hearsay rule on its head. It may well be that the hearsay statement would fit a hearsay exception, and then either the statement or the identical testimony might be cumulative. But it cannot be the case that otherwise inadmissible hearsay can be admitted under Rule 611(a) because the witness testimony on the same point will take too much time. If the Committee does wish to pursue an amendment to Rule 611(a), it may wish to add, perhaps in a Committee Note, that Rule 611(a) does not allow the court to admit evidence that is specifically excluded under another rule.

II. Possible Language for Amendments to Rule 611

A. Expanding Rule 611(a) to cover more actions and more purposes.

If the Committee is interested in pursuing a project to broaden the language of Rule 611(a) to cover actions currently out of the textual grant but nonetheless authorized by the courts under the Rule, then here is a possible amendment --- which is not at all intended to be the final word.

(a) Control by the Court; Purposes.

(1) Actions within the court's discretion. The court should exercise reasonable control over ~~such matters as the~~:

- the mode and order of examining witnesses and presenting evidence so as to;
- the timing and conditions of witness testimony; and
- conduct of the parties in examining witnesses and presenting evidence.

[Add other purposes as the Committee sees fit.]

(2) Proper purposes for the court's action. Actions under this rule must be taken for one or more of the following purposes:

- ~~make those procedures~~ promoting effective procedures for determining the truth;
- ~~avoid wasting~~ avoiding a waste of time; and
- protecting witnesses from harassment, ~~or~~ undue embarrassment, or substantial inconvenience; and
- protecting the health and safety of trial participants.

Reporter's comment: The reference in the last bullet point to “protecting the health and safety of trial participants” obviously flags Covid-related issues (as well as future emergencies). The Committee previously determined that it was unnecessary to add an emergency rule to the Evidence Rules --- precisely because Rule 611(a) gave broad discretion to trial courts to order remote testimony, testimony with masks, etc. While this is true, if Rule 611(a) is going to be amended to “codify” the actions courts take to control a trial, then it would be very useful to include, as an objective, protecting the health and safety of trial participants. Covid-response procedures are, broadly speaking, done with the motivation of determining the truth, but it would improve the rule to add health and safety to the list of proper purposes.

B. Adding a new subdivision to set forth safeguards if jurors are to ask questions.

As stated above, the Committee might consider adding a new subdivision to Rule 611 that would set forth safeguards if the court decides to allow jurors to ask questions. Safeguards are found in some case law, but there is an argument that it would be useful to have them at the ready in a rule. A provision on the subject might look like this:

(d) Juror Questions. If the court allows jurors to ask questions of the witnesses or

the parties during a trial, that questioning must be subject to the following safeguards:

- Questions must be submitted in writing;
- Jurors must be instructed not to disclose to other jurors the content of any question submitted to the court;
- The court must review each question with counsel --- outside the hearing of the jury --- to determine whether it is appropriate under these rules;
- The court must allow a party's objection to a juror's question to be made outside the hearing of the jury;
- The court must notify the jury that it may rephrase questions to comply with these rules;
- The court must instruct the jury that if a juror's question is not asked, or is rephrased, the juror should not draw any negative inferences;
- The court must instruct the jury that answers to questions asked by jurors should not be given any greater weight than would be given to any other testimony; and
- When the court determines that a juror's question may be asked, the question is to be posed by the court, not the juror.

TAB 7B

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Rule on Illustrative Aids and the Treatment of “Demonstrative Evidence”
Date: April 1, 2021

Attached to this memo is an article that proposes an amendment to the Evidence Rules that would specifically treat “demonstrative” or illustrative evidence. The article uses as its poster child case for the need for reform a 2013 opinion from the 7th Circuit, *Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 703 (7th Cir. 2013) (Hamilton, J.). In *Baugh*, the trial court allowed an “exemplar” of the ladder involved in the accident at issue to be presented at trial, but only for the purpose of helping the defense expert to illustrate his testimony. Over objection, the trial court allowed the jury to inspect and walk on the ladder during deliberations. The Seventh Circuit found that while allowing the ladder to be used for illustrative purposes was within the court’s discretion, it was error to allow it to be provided to the jury for use in its deliberations. The court drew a line between exhibits admitted into evidence to prove a fact, and presentations used only to illustrate a party’s argument or a witness’s testimony; it stated that the “general rule is that materials not admitted into evidence simply should not be sent to the jury for use in its deliberations.”

The *Baugh* court hypothesized that the problem it faced might have been caused by the vagueness of the term “demonstrative evidence”:

The term “demonstrative” has been used in different ways that can be confusing and may have contributed to the error in the district court. In its broadest and least helpful use, the term “demonstrative” is used to describe any physical evidence. *See, e.g., Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1231 (7th Cir.1996) (using “demonstrative evidence” as synonym for physical exhibits). . . .

As Professors Wright and Miller lament, the term, “demonstrative” has grown “to engulf all the prior categories used to cover the use of objects as evidence.... As a result, courts sometimes get hopelessly confused in their analysis.” 22 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 5172 (2d ed.); see also 5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal*

Evidence § 9:22 (3d ed.) (identifying at least three different uses and definitions of the term “demonstrative” evidence, ranging from all types of evidence, to evidence that leaves firsthand sensory impressions, to illustrative charts and summaries used to explain or interpret substantive evidence). The treatises struggle to put together a consistent definition from the multiple uses in court opinions and elsewhere. See 2 McCormick on Evidence § 212 n. 3 (Kenneth S. Broun ed., 7th ed.) (recognizing critique of its own use of “single term ‘demonstrative evidence,’ ” noting that this approach “joins together types of evidence offered and admitted on distinctly different theories of relevance”).

The *Baugh* court declined to “reconcile” all the definitions of “demonstrative” evidence but did delineate the distinction between exhibits that are admitted into evidence to prove a fact and illustrative aids that are introduced only to help the factfinder understand a witness’s opinion or a party’s presentation.

The distinction addressed in the article, and in this memo, is between (substantive) demonstrative evidence – such as a product demonstration to prove causation or the lack of it --- and *illustrative aids* that help the factfinder to understand a witness’s testimony or a party’s presentation, e.g., closing argument, summation, etc. That is the line that will be followed in this memo, and in the discussion draft of an amendment discussed below.

The article uses the *Baugh* case as a springboard for an argument that the Federal Rules of Evidence should address the topic of “demonstrative” evidence on two fronts: 1. The rule should provide a uniform terminology for this evidence, as the term “demonstrative evidence” is currently subject to varying definitions that cover both admissible evidence and illustrative information; and 2. The rule should clarify what can and cannot be submitted to the jury for deliberations (the specific question addressed by the *Baugh* court).

The authors do not actually propose text for a rule amendment, nor do they specifically suggest where the rule should be located.¹ But they do note that one state, Maine, has a rule that governs “illustrative aids.”

¹ At one point the authors suggest an addition to Rule 403 --- a subdivision (b) that would provide a balancing test for whether exhibits should be submitted to the jury. But messing around with Rule 403 to deal with the narrow problem of illustrative evidence seems like rulemaking heresy. At another point they suggest a Committee Note, that could be added to some rule, without accompanying rule text. That option is definitely rulemaking heresy. It is contrary to 28 U.S.C. §2073(d), which contemplates that committee notes are to be issued only in accompaniment with rule changes.

At another point the authors suggest that a provision be added, presumably to Rule 101, to define “evidence” --- because illustrative aids are not, in their opinion, currently within any definition of “evidence.” But a proposal to define what “evidence” is seems to be a project that is way too late in the game; it could also could lead to the need to amend other rules, such as Rule 611(a), which refers to the court’s authority to control the presentation of “evidence” but which has been used more broadly to allow trial court control over information that is not directly admissible as evidence, such as pedagogical charts, and questioning by jurors. *See, e.g., United States v. Stiger*, 371 F.3d 732 (10th Cir. 2004) (presentation of summary charts, not admissible under Rule 1006, was permissible under Rule 611(a) because they assisted the jury in synthesizing testimony in a complex trial); *United States v. Bush*, 47 F.3d 511 (2d Cir. 1995) (relying on Rule 611(a), stating that trial court has discretion to allow jurors to ask questions, but imposing

This memo consists of four parts. Part One provides a short description of the case law on “demonstrative evidence” and illustrative aids; it includes a section on the confusion of some courts in distinguishing between summaries (covered by Rule 1006) and illustrative aids. Part Two sets forth Maine Rule 616 and provides some comment on it. Part Three provides a short discussion of the costs and benefits of an amendment along the lines of Maine Rule 616, and discusses where it might be placed. Part Four sets forth a drafting alternative. Familiarity with the attached article is presumed.

This memo is intended to be an introduction to the subject. If the Committee is interested in further consideration of a possible amendment, a supporting memo with a more formal proposal will be submitted for the next meeting. And this memo should be read in conjunction with the other memos in this book dealing with various issues arising under Rule 611(a) and 1006. (We thought that one mega memo would be too confusing, as each memo discusses a different problem.)

It should be noted that essentially the same proposal discussed in this memo was previously presented to the Committee in 2018. The Committee decided not to proceed with any amendment, after a very short discussion. The Minutes reflected that a majority of the members thought that courts were not having a problem in distinguishing between demonstrative evidence and illustrative aids. But the Minutes also reflect that several members thought that an amendment would be valuable. The Committee discussion occurred at the end of a long day in which four difficult rule proposals had been intensely discussed. In light of what can be thought to be a mixed message in not taking up the proposal in 2018, the Chair and the Reporter thought it would be appropriate to raise it again.

I. Federal Case Law on “Demonstrative Evidence” and “Illustrative” Evidence

As indicated by the court in *Baugh*, and by the authority it cites, there is no single definition for the term “demonstrative” evidence; and it is of course not optimal to have a term bandied about to cover a number of different evidentiary concepts --- everything from physical evidence in the case, to evidence offered circumstantially to prove how an event occurred, to information offered as an illustrative aid, i.e., a pedagogical device to assist the jury in understanding a witness’s testimony or a party’s presentation. The fluidity of the nomenclature can certainly lead to problems like that found in *Baugh*, where the trial court started out on the right path in allowing the ladder to be introduced to help illustrate the expert’s testimony, but then switched tracks and treated it as “demonstrative” evidence of a fact.

limitations on the practice). [A separate memo is included in the agenda book on whether 611(a) should be amended to cover judicial actions that are not currently covered in the rule.]

A. General Description of the Case Law

What follows is a general description of the case law on “demonstrative evidence” and “illustrative aids”:

1. For evidence offered to prove a disputed issue of fact, it must 1) withstand a Rule 403 analysis of probative value balanced against prejudicial effect; 2) satisfy the hearsay rule; and 3) be authenticated. Rule 403 is usually the main rule that comes into play when the term “demonstrative evidence” is used. The question will be whether the demonstration is similar enough to the facts in dispute that it withstands the dangers of any unfair prejudice and jury confusion it presents.

If the evidence satisfies Rule 403 and it is in tangible or electronic form, it will be submitted to the jury for consideration as substantive evidence during deliberations.

2. For information offered only for pedagogical or illustrative purposes, the trial judge has discretion to allow it to be presented, depending on how much it will actually assist the jury in understanding a witness’s testimony or a party’s presentation; that assessment of assistance value is balanced against how likely the jury might misuse the information as evidence of a fact, as well as other factors such as confusion and delay. This balance is conducted by most courts explicitly under Rule 403 --- but as seen in another memo in this agenda book, some courts also cite Rule 611(a), which provides the trial court the authority to exercise “reasonable control over the mode and order of examining witnesses and presenting evidence.”² The bottom line is that the aid cannot be misrepresentative, as that could lead the jury to confusion or to draw improper inferences.³

If the pedagogical aid is sufficiently helpful and not substantially misleading or otherwise prejudicial, it may be presented at trial, but, as the court held in *Baugh*, *it may not be given to the jury for use in deliberations*. Though if you ask individual judges, you will find that many believe they have the discretion to allow the jury to use pedagogical aids, powerpoints, etc. in their deliberations. And as seen below, there is some dispute in the courts on this point.

3. There is another related type of evidence that raises the substantive/pedagogical line: summaries and charts. Here, the line is the same though there is an additional rule

² See, e.g., *United States v. Kaley*, 760 F. App’x 667, 681–82 (11th Cir. 2019) (finding under Rule 611(a) and Rule 403 that the illustrative aid fairly represented the evidence); *United States v. Crinel*, 2017 WL 490635, at *11–12 & Att.2 (E.D. La. Feb. 7, 2017) (directing modification to pedagogical aid so that it is not misleading).

³ The authors intimate that Rule 403 is not applicable to illustrations and pedagogical devices because they are not “evidence” and even if they were, they would not be “relevant” to prove a fact in dispute and so they are not admissible under Rule 401. But that is surely a hypertechnical view that gets you nowhere. Rule 611(a) is grounded in the presentation of “evidence” as well. So the conclusion from this view is that there is no rule that regulates the presentation of information offered to illustrate a point. If a party wants to bring a circus in to illustrate a breach of contract, the court is powerless to respond. That just cannot be, and as will be seen below, the courts have not at all considered themselves hamstrung in regulating information offered for pedagogical or illustrative purposes.

involved: Rule 1006 covers summaries if they are to be admitted substantively. The conditions for admission under Rule 1006 are: 1) the underlying information must be substantively admissible; 2) the evidence that is summarized must be too voluminous to be conveniently examined in court; 3) the originals or duplicates must be presented for examination and copying by the adversary. Rule 1006 summaries of the evidence are distinct from illustrative aids, which are not offered into evidence to prove a fact. *See, e.g., United States v. Posada-Rios*, 158 F.3d 832, 835 (5th Cir. 1998) (“Since the government did not offer the charts into evidence and the trial court did not admit them, we need not decide whether ... they were not admissible under Fed. R. Evid. 1006 Where, as here, the party using the charts does not offer them into evidence, their use at trial is not governed by Fed. R. Evid. 1006.”); *White Indus. v. Cessna Aircraft Co.*, 611 F. Supp. 1049 (W.D. Mo. 1985) (“[T]here is a distinction between a Rule 1006 summary and a so-called ‘pedagogical’ summary. The former is admitted as substantive evidence, without requiring that the underlying documents themselves be in evidence; the latter is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted.”). Summaries offered for illustrative purposes are permissible subject to Rule 611(a) and 403. That is to say they may be considered by the factfinder so long as they are consistent with the evidence and not misleading. *See, e.g., United States v. Wood*, 943 F.2d 1048 (9th Cir. 1991) (in a complex tax fraud case, the trial court allowed a government witness to testify to his opinion of Wood’s tax liability, as summarized by two charts, but prohibited the defendant’s witness from using his own charts; Rule 1006 was not applicable, because the charts were pedagogical devices and not substantive evidence; the court found no error in allowing the use of the prosecution’s chart but prohibiting the use of the defense’s chart, because the prosecution’s chart was supported by the proof, while the chart prepared by the defense witness was based on an incomplete analysis). *See also United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991) (the defendant’s summaries were properly excluded because they did not fairly represent the evidence).⁴

⁴ The court in *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir. 1998), gives some helpful guidance on the use of pedagogical aids, as distinct from summaries that are admitted under Rule 1006:

We understand the term “pedagogical device” to mean an illustrative aid such as information presented on a chalkboard, flip chart, or drawing, and the like, that (1) is used to summarize or illustrate evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary’s proponent. This type of exhibit is more akin to argument than evidence since it organizes the jury’s examination of testimony and documents already admitted in evidence. Trial courts have discretionary authority to permit counsel to employ such pedagogical-device “summaries” to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury. This court has held that Fed.R.Evid. 611(a) provides an additional basis for the use of such illustrative aids, as an aspect of the court’s authority concerning the mode of interrogating witnesses and presenting evidence.

Professor Richter, in a separate memo in this agenda book, discusses possible amendments to Rule 1006.

But as stated in *Baugh*, when summaries are offered only for illustration, the general rule is that they should not be submitted to the jury during deliberations. *See, e.g., Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 421 (5th Cir. 1985) (distinguishing between summaries that are admitted under Rule 1006 and “other visual aids that summarize or organize testimony or documents that have already been admitted in evidence”; concluding that summaries admitted under Rule 1006 should go to the jury room with other exhibits but the other visual aids should not be sent to the jury room without the consent of the parties).

B. Areas of Confusion or Disagreement

One area of confusion and disagreement is over whether the court ever has discretion to send an illustrative aid to the jury over a party’s objection. The *Baugh* court finds that it was error to do so. *See also United States v. Harms*, 442 F.3d 367, 375 (5th Cir.2006) (stating that illustrative aids “should not go to the jury room absent consent of the parties”); *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004) (pedagogical devices are considered “under the supervision of the district court under Rule 611(a), and in the end they are not admitted as evidence”). But *United States v. Robinson*, 872 F.3d 760, 779–80 (6th Cir. 2017), suggests some disagreement about the discretion of the trial judge to send illustrative aids to the jury room. In that case, the defendant argued that the district court abused its discretion when it sent illustrative aids to the jury during deliberations, where the aids had been displayed to the jury during the testimony of a government witness, but had not been admitted into evidence. Over a defense objection, the district court sent these aids to the jury in response to the jury’s request to have them, but also read a pattern jury instruction stating that “[the demonstrative aids] were offered to assist in the presentation and understanding of the evidence” and “[were] not evidence [themselves] and must not be considered as proof of any facts.” The Sixth Circuit stated that “the law is unclear as to whether it is within a district court's discretion to provide a deliberating jury with demonstrative aids that have not been admitted into evidence.” The court found it unnecessary to decide this point because any error was harmless given that the summaries sent to the jury merely reiterated evidence already admitted at trial.⁵

Beyond the case law, discussions with individual trial judges seem to show disagreement about whether illustrative aids can be sent to the jury over a party’s objection. I’ve spoken to about 20 judges on this matter, and more than half said that they have on occasion submitted illustrative aids to the jury --- sometimes after a jury’s request.

⁵ In *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F. Supp. 2d 136, 140 (E.D.N.Y. 2004), Judge Jack Weinstein also suggested that pedagogical devices and summaries not within Rule 1006 could be admitted into evidence and sent to the jury room in appropriate cases. He states that increased flexibility in the use of educational devices “will probably result in courtroom findings more consonant with truth and law” and so whether designated as “pedagogical devices” or “demonstratives,” this material “may be admitted as evidence when it is accurate, reliable and will assist the factfinder in understanding the evidence.”

The second area of confusion regards the distinction between summaries of evidence under Rule 1006 and illustrative aids. Professor Richter states that “some district courts struggle with the basic distinctions between summaries admitted under Rules 611(a) and 1006 and the requirements that must be satisfied for the application of each rule.” Professor Richter’s memo, also in this agenda book, discusses the problems that the courts are having with Rule 1006 (especially, distinguishing Rule 1006 summaries from pedagogical summaries).

In sum, while the distinction between demonstrative evidence and illustrative aids can be clearly stated, there remains some confusion about whether an illustrative aid can be sent to the jury. And while the distinction between an illustrative aid and a Rule 1006 summary can be articulated, there are some problems in line-drawing.

II. Maine Rule 616

Maine Rule of Evidence 616 is the only rule of evidence in the country that is specifically designed to treat any aspect of “demonstrative” evidence. The Maine rule regulates the use of evidence referred to in this memo as “illustrative” or “pedagogical” i.e., offered to assist the jury in understanding a witness’s testimony or a party’s argument. Rule 616 is entitled “Illustrative Aids”; and its placement as Rule 616 indicates an attempt to place it close to Rule 611(a), the rule that many courts have cited as a source of authority for admitting illustrative information.⁶

Maine Rule 616 provides as follows:

Rule 616. Illustrative Aids

- (a)** Otherwise inadmissible objects or depictions may be used to illustrate witness testimony or counsel's arguments.
- (b)** The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time.
- (c)** Opposing counsel must be given reasonable opportunity to object to the use of any illustrative aid prepared before trial.
- (d)** The jury may use illustrative aids during deliberations only if all parties consent, or if the court so orders after a party has shown good cause. Illustrative aids remain the property of the party that prepared them. They may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.

⁶ If placement near Rule 611(a) was the goal, one might think a better choice would have been to make it part of Rule 611 itself. That possibility is explored for a Federal Rule in the next section.

Reporter’s Comment on Maine Rule 616: This seems to be a helpful and clear statement about how illustrative evidence should be treated. It could be improved in a few ways, however:

- 1) Subdivision (b) could more clearly track the Rule 403 test, e.g., “the court may limit or prohibit the use of an illustrative aid if its value in assisting the jury is substantially outweighed by the risk of unfair prejudice, confusion or delay.”
- 2) The last three sentences of subdivision (d) should be a separate subdivision as they are about a different matter than the first sentence. The first sentence is about allowing the jury to use the aid in deliberation. That should be a separate point. The remaining three sentences are about procedural details.
- 3) If you’re going to all the trouble to write a specific rule, you should include a requirement that the court must upon request give a limiting instruction as to the proper use of the illustrative aid.
- 4) Under federal rulemaking, the subdivisions would each need a caption.

Maine Rule 616 contains a substantial and detailed Committee Note. **The Committee Note to Maine Rule 616 provides as follows:**

This rule is intended to authorize and regulate the use of “illustrative aids” during trial.

Objects, including papers, drawings, diagrams, the blackboard and the like which are used during the trial to provide information to the finder of fact can be classified in two categories. The first category, admissible exhibits, are those objects, papers, etc., which in themselves have probative force on the issues in the case and hence are relevant under Rule 401. Such objects are admissible in evidence upon laying the foundation necessary to establish authenticity and relevancy and to avoid the strictures of the hearsay rule and other evidentiary screens. Usually the jury is permitted to take these objects with them to the jury room, to study them and to draw inferences directly from them relating to the issues in the case.

The second class of objects are those objects which do not carry probative force in themselves, but are used to assist in the communication of facts by a lay or expert witness testifying or by counsel arguing. These may include blackboard drawings, pre-prepared drawings, video recreations, charts, graphs, computer simulations, etc. They are not admissible in evidence because they themselves have no relevance to the issues in the case. Their utility lies in their ability to convey relevant information which must be provided directly from some actual evidentiary source, whether that source be witness or exhibit

which is admissible in evidence. The ultimate credibility and scope of the information conveyed is that of the source, not that of the illustrative media.

This latter group of objects can be referred to as “illustrative aids.” Sometimes they have been referred to as “demonstrative exhibits” or even “chalks.”

Frequently voluminous evidentiary data is summarized in tabular, or even graphic form, and is offered as a summary under Rule 1006. A summary which presents the data substantially in its original form would be admissible in evidence. A summary which presents the data in a tabular or graphic form to “argue” the case or support specific inferences would be an illustrative aid and would be governed by this rule.

While such aids do not have evidentiary force in themselves, they can be extremely helpful in assisting the trier of fact to visualize evidentiary material which is otherwise difficult to understand. For the same reason, illustrative aids can also be subject to abuse. Sometimes the form of the illustrative may be grossly or subtly distorted to “improve” upon the underlying testimony, to oversimplify, or to provide subliminal messages. The opportunity for inventiveness and creativity in illustrative aids may exaggerate the effect of disparities in financial resources between parties.

The proposed rule addresses some of the most common issues associated with the use of illustrative aids.

First of all, Rule 616(a) permits the use of illustrative aids for the purpose of illustrating the testimony of witnesses or the arguments of counsel. In the case of witness testimony, the foundation for the use of an illustrative aid would be testimony to the effect that the aid would assist the witness in illustrating her testimony. It is clear that the object need not be admissible in evidence to be useful as an illustrative aid. Thus there is no need to establish the authenticity of an illustrative aid or even its accuracy as long as it has no probative force beyond that of illustrating a witness’s testimony.

Paragraph (b) of the proposed rule makes clear, however, that the court retains the discretion to condition, restrict or exclude the use of any illustrative aid in order to avoid the risk of unfair prejudice, surprise, confusion or waste of time. This is similar to the discretion exercised by the court under Rule 403 in dealing with objects which are admissible in evidence. Because of the multiplicity of potential problems which may be encountered, it is deemed wiser to allow the court a measure of discretion in applying general standards rather than to establish a legal test for utilization of these media.

Some of the problems associated with the use of illustrative aids can include the following:

1. Cases where the illustrative aid is so crafted as to have probative force of its own. Few people would attribute much probative force to a blackboard drawing which is used to illustrate a witness’s testimony. However, with a precisely drawn chart, or even more a computer video display, the perceived quality of the media may impart to the information conveyed a degree of authority, accuracy and credibility much greater than the source from

which the information originally came. If the court finds that the use of illustrative aids results in a “dressing up” of testimony to a level of perceived dignity, accuracy or quality greater than it deserves and this works an unfair prejudice, the aid could be limited or excluded under Rule 616(b).

2. Sometimes illustrative aids are used to take advantage of and heighten a disparity in economic resources. The entertainment quality of certain media may give an edge to a wealthy litigant which is entirely unjustified by the actual facts.

3. There is risk that the jury may draw inferences from the illustrative aids different from those for which the illustrative aid was created and offered. This is especially likely to be a risk if the jury takes the aids with them in the jury room to experiment with or scrutinize.

4. Use of illustrative aids often makes a more informative visual presentation which is difficult to capture on an oral record. Problems of ownership and control of the aids may make it impossible to document in the transcript a meaningful record on appeal.

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

Illustrative aids may themselves become issues in the case leading to waste of time quibbling over the fairness of the illustrative aid, or battles between opponents marking up each other’s illustrative aid, and the like.

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

“Reasonable opportunity” for objection means reasonable under the circumstances. In a case where the aid is simple and is generated shortly before or even during trial, disclosure immediately before use would allow reasonable opportunity for the opponent to check out the aid. On the other hand counsel proposing to use a computer simulation or other complex illustrative media should be expected to make the aid and any information necessary to check its accuracy available sufficiently far in advance of use so as to permit a realistic appraisal and understanding of the proposed aid. The idea is to permit opposing counsel the opportunity to raise any issues of fairness or prejudice with the court out of the presence of the jury and before the jury may have been tainted by the use of the illustrative aid. This requirement of prior disclosure should be applied to both prosecution and defense in criminal cases consistent with constitutional rights of criminal defendants. The rule also

provides that illustrative aids are not to go to the jury room unless all parties agree or unless the court orders. In many cases, it is likely that the parties will agree that certain illustrative aids might go to the jury room to aid the jury in their understanding of the issues. In other cases, it is possible that, despite the protest of one party, the court may determine that the jury's consideration of the issues might be so aided by an illustrative aid used during the trial that it should go with the jury to the jury room. But in the absence of such agreement or specific order, the residual rule would be that illustrative aids may be used in the courtroom only.

A recurrent problem with the use of illustrative aids arises from the fact that these are often proprietary items prepared by a particular party to give that party an advantage in the courtroom presentation. However, when a witness has relied heavily on an illustrative aid in giving her testimony, it is often impossible to cross-examine that witness effectively without the use of the same illustrative aid. Similarly, if an illustrative aid has been important in the presentation of one side, the other side ought to have access to that illustrative aid in meeting the testimony illustrated. "Use" of an illustrative aid does not mean despoiling it. Mutual courtesy and respect, reinforced if necessary by court supervision and aided by mylar overlays and the like, should suffice to preserve each party's illustrative aids from detracting markings by opposing counsel or witnesses.

The authorization here provided for the use of non-admissible "illustrative aids" does not prevent a party from using an actual probative exhibit also as an illustrative aid. For instance, a witness might be asked to indicate by marking on a photograph the location of an object which was not present at the time the photograph was taken. The photograph, as an exhibit, would be probative in itself. The jury could draw inferences directly from it. But the marks added by the witnesses would be a visual form of witness testimony. The preservation of that particular testimony in visual form for later inspection by the jury during deliberations might give that testimony undue weight and durability under the circumstances. Thus the court would have the discretion under this rule to withhold from the jury room an exhibit to which illustrative markings had been added if the markings would give undue weight to a witness's testimony on a disputed issue or otherwise would have some unfairly prejudicial effect.

The court would also have the discretion under this rule to restrict or prohibit marking on an evidentiary exhibit if the effect would be to remove the exhibit from the jury room during deliberations. Thus, if a counsel wishes to mark or to enhance an admitted exhibit or add additional material as an illustrative aid, it probably should be done on another counterpart of the exhibit or with a mylar overlay or some other suitable removable means so that the exhibit could be considered in the jury room in its original state.

Reporter Comment on the Committee Note

This Committee Note seems extremely helpful, though much more detailed than Federal Notes have been in recent years. If an amendment is thought to be necessary to cover illustrative

aids and distinguish them from demonstrative evidence, there is much from this Note that could be used. The text and the Note together seem helpful in working out some of the nomenclature --- differentiating “demonstrative” evidence, and discussing the more particularized problem that is at the heart of the cases, which is regulating illustrative information and preventing it from going into the deliberation room if it is introduced at trial.

The authors of the article criticize Rule 616 as being “analytically infirm” because it allows “irrelevant” information to be presented at trial, despite the bar of Rule 402. (The Maine Committee Note says of illustrative aids: “They are not admissible in evidence because they themselves have no relevance to the issues in the case.”) The proper criticism is not that supposed analytical infirmity, but that the Committee Note simply has it wrong in concluding that an illustrative aid “has no relevance.” Relevance is defined as evidence that has any tendency to make a fact more or less probable than it would be without the evidence. An illustrative aid, to the extent it assists the jury in understanding the testimony of a witness or the presentation of a party, does exactly that --- it makes it more likely than without the information that the jury will find a fact in favor of the party who presents the illustration. Everybody knows that the definition of “relevance” under Rule 401 is intended to be broad, so why shouldn’t it cover an illustrative aid that improves the offering party’s presentation of facts in dispute?

The Committee Note to Rule 401 clearly supports a conclusion that illustrative aids can be relevant even though not offered directly to prove a fact in dispute. The Committee Note states:

Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs * * * and many other items of evidence fall into this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

So instead of describing illustrative aids as having no relevance, the Maine Committee Note would have been better off saying something like “not offered to prove directly any fact in dispute.”

The authors of the article keep getting stuck by the technicality that illustrative evidence is declared at the outset to be “not admissible” because “irrelevant” but then it is subject to a second, “shadow Rule 403” test to determine whether it can be admitted anyway --- but not formally so, and not for purposes of jury deliberation. In fact the Maine Rule 616 approach seems perfectly understandable in terms of what we mean by “relevant” --- taking a broad view as Rule 401 intends --- and in view of the fact that the Rule 403 balancing always works differently depending on the purpose for which the evidence is offered. If it is offered to prove a fact in dispute, the question is its probative value in proving that fact, balanced against the risk that the jury will be confused or unfairly prejudiced. Generally in the case of demonstrative evidence offered to prove a fact in dispute, the unfair prejudice will be that the jury will make more of the evidence than it is really worth (because, for example, there are differences between the demonstration and the actual event

that the jury might gloss over).⁷ If the information is offered for illustrative purposes only, then the Rule 403 balance is to figure out probative value (how helpful it is to the jury in understanding a witness's testimony or a party's argument) against the risk of prejudice or confusion (which in this instance is likely to mean that the jury may actually consider the information as proof of a fact asserted in it).⁸

There seems to be no reason to get hung up on the theoretical question of “what is evidence” and “what is relevance”? Certainly the courts are not doing that kind of evidentiary navel-gazing. So the question of adding a rule on demonstrative evidence is instead whether it would be helpful to solve a real problem. If so, Maine Rule 616 would appear to be a good starting point toward a rule, with the provisos discussed above, and recasting the problem as one not of “irrelevant” evidence but rather as information that is relevant because it helps the factfinder understand other evidence.⁹

III. Costs and Benefits of a Rule Covering Some Aspect of “Demonstrative Evidence”

The major benefit of the amendment is that it is likely to try to provide some clarity and procedural regulation --- and user-friendliness --- to the use of illustrative aids. It would create a convenient location for standards governing illustrative aids --- which currently are found in scattered case law. It would certainly help the neophyte figure out the limits of Rule 1006 and the distinction between summaries admissible under that rule and illustrative aids (especially if coupled with changes to Rule 1006 that are discussed in Professor Richter's memo). And it would mean that the neophyte would not have to master the case law distinguishing “demonstrative evidence” offered to prove a fact from other demonstrations that are offered only to illustrate an expert's opinion or the party's argument --- a daunting problem because, as discussed above, the courts use the term “demonstrative evidence” quite loosely. It is undeniable that the terms used are often slippery and vague, and that mistakes are sometimes made, as in *Baugh*. And as noted above, there are some contrary cases suggesting that illustrative aids can be sent to the jury over an objection. So in particular it might be valuable to provide in a rule that if information is admitted only for illustrative purposes, it cannot be provided to the jury in deliberation unless all parties

⁷ But there could also be unfair prejudice from the demonstration itself in some cases involving extreme or inflammatory conduct. See, e.g., *United States v. Gaskell*, 985 F.2d 1056, 1063 (11th Cir. 1993) (in a case involving shaken baby syndrome, the trial court erred in allowing an expert to shake a doll with a higher degree of force than would have been necessary to cause the syndrome in a real baby).

⁸ And again, there might be unfair prejudice from the presentation itself. For example, the presentation in *Gaskell*, note 7 *supra*, purported to be both demonstrative evidence and a scientific illustration on how shaken baby syndrome occurs.

⁹ It should be noted that the original Advisory Committee Note to Rule 611(a) states that the rule is a source of authority for regulating “the use of demonstrative evidence” and it seems clear that by the citation to McCormick the Advisory Committee was thinking of evidence that is used for illustrative purposes.

agree. That limiting principle would not only be a helpful statement but would also resolve whatever conflict exists in the case law. Moreover, that limiting principle is already found in Rules 803(5) and 803(18) --- which are both designed to prevent the jury from being more influenced by the information than should be permitted given the purpose for which it is offered (in those cases the hearsay is offered as trial testimony, which is not provided to the jury in deliberations). Thus, a rule preventing use of certain evidence by jurors in deliberations is not foreign to the Evidence Rules.

(Though of course all this presumes that the principle is correct on the merits, i.e., that a court should not have the discretion to send an illustrative aid into the jury room. The argument in favor of the limitation is that if illustrative aids are allowed into the deliberations, they may well be treated like evidence to prove a fact --- even though the trial court instructs to the contrary. But there appears to be some disagreement on that question among district judges. In which case the value of an amendment would lie in resolving the question on the merits and providing a uniform result --- one way or another).

The cost of an amendment like Maine Rule 616 is not zero --- because an amendment by definition imposes transaction costs. But there is an upside in providing guidance in what courts and commentators have recognized is a difficult and complex area.

Where Would an Amendment be Located?

Assuming an amendment to address illustrative aids would be a worthwhile addition, the question is where to put it. As stated above, adding a Rule 616 is an understandable move, but perhaps a better place is Rule 611 itself. That is where the Advisory Committee thought the court's authority to admit illustrative aids would lie.¹⁰ That is where the federal courts have found the authority to regulate summaries that are offered only as pedagogical aids rather than proof of the underlying records. [Of course, any amendment to Rule 611 would have to be integrated with other possible amendments to that rule that are discussed in a separate memo in this agenda book.]

Application in the Maine Laboratory --- Costs and Benefits?

The Maine practice under Rule 616 might give some indication of whether a similar amendment to the Federal Rules would be useful. There is an intangible, though: the effect would not be in result as much as in nomenclature and user-friendliness. With that proviso, here is a discussion of the handful of reported decisions on Maine Rule 616:

Irish v. Gimbel, 743 A.2d 736 (Me. 2000): In a medical malpractice case, the trial judge allowed the defendant to use a two foot by three foot enlargement of the finding of a medical malpractice panel. The court held that under Rule 616, this enlargement could be used by counsel

¹⁰ See Advisory Committee Note to Rule 611(a), discussed in Note 9, supra.

in argument, but could only be put up while counsel was referring to it. In the previous trial in this case, the court had found error under Rule 616 when the enlargement was left facing the jury during the entirety of the trial. The case did not present the question of submitting the illustrative aid to the jury during deliberations.

Merrill v. Sugarloaf Mtn. Corp., 745 A.2d 378 (Me. 2000): The plaintiff was injured on a ski slope and brought an action against the ski resort. The defendant was allowed to use an illustrative aid depicting unrelated areas of the ski slope for the purpose of educating the jury on the difference between groomed and ungroomed snow conditions. The court found no error, saying only that under Rule 616, “use of an illustrative aid is within the trial court’s discretion.” There was no issue about submitting the aid to the jury.

State v. Irving, 818 A.2d 204 (Me. 2003): The defendant was charged with vehicular manslaughter. At trial the government was allowed to put up the high school graduation photo of the victim during its opening argument. It was a blowup placed on an easel and it was taken down after the opening. The court found no error under Rule 616 and had this to say:

An illustrative aid is a depiction or object which illustrates testimony or argument. M.R. Evid. 616(a). It does not go into the jury room unless counsel agree or by order of the court for good cause. While it does not have to meet the requirements of admissibility, *id.* 616(a), it has to be related to the testimony or argument which it illuminates. When used to illustrate argument, the aid must not be used for an improper purpose just as an opening statement or closing argument cannot contain improper references. * * * An illustrative aid used during argument that diverts a jury from the evidence or injects a risk of unfair prejudice would be improper.

Because there is no transcript of the State’s opening statement, there is nothing in the record that demonstrates that the State did not relate its display of the photograph to its statement. Furthermore, on this record, neither an improper purpose for displaying the photograph nor a risk of unfair prejudice is apparent. Irving argues that the photograph risked sidetracking the jury into comparing the defendant and the victim, but nothing in this record supports that assertion. By allowing the State a narrowly restricted use of Massey’s photograph, the court did not abuse its discretion. The court obviously retained control over the manner in which the State used the photograph and could have restricted its use further if the State’s comments about it during the opening statement gave the court concern about improper use or unfair prejudice.

Thus the court made clear that the decision to allow an illustrative aid is a question to be decided under Rule 403-type principles.

Jacob v. Kippax, 10 A.3d 1159 (Me. 2011): In a medical malpractice action, as in *Irish, supra*, defense counsel used a blowup of the medical malpractice panel opinion, this time during closing argument. The court found no error, stating that “the display of the enlargement for limited

periods during Kippax's closing * * * was permissible pursuant to *Irish* and M.R. Evid. 616, which allows the use of illustrative aids in certain circumstances.”

State v. Corbin, 759 A.2d 727 (Me. 2000): In a trial on charges of theft and tax evasion, the government used a summary chart that was an enlargement of a list of several checks used by the defendant to embezzle funds. That chart was allowed into the jury room for deliberations. The court found no error because the chart was offered as evidence of acts of the defendant. So as it was not being used as an illustrative aid, and Rule 616 was inapplicable.

Summary Comment on Maine Cases:

It appears that since 1997, when Rule 616 was enacted, there has been very little (reported) litigation over its meaning or application. This may be due to the fact that the line between illustrative aid and demonstrative evidence that is substantive proof is one that can be fairly easily understood once it is articulated, and also because the Rule serves more to clarify and provide a location for the law on the subject, rather than to change it.

The Committee has “sources” in Maine that can be tapped to see how the rule is working at the trial court level. If the Committee wishes to proceed further with considering an amendment like Maine Rule 616, those sources will be contacted before the next meeting.

IV. A Draft for Consideration

What follows is a possible draft and Committee Note for a new subdivision to Rule 611. Whether that subdivision would be (d) or (e) would depend on whether the Committee decides to proceed with another possible amendment to Rule 611 that would govern the use of juror questioning – a matter discussed in another memo in this agenda book.

The draft uses Maine Rule 616, and its extensive Committee Note, as a model, but it makes a number of changes in light of the comments and suggestions contained in this memo.

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

* * *

(d/3) Illustrative Aids. The court may allow a party to present an illustrative aid to assist the factfinder in understanding a witness’s testimony or the proponent’s presentation if:

(a) its utility in helping the jury to understand the testimony or presentation is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence;

(b) all adverse parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its use; and

(c) it is not provided to the jury during deliberations unless all parties consent.

Comments:

1. Maine Rule 616 talks in terms of illustrative aids as being “otherwise inadmissible” but that is what gets everyone confused. The benefit of a new rule would be to get courts and parties thinking directly about a different kind of “evidence” --- offered only to illustrate --- the consequence of which is that the information is presented only for that purpose at trial and then is kept from the jury during deliberations.

2. Subparagraph (a) basically tracks the Rule 403 test. So why not just say “Rule 403”? Because the whole innovation is that Rule 403 has a different focus when it comes to illustrative aids --- the “probative value” to be considered is whether it assists the jury in understanding a witness or a party’s presentation. It is not an assessment of how far it tends to prove a substantive fact in dispute. In this way the test is articulated like the one added to Rule 703 in 2000 --- which tracked (albeit in reverse) the Rule 403 balancing test but went further and described what the evidence was supposed to be probative for. That articulation received good reviews, and the above proposal applies the same kind of articulation of probative value.

3. The last three sentences of the Maine provision are deleted. Those were procedural details, and they are best placed in the Committee Note.

Draft Committee Note

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

Writings, objects, charts, or other presentations that are used during the trial to provide information to the factfinder can be classified in two categories. The first category is evidence that is offered to prove a disputed fact; admissibility for such evidence is dependent upon laying the foundation necessary to establish authenticity and relevancy and to avoid the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this evidence to the jury room, to study it and to use it to help determine the disputed facts.

The second category --- the category covered by this Rule --- is information that is offered for the narrow purpose of assisting the jury to understand what is being communicated to them by the witness or party. Examples include blackboard drawings, photos, diagrams, powerpoint presentations, video depictions, charts, graphs, computer simulations, etc. These kinds of presentations, referred to in the Rule as “illustrative aids,” have also been labelled “pedagogical devices” and sometimes (and less helpfully) “demonstrative presentations” --- that latter term being unhelpful because the purpose for presenting the information is not to “demonstrate” how an event occurred but rather to assist in the presentation of another source of evidence or argument.

There is thus a distinction, as the courts have recognized, between a summary of voluminous, admissible information to prove a fact and a summary of evidence or argument that is offered solely to assist the jury in evaluating the evidence. The former is subject to the strictures of Rule 1006. The latter are illustrative aids, which the courts have regulated pursuant to the broad standards of Rule 611(a), and which are now to be regulated by the more particularized requirements of this Rule 611(d/e).

While an illustrative aid is by definition not offered directly to prove a fact in dispute, this does not of course mean that it is free from regulation by the court. Experience has shown that illustrative aids can be subject to abuse. It is possible that the illustrative aid may be grossly or subtly prepared to distort the testimony or argument, to oversimplify, to stoke unfair prejudice, or to provide subliminal messages. The Rule requires the court to assess the value of the illustrative aid in assisting the jury to understand the witness’s

testimony or the proponent's presentation. Cf. Fed.R.Evid. 703; *see* Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403. If those dangers substantially outweigh the value of the aid in assisting the jury, the trial court should exercise its discretion to prohibit --- or modify --- the presentation of the illustrative aid. And if the court does allow the aid to be presented at trial, the adverse party has a right to have the jury instructed about the limited purpose for which the illustrative aid may be used. See Rule 105.

One of the primary means of safeguarding and regulating the use of the illustrative aids is to require advance disclosure. The Rule provides that illustrative aids prepared for use in court must be disclosed in advance in order to allow a reasonable opportunity for objection. The rule applies to aids prepared before trial or during trial before actual use in the courtroom.

Because an illustrative aid is not offered directly to prove a fact in dispute, and is only admissible in accompaniment with testimony or presentation by the proponent, the Rule provides that illustrative aids are not to go to the jury room unless all parties agree. This rule is consistent with the holdings of the vast majority of federal and state courts. Allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or presentation, runs the serious risk that the jury may confuse the import, usefulness, and purpose of the illustrative aid. *See* Fed.R.Evid. 803(5), (18).

The Rule does not prevent a party from using evidence offered to prove a disputed fact as an illustrative aid as well. For instance, a witness might be asked to indicate by marking on a photograph the location of an object which was not present at the time the photograph was taken. The photograph, if properly authenticated and probative of a fact, could be admissible as substantive evidence. The jury could draw inferences directly from it. But the marks added by the witnesses would be a visual form of witness testimony. The preservation of that particular testimony in visual form for later inspection by the jury during deliberations might give that testimony undue weight under the circumstances. Thus the court would have the discretion under this Rule to withhold from the jury room an exhibit to which illustrative markings had been added, if the markings would give undue weight to a witness's testimony on a disputed issue or otherwise would have some unfairly prejudicial effect. The court would also have the discretion under this rule to restrict or prohibit marking on an evidentiary exhibit if the effect would be to remove the exhibit from the jury room during deliberations.

Illustrative aids remain the property of the party that prepared them, but they may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.

TAB 7C

88 Temp. L. Rev. 513

Temple Law Review
Spring 2016

Article
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BRINGING DEMONSTRATIVE EVIDENCE IN FROM THE COLD: THE ACADEMY'S ROLE IN DEVELOPING MODEL RULES

To this day, judges and advocates struggle with the definition and use of “demonstrative evidence.” The ambiguity of this term (or its close cousins “illustrative evidence” and evidence offered “for illustrative purposes only”) infects the judicial process with uncertainty, hindering advocates when preparing for trial and, in some cases, producing erroneous verdicts. For example, the Seventh Circuit recently reversed a case for improper use of a demonstrative exhibit, and on retrial the result swung from a defense verdict to an \$11 million plaintiff’s victory.

Uncertainty about the admission and use of demonstrative evidence has festered for decades. Lawyers innovate in presenting their cases, forcing judges to make case-by-case rulings. This is increasingly significant as technology becomes commonly used throughout trial practice. Law professors in turn solidify this unpredictable practice by teaching subsequent generations that the admission of demonstrative evidence is subject only to the unbounded discretion of the trial court.

*While this confusion has been long acknowledged and ably documented, it has not galvanized reform. Trial advocacy and evidence professors should meet at this intersection of their respective areas of scholarship and teaching; they should capitalize on their collective knowledge and influence and propose to the Advisory Committee on the Federal Rules of Evidence a set of uniform, analytically sound *514 Model Rules for Demonstrative Evidence. Until evidence rules are amended to address the problem, professors should teach the Model Rules alongside the current unpredictable, ad hoc practice. Exposure to such standardized criteria during law school will influence a generation of future lawyers and judges, promoting consistency in the handling of demonstrative evidence in the courtroom.*

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*515 INTRODUCTION

"You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete."

- R. Buckminster Fuller

Sixty years ago, seeds of an evidence revolution were sown by mavericks in the trenches of trial practice. Chicago trial lawyer Joseph H. Hinshaw wrote:

Many texts have been written on rules of evidence, and our casebooks are full of decisions which have turned upon points of evidence alone. On the other hand, there is little in the books which furnishes a guide for the proper supervision of the introduction and use of many new forms of demonstrative evidence.¹ Hinshaw understood that clarification of the law of demonstrative evidence was necessary for trial lawyers to adequately evaluate and prepare their cases. Six decades later, however, litigants and their lawyers continue to face settlement negotiations and trials unprepared, having to gamble on the admissibility and use of evidence that may or may not be classified by a court as demonstrative. Too frequently, predicting a court's ruling is tantamount to flipping a coin. In the 2015 case of plaintiff John Baugh, it was an \$11 million coin flip -- and he

ultimately won.

It was a products liability case. John Baugh was working on his house in the summer of 2006 and used his Cuprum ladder to reach the gutters. Or at least he tried. Baugh was found sitting in his driveway, bleeding, with his ladder lying dented beside him. Baugh sued Cuprum, alleging defective design, but, tragically, in his fall Baugh suffered severe brain injuries rendering him unable to testify. There were no other eyewitnesses to Baugh's fall.²

The case proceeded to trial. Two years after discovery had closed, and only three months before trial, Cuprum informed Baugh that it intended to use an exemplar of the ladder used by Baugh, built to the exact specifications of Baugh's ladder. Over the plaintiff's objection, the ladder was marked as an exhibit "for demonstrative purposes." Cuprum maintained that the ladder was "not substantive evidence," and Cuprum's expert used the ladder during his *516 testimony at trial.³

At first, the ladder was not sent back to the jury room. Soon, however, the jury asked to see the exemplar ladder. The plaintiff renewed his objection based upon the demonstrative character of the evidence, and that he had developed his trial strategy on the basis that the exemplar ladder was not substantive evidence. Tellingly, he noted that "the practice *in this courthouse, as far as [he had] known*" was that demonstrative exhibits did not go back to the deliberation room.⁴ The judge initially agreed with plaintiff's counsel, but, after a few days, permitted the ladder to go back to the jury room. A few hours after the ladder arrived in the jury room, the jury returned a verdict for the defendant.⁵ The Seventh Circuit reversed, noting that the ladder, as a demonstrative exhibit, should have never been permitted in the jury room.⁶ On retrial, the jury found for the plaintiff and awarded him over \$11 million in damages.⁷

The *Baugh* case is a cautionary tale, indeed. Despite Hinshaw's prescience on the need for discourse and agreement on the subject of demonstrative evidence, little progress has been made. Scholars either ignored the concept of demonstrative evidence or greatly limited its definition to some version of derivatively relevant, nonsubstantive evidence.⁸ Demonstrative exhibits were acknowledged as permissible "assists" to witnesses' oral testimonies, but scholars wrote little about the evidentiary status of such exhibits.

Notwithstanding scant academic discussion of the subject, trial lawyers began experimenting with the use of visual aids at trial, borrowing lessons learned from social science research used to good effect on Madison Avenue. Peer-to-peer teaching on the subject blossomed, with early pioneers of demonstrative aids sharing anecdotal data fresh from recent courtroom victories.⁹ In using this "new" tool, trial lawyers' imaginations were boundless -- both as to what could be used as a visual aid to maximize information transfer to jurors and to persuade them as to the significance of those facts. It was a grand experiment: the courtroom was the laboratory, the advocates were the scientists, the proposed use of the full spectrum of demonstrative evidence was the experiment, and the judges' rulings were the data.

The data demonstrated that without a uniform lexicon and agreed-upon rules, trial judges arrived at vastly different conclusions about the categorization, admissibility, and use of demonstrative evidence. A number of inconsistent *517 judge-made "practice rules" developed over time whereby judges, faced with a new form of proof not addressed in the Federal Rules of Evidence or most state analogues,¹⁰ navigated the waters of admissibility and use by way of trial and error. In essence, judges were left to figure out the proper evidentiary treatment of demonstrative exhibits and hammer out common sense conclusions. They used the discretion allotted to them under federal rules of evidence and their state counterparts to put that conclusion into effect.

In articulating the rationale for these ad hoc "laws of trial advocacy," judges employed language evocative of the various aspects of [Federal Rules of Evidence 105](#), [403](#), and [611](#) that impart tremendous authority to trial judges over the presentation of evidence. Judges recognized that the probative value of demonstrative evidence validated its consideration by a jury, but they were concerned about delivering demonstrative exhibits to jurors during deliberations along with other admitted exhibits. These concerns centered on the risks that jurors would overvalue or misunderstand the demonstrative evidence.

Mounting inconsistencies in the definition and use of demonstrative evidence did not go unnoticed. Scholars and commentators wrote articles attempting to reconcile and explain these inconsistencies in an effort to decipher an orderly pattern that offered advocates some degree of predictability of judicial rulings.¹¹ Others called for modification of the evidence rules to create a uniform standard of admissibility.¹² The Advisory Committee on Rules of Evidence (Advisory

Committee), however, has not considered any amendments to the Federal Rules of Evidence on this issue.¹³

Given this scholarly commentary, why this stagnation? Why do evidence and trial advocacy professors continue to teach the muddled status quo? Most evidence texts gloss over demonstrative evidence and its foundations, while trial advocacy texts perpetuate the existing confusion by teaching students that practice is inconsistent, varying from judge to judge, and jurisdiction to jurisdiction.¹⁴

***518** Law professors should confer and agree on Model Rules for Demonstrative Evidence (Model Rules). They should present proposed amendments both to the Advisory Committee and to their state counterparts for consideration, debate, and adoption. This is not to suggest, however, that once Model Rules have been agreed upon and presented legal teachers should rest on their laurels.¹⁵ Law professors should straightaway introduce to their students these Model Rules along with the conventional understanding of practice that is the “law of trial advocacy.” In doing so, professors have an opportunity to explain the analytic and practical superiority of the Model Rules and engage the next generation of trial lawyers in a discussion of the issues. Exposure in law school to a set of model rules and the analytic justification for them would, in turn, influence a future generation of lawyers and judges. The goal would be to have an immediate positive impact on the consistency of judicial rulings regarding the admissibility and use of demonstrative evidence, and eventual clarification of the standards for admissibility in the rules of evidence.

Section I of this Article documents the current practice across jurisdictions, noting that differences in nomenclature lead to confusion as to practice, which results in unpredictable results. Section II traces the roots of this doctrinal confusion, paying particular attention to the role of professors in perpetuating the confusion. Section III documents the magnitude of the problem and illustrates why the issue will likely worsen. Finally, Section IV highlights the privileged position of professors to identify a solution by examining the role of the academy in developing the Federal Rules of Evidence. Section IV also examines [Maine Rule of Evidence 616](#), which addresses demonstrative evidence directly, and the lessons gleaned from Maine’s experiment.

I. TODAY’S JURISDICTIONS ARE INCONSISTENT IN THEIR IDENTIFICATION AND USE OF DEMONSTRATIVE EVIDENCE

Judges are the masters of their courtrooms. They have broad discretion as to the conduct of trials and control over how lawyers present their cases.¹⁶ They also generally have great latitude when evaluating the probative value of offered evidence and balancing that against the risks of admission.¹⁷ Underlying this discretion of the trial court is a codified standard -- be it a broad balancing test as in [Federal Rule of Evidence 403](#) or a more strict restriction as in [Federal Rule of Evidence 412](#). These standards, supplemented by case law, cabin a judge’s discretion and promote consistent evidentiary rulings.

***519** The admission and use of demonstrative evidence lacks these formal standards. The federal rules of evidence (and all state evidence rules except for Maine’s) offer no direction, as they are silent. Other guidance -- such as it is -- in case law, jury instructions, academic writings, and textbooks is limited, piecemeal, and inconsistent, leading to unpredictable judge-specific rules of admission.

A. Present-Day Judges Have Wide and Varied Definitions of Demonstrative Evidence

That judges struggle with the term demonstrative evidence¹⁸ is not surprising: the Federal Rules of Evidence and state analogues, with the exception of Maine’s, have not given rule-based guidance to judges regarding the use of such visual aids. Nor do legal dictionaries or scholars offer useful guidance.¹⁹ Black’s Law Dictionary defines demonstrative evidence as “[p]hysical evidence that one can see and inspect,” while noting that the physical object “does not play a direct part in the incident in question.”²⁰ In the very next sentence, Black’s notes that “[t]his term sometimes overlaps with and is used as a synonym of real evidence,” and that this evidentiary universe may also be referred to as “illustrative evidence; autoptic evidence; autoptic profference; real evidence; [and] tangible evidence.”²¹

Scholars acknowledge the confusion. For example, Professors Christopher Mueller and Laird Kirkpatrick highlight existing definitional confusion in their treatise, stating:

There are at least three definitions of demonstrative evidence in current use. One describes demonstrative evidence as anything that “appeals to the senses,” but this definition seems too broad because it reaches essentially everything (even testimony must be heard to be understood). An intermediate definition says that evidence is demonstrative if it conveys a “firsthand sense impression,” thus excluding testimony because it is a secondhand recounting of the witness’[s] perceptions. An even narrower definition equates demonstrative evidence with “illustrative evidence,” thus limiting its scope to evidence used to explain or illustrate testimony (or other evidence) but lacking any substantive force of its own. Under such a definition, demonstrative evidence serves merely to add color, clarity, and interest to a party’s proof.²²

***520** This terminology turmoil unsurprisingly appears in judicial decisions. Some judges use the term demonstrative evidence to refer to any physical evidence,²³ while others restrict the term’s use to any nonadmissible exhibit to aid in understanding testimony or argument,²⁴ and still others use the words demonstrative evidence to describe substantive physical evidence (such as the weapon in a murder trial).²⁵ To add to the confusion, some judges use the term “illustrative” to refer to an entire subset of this evidentiary universe,²⁶ sometimes using the terms demonstrative and illustrative interchangeably,²⁷ yet at other times to describe discrete subparts of this evidentiary universe.²⁸ Still other jurisdictions talk of “admitting” demonstrative evidence as shorthand for permitting its use at trial without formally admitting it into evidence.²⁹

In addition to definitional problems, there is disagreement on theories of admissibility and use. Federal courts seem to address demonstrative evidence through the lens of [Federal Rule of Evidence 611\(a\)](#), which permits a trial court to “exercise reasonable control over . . . presenting evidence so as to . . . make those procedures effective for determining the truth.”³⁰ Some federal courts speak of “authorizing” the use of “pedagogical aids,” as opposed to admitting these items into evidence.³¹ Other jurisdictions address demonstrative evidence ***521** by focusing on its relevance.³² Other courts seem to conflate a showing of relevance with one of authenticity. In doing so, they address the authenticity of a demonstrative object, implicitly acknowledging its relevance, in that the evidence presented to establish authenticity would, in nearly every circumstance, serve to establish the object’s relevance.³³

B. Contemporary Confusion About the Definition Results in Different Uses of Demonstrative Evidence

Confusion as to nomenclature, characterization, and admissibility adds to the uncertainty as to whether demonstrative evidence is formally admitted into evidence and whether jurors get to review the object in their deliberations.³⁴ If a demonstrative exhibit is admitted without limitation, then the advocate’s use throughout the trial and the jury’s use during deliberations presents no controversy. Confusion blossoms when the court permits some limited uses of the demonstrative exhibit short of admitting it in evidence for all purposes. This can happen, for example, when evidence is admitted for “illustrative purposes,” or when evidence is *used* during the trial (presumably under the judge’s authority to control presentation of evidence under rules such as [Federal Rule of Evidence 611](#)), and yet not formally admitted into evidence.³⁵ The approaches of jurisdictions vary widely, from barring such evidence from entering the jury room,³⁶ to permitting it if the evidence meets a certain evidentiary threshold of ***522** probity and fairness,³⁷ to permitting it wholesale with only a limiting instruction.³⁸ Yet others provide no guidance to the trial court, leaving the matter completely within the trial court’s discretion.³⁹

Differing standards for use of demonstrative evidence (in many cases without any criteria to guide a judge in her decision) are further complicated when trial and appellate courts conflate the concepts of admission and use. Admission of exhibits in evidence requires relevance,⁴⁰ authenticity,⁴¹ and reliability (through the hearsay⁴² and best evidence⁴³ rules). “Authorized for use” is theoretically a lower standard.⁴⁴ For example, a chart summarizing various criminal counts and the evidence therefore may not meet the voluminous requirement of [Federal Rule of Evidence 1006](#) (and thus would be otherwise inadmissible as hearsay), but could still be “authorized for use” under [Federal Rule of Evidence 611\(a\)](#). Yet the reports are replete with appellate courts “admitting” demonstrative aids into evidence.⁴⁵ Moreover, many courts explicitly cite [Federal Rule of Evidence Rule 611\(a\)](#) (or a state equivalent) as the basis for “admitting” the evidence.⁴⁶ The inconsistency in lexicon and definition ***523** leads to further confusion as to admissibility and use because appellate courts’ discussions of acceptable discretionary practice rules for one type of evidence labeled demonstrative often conflict with other courts’ practice rules.

C. The Inconsistent Practice Risks Inconsistent Case Results in Today's Courts

There are at least three ways that the doctrinal confusion surrounding demonstrative evidence risks inconsistency and inaccuracy. The uncertainty as to nomenclature casts the status of the proffered evidence into doubt. This uncertainty is magnified when courts fail to enforce the barrier between exhibits admitted into evidence and aids authorized for use in the courtroom. The unpredictability is amplified when a judge charges a jury and determines which exhibits will accompany the jury: confusion about the status of the evidence makes it difficult to predict whether an admitted demonstrative exhibit will be available to the jurors during deliberations along with other admitted exhibits. In addition, as noted by the Seventh Circuit, it could actually affect the outcome of the case as previously inadmissible exhibits are physically present in the jury deliberation room.⁴⁷

The lack of a cognizable standard across these decision points undermines accurate pretrial settlement valuation of a case and an advocate's trial preparation and presentation strategy. How does a trial lawyer know the value of her case if she is unsure of the strength of her evidence? Is the evidence coming in at trial or not? How will the advocate be permitted to use the evidence? What technical foundation is called for admission? What persuasive foundation will be needed to convey the information to the jurors? A lawyer planning to show the jury a diagram, for example, will need to know in advance whether a diagram is admissible under any (and what) conditions or whether a diagram properly authenticated is admissible for purposes of sufficiency of the evidence only as an illustrative exhibit. The advocate's examination of the foundational witness in the former circumstance will be vastly different than that of the latter. In essence, differing approaches to the admission and use of demonstrative evidence increase the risk of inconsistent verdicts.⁴⁸

However, unlike a situation where the appellate court may disagree with the application of a particular rule (even a rule which leaves the trial court with *524 considerable discretion such as [Federal Rule of Evidence 403](#)),⁴⁹ leaving the admission and use of demonstrative exhibits solely to a trial court's discretion (without accompanying criteria) creates a criterion-less standard which makes advocacy or oversight nearly impossible.

II. HOW THIS TANGLED WEB WAS WOVEN: THE EVOLUTION OF JUDGE-SPECIFIC, DISCRETION-BASED GUIDELINES

Several factors contributed to the evolution and persistence of inconsistent practices within and across jurisdictions governing the use of demonstrative evidence at trial. The entering argument, of course, is that there are not any rules or standards governing the admissibility and use of demonstrative evidence.⁵⁰ Against this backdrop, scholars have failed to agree on the nomenclature and on the use and admissibility of various visual aids, using terms such as "demonstrative aid," "demonstrative exhibit," "illustrative exhibit," and "exhibit admitted for illustrative purposes only" to describe similar evidentiary objects.⁵¹ Advocates capitalized on this uncertainty by pushing the envelope. In the absence of an evidence rule or united scholarly direction, trial judges developed a "common-sense common law of trial advocacy." Lacking focused guidance from evidentiary rules and stymied by the contradictory direction from scholars of evidence and trial advocacy, judges created court-specific, discretion-based guidelines for the use of visual aids at trial that are inconsistent across jurisdictions and courtrooms. This confusion is perpetuated by evidence and trial advocacy teachers who teach that each jurisdiction (and each judge) is unique in its approach.

****525 A. Before "Demonstrative" There Was "Visual" Evidence -- and Scholars Never Agreed on Rules for Its Use or Admission***

Early evidence scholars gave little attention to the concept of demonstrative evidence.⁵² This is unsurprising given that the history of evidence dating back to the common law recognized testimonial evidence (oral testimony from a competent witness with personal knowledge about the facts at issue in a case) and certain types of tangible evidence, commonly referred to as "real" evidence.⁵³ The nature of tangible, extratestimonial evidence was originally limited to documents at issue in a case (the contract, the lease, the bank note, the publication in a defamation suit) and other items involved in the events of the case (the gun, the knife, the stolen property).⁵⁴

The idea of something beyond either the oral testimony of a witness with personal knowledge or the production of a tangible item that itself played a part in the underlying dispute seems to have been little contemplated. One notable outlier of academics' bimodal thinking about evidence was John Wigmore, who referred to visual aids used during testimony as "non-

verbal testimony.”⁵⁵ For Wigmore, the concept of nonverbal testimony recognized that a witness could communicate to a jury wordlessly by using physical demonstrations, diagrams, maps, photographs, and models.⁵⁶

Meanwhile, in the courtroom, the concept of “real” evidence was expanded to include not just items that played a role in the case themselves, but items with independent “real” probative value vis-à-vis the issues in the case. While not “the thing” at issue in the case, the evidence was admitted as providing direct, independent value supporting a fact useful to the determination of the issues in the case.⁵⁷ These items came to be viewed as an extension of those tangible items -- such as contracts, deeds, or guns -- that had an active “role” in the underlying controversy.⁵⁸ For example, a map documenting property parcels, created by city engineers and filed with the city, where the underlying controversy concerned the ownership or use of the property (such as a boundary dispute underlying a cause of adverse possession or trespass), was now treated as “real” evidence worthy of unqualified admission and consideration by a jury.⁵⁹

This development invited advocates to try to further broaden the universe of items admissible as substantive evidence. This newly-substantive evidence *526 could be used for all purposes, including establishing sufficiency of the evidence at all stages of the proceeding and on appeal. Over time, trial lawyers offered into evidence more varied tangible items that were not themselves involved in the controversy. Instead of city engineered maps in property disputes, advocates now offered hand-drawn diagrams of the layout of a living room in a domestic violence assault case.

Scholars were reluctant to draw a hard line or adopt a unified proposal for treatment of this expanding class of evidence. Instead, there was mostly silence or adherence to a general concept that only testimonial and “real” exhibit evidence -- that which provided direct evidence in a matter -- was admissible.

Later scholars faced with this explosion of nontestimonial evidence fell primarily into three categories: (1) those who ignored the topic; (2) those who used the term “demonstrative evidence” to describe any admissible, derivative evidence; and (3) those who used the term to refer to visual aids that assisted witness testimony but were not themselves evidence.⁶⁰ Scholars began to create various lexicons to describe similar items, inconsistently using the terms visual aids, demonstrative aids, illustrative aids, demonstrative evidence, illustrative evidence, and exhibits admitted for illustrative purposes. This variable labeling led, in part, to multiple, inconsistent formulae for evidentiary consideration and admission of such items at trial.⁶¹

B. Practitioners Creatively Expanded the Use of Demonstrative Evidence, Importing Lessons from Madison Avenue into the Courtroom

As trial lawyers began to experiment with the use of visual aids at trial, they lamented the lack of clarity surrounding the admissibility and use of demonstrative evidence.⁶² This call to the academy for help went largely unanswered.⁶³ Academics either ignored the concept of demonstrative evidence or greatly limited the definition to some version of “derivatively relevant evidence” that is admissible, but for the limited purpose of augmenting a witness’s oral testimony. The examination and analysis of the nature and use of such visual evidence by scholars in the area is quite cursory. A survey of *527 evidence textbooks reveals that none accord more than a few pages of text to the concept.⁶⁴

The transformation of trial practice in the 1960s, through the 1990s, and the 2010s was dramatic in terms of the type and quantity of visual material lawyers wanted to share with juries. Trial lawyers born after World War II grew with television as a source of both information and entertainment. They were also influenced by the advertising revolution spawned by postwar affluence that encouraged consumerism. Advocates were influenced by the social science data that followed the explosion of visual information delivery in mass media.⁶⁵ Early writing on the subject was generally found in professional journals, while later books like Robert Cialdini’s *Influence: The Psychology of Persuasion* were national best sellers aimed at the general public.

Innovative trial lawyers, seeking an advocative advantage, began experimenting with the use of visual aids at trial, leveraging the social science lessons to deliver information in the same manner contemporary jurors were accustomed to receiving entertainment. The practice quickly spread, with early adopters of demonstrative aids, such as personal injury attorney Melvin Belli, sharing lessons from the trenches of trial and encouraging fellow practitioners to push the envelope as far as trial judges would permit.⁶⁶

Evolution of visual aids at trial went from the early days of two-dimensional charts, graphs, and diagrams,⁶⁷ to the use of

three-dimensional anatomical displays and to-scale dioramas of intersections replete with model cars, to the use of comprehensive computer animations visually conveying facts about everything from product manufacture methods to car, train, and aviation accidents. Trial lawyers' imaginations as to what could be used as a visual aid both to maximize information transfer to jurors and to persuade them as to what those facts meant seemed without limit.

C. Judges Responded Using the Discretion Provided Under the Evidence Rules to Create a Judge-Specific "Law of Trial Advocacy"

Faced with this ever-expanding universe of evidentiary objects, judges were left to figure out the proper evidentiary treatment of such objects. Judges who ascended to the bench were poorly indoctrinated by their law school professors and early practice mentors on the expanding use of visual materials, if at all. Consequently, when faced with an onslaught of novel visual evidence, they used the discretion allotted them under the evidence rules to fashion court-specific *528 guidelines.

The existing rules of evidence provided little assistance in this endeavor. Rule 402 provides that relevant evidence is admissible unless barred by the Constitution, federal statutes, or the rules of the Supreme Court, including the evidence rules. So, unless some valid bar exists, the court must admit relevant evidence. Relevant evidence is defined in Rule 401 as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."⁶⁸ This definition provides an extremely low threshold for admissibility: no category of evidence is excluded, no particular characteristics are required.⁶⁹

Given the relatively low bar of relevance, judges were faced with an expanding universe of evidence without training or experience to guide them. For example, exhibits such as diagrams drawn by a testifying witness and not to scale met the low threshold of relevance under Rule 401 and so were presumptively admissible under Rule 402. There was, however, a discomfort among judges who had not received training about the admissibility and use of such evidence, either in law school or in practice. This discomfort led to a wariness about the evidence itself: yes, it was relevant, but it did not seem to fit historic categories of testimonial or real evidence as defined and discussed in the scholarly literature. Judges recognized that the probative value of such evidence validated its consideration by a jury, but they were concerned about delivering demonstrative exhibits to jurors during deliberations along with other admitted exhibits. These concerns centered on the risks that jurors would overvalue or misunderstand the demonstrative evidence.

Judges faced unattractive options under the rules. Judges could exclude a hand-drawn diagram under [Rule 403](#) as cumulative, on the theory that a witness already testified to the scene; this rationale, however, would make a diagram of roadways in an automobile accident similarly inadmissible, even one produced by a city engineer. Judges could admit a diagram for a limited purpose and give a limiting instruction to a jury under [Rule 105](#), but this would result in the diagram being delivered to the jury deliberation room with the other admitted exhibits. This also seemed like a wrong result: after all, a hand-drawn diagram was an *529 extension of a witness's oral testimony, which was itself unavailable to the jurors for review during deliberations. In some jurisdictions, then, a practice developed that such exhibits would be "admitted," but for "illustrative purposes" only: the exhibits were "admitted" into evidence, the jury would see the exhibits during the trial, the exhibits were part of the evidentiary record both on appeal and at trial for a challenge to the sufficiency of evidence, the exhibits could be used in summation, but the exhibits would not be delivered to the jury deliberation room as were the other admitted exhibits in the case.⁷⁰

A common judicial analysis for admitting demonstrative exhibits into evidence but excluding them from the jury deliberation room seemed to be a form of [Rule 403](#), applied as a secondary afterthought to "admission" -- in essence, a "shadow [Rule 403](#)." The first round of [Rule 403](#) balancing was applied to determine if the evidence should reach the jury at all. Having determined the answer to be "yes," judges admitted the evidence and then seemed to perform a second, "off-the-books" [Rule 403](#) analysis to determine if the "admitted" evidence should be delivered to the jurors during deliberations.

In reaching this split-the-baby approach, some judges relied on the broad discretion afforded them to control courtroom proceedings, including discretionary regulation of the mode of presentation of evidence. The language underlying this reasoning reflected that of [Federal Rule of Evidence 611](#).²¹ Additionally, some judges admitted the demonstrative evidence "for illustrative purposes only" and then instructed the jury as to the limited nature of the evidence. This language was similar to that of [Federal Rule of Evidence 105](#).²² In essence, judges were left to figure out the proper evidentiary treatment of such visual aids and, having arrived at a commonsense conclusion, primarily used the *530 discretion allotted to them under

[Federal Rules of Evidence 403](#) and [611](#) and their state counterparts to put that conclusion into effect.⁷³

D. The Snake Comes Full Circle: Law Professors Now Teach that Admissibility and Use of Demonstrative Evidence Is Judge-Dependent, Not Standard-Dependent

The persistent, uncertain state of demonstrative evidence, which the Seventh Circuit stated “may have contributed to the error in the district court,”⁷⁴ is unsurprising, considering the array of scholarship on this topic. Evidence treatises are replete with resigned statements. Professors Mueller and Kirkpatrick note that “[t]here is no consensus on the proper definition or scope of demonstrative evidence,”⁷⁵ while Professor Kenneth McCormick cautions that “the use of any single term to denominate all such evidence can be at best confusing and at worst harmful to a clear analysis of what should be required to achieve its admission into evidence.”⁷⁶ Professor Wigmore refused to even use the term “demonstrative.”⁷⁷ As recently as 2012, one commentator lamented that “[a]s demonstrative exhibits have become increasingly more powerful, one might expect courts to have responded by becoming more vigilant about what the exhibits depict. This has not been the case.”⁷⁸

Most treatise and textbook authors do not address the landscape with a normative analysis, but rather identify the accepted trial procedure in their respective jurisdiction. They do not advocate for a particular approach, but rather acknowledge the lack of consensus across jurisdictions.⁷⁹ Some academics teach that demonstrative exhibits can constitute substantive evidence under certain circumstances,⁸⁰ some consider visual aids to be admissible as exhibits *531 with a limited use, for “illustrative purposes only,” while others argue that any visual evidence is derivative, and thus inadmissible, even where testimonial foundation has been laid establishing both its authenticity and relevance to the issues in the case. Some evidence textbooks do not list demonstrative evidence in either the table of contents or the index, and others reference it only in brief passing.⁸¹ Stanford Professor George Fisher and University of Washington Professor Peter Nicolas, for example, do not discuss demonstrative evidence in their texts, although each author includes a case that illustrates specific evidentiary issues that intersect with the concept of demonstrative evidence.⁸²

By 2010, authoritative academic works catalogued multiple evidentiary statuses of various tangible items, such as photographs or diagrams produced to scale.⁸³ A survey of evidence and trial advocacy texts and treatises reveals at least five differing characterizations of a photograph offered into evidence: “real *532 evidence,”⁸⁴ “tantamount to real evidence,”⁸⁵ “substantive evidence,”⁸⁶ “representative evidence,”⁸⁷ and “demonstrative evidence.”⁸⁸ The different characterizations, in turn, produce different instruction as to the nature and use of a photograph at trial. This is particularly notable, given that “[s]ome students of photographic evidence estimate that photographs are used in roughly half the cases in the United States.”⁸⁹ One text highlights an Indiana case in which the court considered competing definitions and evidentiary uses of photographs.⁹⁰ The Indiana court noted that photographs fall within the “‘pictorial testimony theory’ of photographic evidence,” and, as such, are not evidence in themselves, as contrasted with the “‘silent witness theory’ for the admission of photographs that qualifies the photo as substantive evidence.”⁹¹ The text’s authors posit: “Given the impressive scientific evidence of the reliability of the photographic process, doesn’t it seem logical that a photograph should qualify as substantive evidence?”⁹²

Similarly, a survey of texts and treatises reveals conflicting characterizations of a hand-drawn diagram or map: it is described as a “visual aid” used for explanatory or illustrative purposes only;⁹³ “representative evidence” that represents another thing;⁹⁴ an “illustrative exhibit” that is “relevant so long as it fairly and accurately depicts the portrayed scene”;⁹⁵ “demonstrative evidence” that can be taken to the jury deliberation room if the judge finds “it is particularly helpful . . . and is not too argumentative.”⁹⁶ These conflicting characterizations have led to inconsistent conclusions with respect to relevance and admissibility: “the use of such evidence is usually left to the discretion of the trial court”;⁹⁷ a diagram is no different than a photograph, and like a photograph, should be admitted into evidence;⁹⁸ and a diagram need not be to *533 scale and “the mere fact that the drawing is hand-drawn during the course of trial and fails to get the size and distance exactly right is ordinarily a matter that goes to the weight of the evidence and not its admissibility.”⁹⁹

Not only do definitions and uses of demonstrative evidence differ between texts, there exist inconsistencies within single sources. For example, one text categorizes photographs as demonstrative evidence, which the authors define as generally “ha[ving] no probative value,” but nonetheless states that such nonprobative evidence can be admitted into evidence.¹⁰⁰ This conflicts with the prohibition of Rule 402, which dictates that nonprobative evidence is irrelevant and inadmissible.¹⁰¹

Not only do scholars document the state of confusion, they also perpetuate it. Having left judges to their own devices to create court-specific discretionary guidelines for demonstrative evidence, professors have solidified the resulting confusion

by teaching the next generation that demonstrative evidence lives outside the rules of evidence. In the classroom, in textbooks, and at continuing legal education seminars, those reared to accept the standardless status quo pass that acceptance to the next generation. The lack of uniform standards on admissibility and use of demonstrative evidence is particularly apparent when evidence professors, trial advocacy teachers, lawyers, and judges come together to teach trial skills in such programs as those sponsored by the National Institute of Trial Advocacy.¹⁰² When the question of how to use demonstrative evidence in the courtroom comes up, as it inevitably does at such training seminars, confusion reigns. Conflicting statements of “the law of trial advocacy” erupt, with the experts either disavowing any reliable practice or espousing contradictory views of “the way it’s done.” A sampling of current authoritative works and law school texts illustrate this:

While all jurisdictions allow the use of demonstrative aids throughout the trial, there is some diversity of judicial opinion concerning their precise evidentiary status. Some jurisdictions treat such items as admissible exhibits which may be reviewed on appeal and sometimes viewed by the jury during deliberations. Other courts treat them differently, either admitting them for “demonstrative purposes” only or refusing to admit them at all as exhibits. These courts then differ on *534 whether to allow them into the jury room during deliberations.¹⁰³

Judges exercise discretion over what evidence, if any, the jurors may take to the jury room. Judges often allow the jury to take into the jury room real and documentary evidence that has been admitted into evidence. Sometimes they permit the jury to take demonstrative evidence, if it is particularly helpful in organizing the facts of a complex case and is not too argumentative.¹⁰⁴

The only limits on the use of demonstrative evidence are the trial judge’s discretion and the trial attorney’s imagination.¹⁰⁵

Despite the solid case support for visual evidence, lawyers often feel anxious about foundational and ethical questions. The concerns and questions feeding this discomfort include the following: . . . What category does this evidence fall in -- real or demonstrative? . . . What is the potential for impeachment over foundation details?”¹⁰⁶

Most judges in exercising judicial discretion will permit the use of visual aids if it can be demonstrated in advance that these aids can properly be used.¹⁰⁷

Conflicting practices exist on whether jurors may take exhibits into deliberations. Explicit rules on the subject do not exist in many jurisdictions¹⁰⁸

The introduction and use of demonstrative evidence is subject to a variety of approaches depending upon the practice in a jurisdiction and the preferences of the judge¹⁰⁹

The status of diagrams . . . is somewhat uncertain in many jurisdictions. . . . [T]here are wide variations In some states, illustrations of a witness’s testimony such as diagrams, models, and computer simulations are treated as visual testimony. . . . In other states, this kind of media is considered as “demonstrative evidence” and is admitted as a special category of evidence, sometimes with a limiting instruction to the effect that the diagram should be given no greater weight than the *535 supporting witness’s testimony. In some states, diagrams seem to be treated as ordinary tangible evidence.¹¹⁰

The admissibility status of demonstrative exhibits varies. What does it mean when a judge “admits” the exhibit in evidence? . . . This difference in judicial views means that when a demonstrative exhibit is offered and

“admitted” in evidence, a lawyer must determine if the judge will allow the exhibit to be used only with the witness, allow it to be used during closing arguments, and allow it to go to the jury during deliberations.¹¹¹

Even though scholars have ably identified the problem, they have not yet unified in an effort towards resolution. Some scholars have attempted to articulate the foundation required for demonstrative evidence,¹¹² although by doing so they serve to perpetuate the confusion as to the “admissibility” of demonstrative evidence.¹¹³ Other scholars attempted to define the universe of demonstrative evidence,¹¹⁴ yet their proposals have not gained universal or even grudging acceptance.

The result of such discord is that each generation of law students is indoctrinated into the “evidentiary rules of trial advocacy” through the prism of law school textbooks and by professors who impart their localized, anecdotal opinions on the “rules” regarding the use and admissibility of demonstrative evidence at trial. Students schooled on these principles, in turn, continue those definitions and terms of use when they enter practice and when they become judges.

III. THE DOCTRINAL CONFUSION, THOUGH SEEMINGLY MINOR, HAS REAL-WORLD NEGATIVE CONSEQUENCES

Although those who have been advocating within, administering, or teaching the status quo may downplay the impact of this confusion, it is already *536 having a negative effect on trial practice. Additionally, as the judge-made “law of trial advocacy” is solidified into pattern jury instructions, the potentially inconsistent practice is reinforced. Finally, multiple innovations in trial practice can combine with unintended and undesirable results.

A. The Relative Silence on the Issue Belies the Seriousness of the Situation

To some extent, the seeming acceptance of scholars, judges, lawyers, and rules drafters regarding the murky and inconsistent “rules” of demonstrative evidence might be chalked up to a collective ennui, expressed through inaction, amounting to “what’s the big deal?” It may be that this type of proof -- whether referred to as a visual aid, demonstrative aid, illustrative aid, demonstrative exhibit, illustrative exhibit, or exhibit admitted for illustrative purposes only -- is reflexively categorized and marginalized as a mere persuasive device in the tool box of the trial advocate. This classification as a trial technique may explain why demonstrative proof is often sidelined from rigorous evidentiary analysis. The oversimplification in definition produces an oversimplified and inconsistent approach to evaluating the relevance and admissibility of the proof.

This ennui appears to be borne out by the relative absence of this issue from appellate reports. But that absence is unsurprising, because there is a long error chain that must remain unbroken to have the issue reviewed and documented. First, the confusion about the admission or use of demonstrative evidence must result in some type of error.¹¹⁵ Second, this error must be of such a magnitude as to potentially affect the outcome of a trial, and a losing party must expend the resources to pursue an appeal. Additionally, there must be sufficient evidence in the record to demonstrate an abuse of discretion to make an appeal worthwhile. Third, the issue must be sufficiently identified (and not lost among other assignments of error) to merit an appellate court’s attention. If any of the links in this chain are broken, the demonstrative evidence issue will not see the light of day. While this may seem to diminish this problem, this long error chain in fact magnifies the importance of this predicament. And even with the relative difficulty of these issues coming to light, trial courts are still incorrectly admitting or using demonstrative exhibits, requiring appellate review, and, in some cases, reversal.¹¹⁶ Whatever the source of the hands-off approach, the potential for real-world, negative consequences exists, and the problem further develops with the calcification (if not codification) of this judge-made “law of trial advocacy” into pattern jury instructions.

**537 B. Pattern Jury Instructions Perpetuate the Problem by Implying a Standard*

Over the years, oral jury instructions were developed to notify jurors during trial that an “illustrative exhibit” being used with a witness would not be available to them during deliberations.¹¹⁷ This was to distinguish these visual aids from other exhibits admitted in the case, because in some jurisdictions judges instruct juries at the beginning of a trial that exhibits admitted into evidence will go back to the jury deliberation room at the conclusion of the trial for the jurors’ consideration. In Washington State, for example, one jury instruction reads:

I am allowing [this exhibit] [exhibit number] to be used for illustrative purposes only. This means that its status

is different from that of other exhibits in the case. This exhibit is not itself evidence. Rather, it is one [[[party's] [witness's] [summary] [explanation] [illustration] [interpretation]], offered to assist you in understanding and evaluating the evidence in the case. Keep in mind that actual evidence is the testimony of witnesses and the exhibits that are admitted into evidence.

Because it is not itself evidence, this exhibit will not go with you to the jury room when you deliberate. The lawyers and witnesses may use the exhibit now and later on during this trial. You may take notes from this exhibit if you wish, but you should remember that your decisions in the case must be based upon the evidence.¹¹⁸

The title of this instruction is “Exhibit Admitted for Illustrative Purposes,” even though the text of the instruction states that the exhibit “is not itself evidence.”¹¹⁹ The language of the instruction thus suggests contradictorily that the exhibit both is and is not admitted into evidence.¹²⁰ Not only does this codify the confusion, but also communicates to judges and practitioners alike the state of uncertainty in this area. This should, standing alone, provide sufficient impetus to address this issue; when combined with other developments in trial practice, this state of affairs can produce unintended and undesirable results.

***538 C. The Combination of Innovations in Both Jury Instructions and Trial Practice Produces Anomalous Results**

While jurisdictions developed approaches to demonstrative evidence (either judge by judge or through pattern jury instructions), there were other independent developments that few foresaw would produce anomalous, unknowable “shadow evidence” to be relied on by juries beyond the eyes of judges and lawyers. One such development was the advent of note taking by jurors.

All jurisdictions have addressed note taking by jurors during trial. There are thirteen states where note taking must be allowed during trial.¹²¹ There are twenty-six states where juror note taking lies in a judge’s discretion.¹²² There are six states where the language is ambiguous, but clearly note taking is allowed and preferred.¹²³ Finally, there are seven where the rule is currently unclear.¹²⁴

*539 The rationale for these rules is well-founded: jurors have limited capacity to remember and a strong desire to render a just verdict based on the evidence. Note taking reduces anxiety in some jurors, knowing that they can record facts they find important without fear of forgetting them. Note taking also allows jurors to engage in a robust discussion in the jury deliberation room about the evidence presented to them. The soundness of juror note taking is widely accepted.

The combination of the common jury instruction regarding exhibits admitted for illustrative purposes only, discussed above, with the newly devised rules allowing jurors to take notes during trial produced several unforeseen and undesirable results. One example is when a witness -- let’s say a domestic violence victim -- is testifying to the events that occurred in her apartment. The prosecutor asks her to describe the apartment: the size, the furniture, and the distances. In the process of doing so, she indicates she could better explain the layout of her apartment to the jury if she could draw the apartment. With the court’s permission, the witness sketches a diagram -- clearly not to scale -- of her apartment. It is marked as an exhibit and offered into evidence. It is objected to by the defense counsel on the basis of foundation. It is, after all, not to scale. The prosecutor, having learned well at school, revises her offer and states: “We offer it for illustrative purposes only your honor.” The court accepts the offer and “admits” the exhibit.

It is at this point that a judge-made “law of trial advocacy” allowing use but not full admission of such a hand-drawn diagram, a pattern jury instruction regarding “exhibits admitted for illustrative purposes only,” and a court rule on juror note taking come together to risk an extremely odd and most unintended and undesirable evidentiary result. The prosecutor is allowed to share the witness’s diagram with the jury during her testimony; at that time the judge reads the jury instruction alerting the jury that this “exhibit,” unlike the other exhibits introduced at trial, will not be going back to the jury deliberation room; the jurors -- recognizing the importance of the diagram and now knowing it will not later be available to them -- pull out their note pads and start sketching the diagram. The jurors are incited to try to reproduce on the fly, with divided attention and no direct knowledge of the scene they reproduce, the floorplan drawn by the witness on the stand. So instead of receiving a single hand-drawn diagram in the jury deliberation room, one to which the witness has attested under oath to be accurate, the jurors now have up to twelve secondary iterations of a diagram to which they had limited temporal exposure and no knowledge of the underlying facts portrayed therein. This is exactly the type of anomalous result, contrary to the goals of the

rules of evidence, that Seventh Circuit noted in its decision in *Baugh ex rel. Baugh v. Cuprum S.A. de C.V.*¹²⁵

*540 There are scores of other anecdotal examples of chaotic and presumably unintended consequences of the lack of agreement on the nature and use of demonstrative evidence. There are, also, the documented facts of the *Baugh* case. In any event, the lack of data on the frequency of disparate rulings on admissibility and use of demonstrative evidence, or data quantifying harm resulting to parties or the system, is not reason for inaction.¹²⁶ Many of the federal rules of evidence were drafted not to solve in-court problems of admissibility left to judicial discretion under [Rule 403](#), but to proactively ensure consistent, fair rulings. For example, Federal Rule 406's addressing of habit evidence was not necessitated by the mischaracterization or misuse of habit evidence by judges: on the contrary, the Advisory Committee's note to Rule 406 states that the rule "is consistent with prevailing views" and that there was general agreement "that habit evidence [was] highly persuasive as proof of conduct on a particular occasion."¹²⁷ There was no pressing corrective need for Rule 406, as habit by its terms is distinguishable from character evidence and is thus not subject to Rule 404. The drafters' decision to expressly include constitutional rights in the text of some evidence rules¹²⁸ is further confirmation that rules may be crafted as a prophylactic measure without documenting chaos in the courts. There is no evidence that there was empirical data that judges were depriving litigants of their constitutional rights in applying the rules of evidence; rather, the inclusion has been characterized as a congressional reminder that due process considerations may extend beyond those enumerated in the text of the rules.¹²⁹

IV. LEADING THE WAY: EVIDENCE AND TRIAL ADVOCACY TEACHERS SHOULD DEBATE THE ISSUES AND ENDORSE A SET OF MODEL RULES

Confusion as to the evidentiary status of demonstrative evidence has been long acknowledged by law professors. They have identified this confusion as a problem that needs to be addressed, although usually from their own discipline's point of view.¹³⁰ Trial advocacy professors and practitioners advance the Melvin Belli omnibus theory of demonstrative evidence: do what is necessary to employ this powerful communication tool.¹³¹ On the other hand, scholars, if they address *541 demonstrative evidence at all, are more likely to focus on the distinction between real and substantive evidence, often addressed through the lens of relevance.¹³² Some professors have even proposed solutions, including modification of the definition of relevance set forth in the evidence rules.¹³³ Scholarly calls for action in law journals, however, have not been answered with reform, at least not by the Advisory Committee, or by the drafters of state evidence rules, with the notable exception of the state of Maine.¹³⁴

However, evidence and trial advocacy teachers are exceptionally well situated to pool their expertise and work together, taking an active role in shaping the future of demonstrative trial evidence. Their respective areas of scholarship and teaching intersect pointedly on the subject of demonstrative evidence. As scholars and teachers, they presumptively have the time, the motivation, and the resources to study this complex issue: they can survey and evaluate practices across jurisdictions and wrestle with the analytical and practical implication of various suggestions for reform. Academic institutions encourage and support such discussion and debate of issues relevant to law professors' areas of teaching and scholarship.

The relevant issues are also ripe for reform. The unrelenting interest of trial lawyers in using demonstrative exhibits,¹³⁵ the reasonable expectation of jurors to receive information via easily understood modalities,¹³⁶ as well as the rapidly expanding universe of digital and computer-assisted evidence,¹³⁷ all signal a need for clarifying the rules of evidence. A preliminary set of Model Rules could provide the needed impetus and basis for a wider, robust dialogue with lawyers and judges who would, in turn, bring their experiences and expertise to bear.

*542 A. Law Professors Were Contributing Architects of the Original Federal Rules of Evidence

Law professors are particularly well equipped to wrestle with the issues presented by demonstrative evidence and help craft proposed rules for consideration by the Advisory Committee. They were integrally involved in the formation of the original Federal Rules of Evidence, enacted in 1975.¹³⁸ The creation of agreed-upon rules did not happen overnight: it took over thirty-five years. The history of the federal rules not only testifies to how long the road to a uniform set of evidence rules can be, but also highlights the critical importance of law professors in providing a foundational analysis and guidance on that journey.

In 1938, a year after the enactment of the Federal Rules of Civil Procedure, former Attorney General William D. Mitchell proposed that an advisory committee draft a set of uniform evidence rules.¹³⁹ Over the next twenty years, journals such as the *Vanderbilt* and *Harvard* law reviews published articles discussing the creation of uniform evidence rules.¹⁴⁰ Dean Ladd of the

University of Iowa said that “[a]ll of the law of evidence needs clarification and simplification. . . . A review of the history of evidence, with its spotted and often accidental growth, is persuasive proof of the need of introspective study of the law of evidence with a view to far-reaching improvement.”¹⁴¹ Judges, too, advocated for uniform evidence rules.¹⁴² Several sets of rules were proposed over the years, but agreement took decades.

In 1961, the Judicial Conference created an advisory committee, which ***543** formed a special committee to study the advisability and feasibility of uniform evidence rules.¹⁴³ Chief Justice Earl Warren included law professors on the committee.¹⁴⁴ The committee endorsed uniform rules as “both advisable and feasible.”¹⁴⁵ Lawyers, judges, and scholars then provided feedback on the committee’s report.¹⁴⁶ The feedback confirmed the special committee’s conclusions, and an advisory committee drafted the first uniform federal rules of evidence. The advisory committee consisted of trial lawyers, federal judges, and law professors, and met for the first time in June 1965.¹⁴⁷ It took almost four years to finish the first preliminary draft of the rules.¹⁴⁸ On completion, the committee acknowledged the valuable contributions of the American Law Institute Model Code of Evidence, the Uniform Rules of Evidence, and the state evidence rules of California and New Jersey.¹⁴⁹ Those model codes and rules provided a working template for the advisory committee as it began its work.¹⁵⁰

This history of the Federal Rules of Evidence underscores the importance of community discussion and debate on proposed evidence rules, and the value of legal scholars being actively engaged in that process. Moreover, the contributions of other entities and jurisdictions (such as the American Law Institute, California, and New Jersey) highlight the benefits of an iterative, deliberative process that builds upon previous attempts at solving this problem. And yet, on the topic of demonstrative evidence the state of Maine stands alone as having enacted a rule-based solution.

B. A Case Study: [Maine Rule of Evidence 616](#)

Maine is the first and only jurisdiction to have grappled with the murky status of demonstrative evidence and fashioned an evidence rule to provide guidance.¹⁵¹ While the rule is crisp in clarifying administrative aspects of use,¹⁵² it is less successful clarifying when and how these demonstrative exhibits may be ***544** used at trial. In the same way that analysis of the New Jersey and California rules of evidence aided the development of the Federal Rules of Evidence, analysis of Maine Rule 616 is helpful in constructing an agenda for scholars tackling the Model Rules of Demonstrative Evidence. Specifically, the Maine rule provides information as to the rule’s placement in the evidence rules, the definition of demonstrative or illustrative evidence, and a judge’s discretion in the use of illustrative evidence in a trial. The Maine rule provides:

RULE 616.

ILLUSTRATIVE AIDS

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

(b) The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time.¹⁵³

Maine’s demonstrative evidence rule is sited in close proximity to its [Rule 611](#),¹⁵⁴ the rule that outlines a trial court’s broad discretion to control courtroom proceedings in controlling the mode and order of presenting evidence.¹⁵⁵ [Rule 611](#) requires that the control be “reasonable” and that it serve the general objectives of ascertaining the truth, avoiding needless consumption of time, and protecting witnesses from harassment and embarrassment.¹⁵⁶ Of course, any discretion exercised by a judge pursuant to [Rule 611](#) cannot circumvent other rules of evidence.¹⁵⁷

The text of Maine Rule 616 does not provide affirmative definitions of “illustrative aids” or demonstrative exhibits.¹⁵⁸ Rather, the rule states what they are *not*: they are depictions and objects *not* admissible as evidence.¹⁵⁹ This definition appears unintentionally overbroad in that it facially includes *all* inadmissible objects, even when the bar to admissibility is relevance, authentication, best evidence, or unfair prejudice (or other bars under [Rule 403](#)). The advisory committee note (ACN) to the rule offers additional guidance on the definition, explaining that illustrative aids, or demonstrative exhibits, are those objects which do not carry probative force in themselves, but are used to assist in the communication of facts by a lay or expert witness testifying or by counsel arguing. . . . They are not admissible in *545 evidence because they themselves have no relevance to the issues in the case.¹⁶⁰

[Rule 616](#) states that this inadmissible, irrelevant nonevidence may be shared with a jury to illustrate the testimony of witnesses or the arguments of counsel unless a court, in its discretion, rules otherwise.¹⁶¹

[Rule 616](#) addresses three areas of potential use by advocates of demonstrative exhibits at trial: (1) before the presentation of evidence (opening statements), (2) after the presentation of evidence (closing arguments), and (3) during the presentation of evidence (witness examinations). [Rule 616](#)’s expansion of Rule 611-like discretion to expressly address the administrative aspects and use of demonstrative exhibits in opening statements and closing arguments is both helpful and consistent with the other rules of evidence. To the extent evidence is previewed in an opening statement, subject to constraints that there is a good faith basis for the admissibility of the facts previewed, or admitted evidence is reviewed and explained in a closing argument, the use of demonstrative exhibits under a court’s supervision with the guidelines set forth in [Rule 616](#) is analytically sound.

The rule is analytically infirm, however, when applied to the use of demonstrative exhibits during the presentation of evidence. Neither [Rule 616](#) nor the ACN attempts to reconcile the requirements of Maine Rule 402¹⁶² with the discretionary authority granted a trial judge under [Rule 616](#) when it comes to the presentation of exhibits to a jury during witness examination. Rule 402 prohibits the admission of irrelevant evidence, presumably for consideration by jurors, while [Rule 616](#) permits the presentation of irrelevant, inadmissible evidence to jurors. For jurors to view demonstrative exhibits during the presentation of evidence with the approval of the court, the absolute prohibition of Rule 402 of admission (and juror consideration) of irrelevant evidence is presumptively overcome. However, that premise contradicts the core definition of “illustrative evidence” under [Rule 616](#)-- that it is irrelevant.

The language of the rule, and the ACN confirming the rule’s intention to give trial judges a form of Rule 403-like discretion in allowing jurors to view irrelevant and inadmissible evidence, seems to be an alternative version of the judge-made “shadow [Rule 403](#)” analysis adopted in other jurisdictions. As discussed above, some judges perform a first round of [Rule 403](#) balancing to *546 determine if the evidence should reach the jury at all.¹⁶³ Having determined the answer to be “yes,” judges admit the evidence and then seem to perform a second, “off-the-books” [Rule 403](#) analysis to determine if the “admitted” evidence should be delivered to jurors during deliberations. Under Maine Rule 616, the reverse seems to be the case: a judge first determines if the evidence is *inadmissible* because it is irrelevant and then proceeds to determine if this irrelevant, inadmissible evidence should be shared with the jury during the presentation of evidence.

Nonetheless, the state of Maine broke ground in drafting a rule of demonstrative evidence in 1993 and deserves credit for doing so. Peter L. Murray, an accomplished trial lawyer, visiting evidence professor at Harvard Law School, and coauthor of a treatise on Maine evidence,¹⁶⁴ was an architect of the rule.¹⁶⁵ Professor Murray was a visionary and an activist: he saw in his own trial practice the state of confusion when it came to the use of demonstrative exhibits and he set out to correct it.¹⁶⁶ He lent his considerable knowledge and experience, both in the courtroom and the classroom, to the work of the Maine advisory committee. Without this experience-based, scholarly input, the rule on demonstrative evidence might never have been proposed.

C. Law Schools Market Leadership, Law Professors Should Deliver on This Promise

A core value of most law schools, often prominently figured in their mission statements, is a commitment to cultivating public leadership.¹⁶⁷ Law schools tout that they educate leaders, creating “a bridge from scholarship and service to leadership and practice.”¹⁶⁸ Law professors have an opportunity to lead by example and build a set of Model Rules for Demonstrative Evidence to be submitted for consideration and debate by the Advisory Committee on the Federal Rules of Evidence.

Progress may not be swift, but it can be steady, and without effort, the problem is likely to worsen as legal practice becomes increasingly digital and reliant on technology.

Evidence and trial advocacy teachers should exchange drafts and comments on proposed demonstrative evidence rules. Professors can post proposed rules on Social Science Research Network (SSRN) for comment, or they can circulate them by email, either directly or through the American Association of Law Schools, the Society of American Law Teachers, the American Bar Association, *547 or other professional organizations. Professors can circulate draft rules to pattern jury instruction committees nationally, which commonly include judges and lawyers. Professors could come together for an academic conference to discuss model evidence rules for demonstrative evidence.¹⁶⁹ It may be that widespread discussion of a set of model rules ultimately produces only a modest proposed amendment to the Federal Rules of Evidence. On the other hand, a robust debate among judges, lawyers, and scholars on the many issues triggered by this subject could effectuate significant change.

When outlining this Article, the authors drafted a working proposal for Model Rules for Demonstrative Evidence. Our intention was to conclude the Article with our concise, analytically sound Model Rules and advocate for their adoption. Initially, we championed no change at all to the existing Federal Rules of Evidence. Rather, we proposed a new Advisory Committee note clarifying that the rules do not recognize or differentiate between various categories of evidence (e.g., real and demonstrative): all evidence is either admissible under the rules or it is not. This “light touch” is consistent with the overarching approach of the Federal Rules of Evidence:

The Federal Rules of Evidence do not form a *code* in the usual sense of that term. . . . [T]hey are neither lengthy nor comprehensive in coverage. The entire set of rules can be fit into a short pamphlet. A number of areas of evidence law are left to judicial development. Even where rules govern particular areas, they are often written in general, rather than specific, language.¹⁷⁰

However, after months of work on this Article, and deep discussion with lawyers, judges, and scholars who read drafts of our work and provided insightful feedback, our proposal has morphed and continues to evolve as this Article goes to press.

A continuing point of debate is whether the Federal Rules of Evidence should endeavor to define the term “evidence.” The California Evidence Code sets forth the following definition: “‘Evidence’ means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.”¹⁷¹ A definition could clarify what fell within the reach of the rules, particularly Rules 401 to 403, in that there would be a single category of “evidence,” all of which would be subject to the same rules of use and admission. This should eliminate the artificial distinction that has developed in practice between real and demonstrative evidence based on a theory of “direct” versus “derivative” probative value. Evidence defined under the rules to include both real and demonstrative exhibits would then be subject to the same analysis under [Rules 401](#), [402](#), and [403](#). There would not be differing *548 standards or an “off the books” shadow 403 determination by a court after admission but prior to submission to a jury.

While we do not have a set of Model Rules to propose at this time, the discussion going forward should include, at a minimum, the topics of terminology and juror use during deliberations. More specifically, the following items should be addressed in any model rule:

Clarifying terminology. Should visual aids bear different labels depending on whether they are employed during opening statement, during the presentation of evidence, or during closing argument? Perhaps jettisoning the terms “illustrative evidence” and “demonstrative evidence” entirely in favor of a new lexicon would be valuable, especially when used in reported appellate decisions. Perhaps items used during opening statements could be labeled “preview aids.” Items used during witness examinations could be called “nonverbal testimony” (if they are adopted by the witness as his testimony and merely communicate the content of that testimony to the jurors nonverbally) or “testimonial aids” otherwise. Items used during closing arguments might be called “argument aids.” **Clarifying what goes to the jury deliberation room.** Current practice is built largely on the general premise that admitted exhibits are delivered to jurors for review during deliberations. Should this continue to be the rule? It made immense sense that early practice was to deliver admitted exhibits to the jurors and not testimony. After all, two hundred years ago, there were far fewer exhibits admitted than is the case today in a large commercial lawsuit. As such, those exhibits would have been quite easy to deliver to the jurors, and easy for the jurors to review. Conversely, recordation and retrieval of oral testimony was much more involved and cumbersome. Considering there

is no more value in a written letter admitted into evidence than the testimony of its author as to the underlying facts contained therein, the mere logistical difficulty in delivering these separate pieces of evidence seems to have been the driver for differentiating between exhibits and testimony.¹⁷² Now that many courts have the capability of recording testimony and producing an easy-to-access DVD (replete with an index), the logistical challenges are all but obviated. This is particularly true in cases with hundreds or thousands of admitted exhibits.

Perhaps the ever-increasing volume of exhibits in modern litigation supports a wholesale change in the basic presumption that all admitted exhibits are delivered to a jury during deliberations.¹⁷³ It may better further the goals of *549 the evidence rules¹⁷⁴ to require parties to identify which exhibits (and perhaps testimony) they propose be delivered to jurors for consideration during deliberations. Opposing counsel could then object to the request, and a judge could perform a 403-like balancing test, weighing the value to jurors' deliberations against the risks of juror confusion, misuse, or overreliance. This would be similar to the "shadow 403" analysis currently conducted by many judges who allow demonstrative evidence to be shared with a jury during trial but prohibit its delivery to the deliberation room. [Rule 403](#) could be divided into two parts: 403(a) would be the rule as currently drafted, allowing the exclusion of evidence otherwise admissible where the probative value is substantially outweighed by risks of harm. [Rule 403\(b\)](#) would provide a court a "second look" at evidence to determine, after performing a similar balancing test, if it should be submitted to the jury deliberation room.

CONCLUSION

The unsettled state of demonstrative evidence has caused problems for trial courts, practitioners, and academics alike. The confusion surrounding the characterization and use of demonstrative exhibits produces results that can undermine the aspiration underlying the Federal Rules of Evidence: 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."¹⁷⁵ While jurors have changed how they accept and process information, the formal rules of evidence have not kept pace. This state of affairs promises to worsen as technology improves. A unified approach is needed: evidence rules should be amended to address demonstrative evidence, and trial advocacy and evidence teachers can lay the groundwork for reform. Law professors are in a unique and privileged position to be able to articulate and advocate for a unified solution because they can both understand the scope of the problem and have access to the next generation of lawyers, judges, and academics.

Footnotes

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¹ Joseph H. Hinshaw, *Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion*, 40 A.B.A. J. 479, 479 (1954).

² [Baugh v. Cuprum S.A. De C.V., No. 08 C 4204, 2015 WL 9304338, at *1 \(N.D. Ill. Dec. 22, 2015\)](#).

³ [Baugh ex rel. Baugh v. Cuprum S.A. de C.V., 730 F.3d 701, 703 \(7th Cir. 2013\)](#).

⁴ [Id. at 704](#) (emphasis added).

⁵ *Id.*

⁶ *Id.* at 711.

⁷ [Baugh, 2015 WL 9304338, at *1.](#)

⁸ See, e.g., [ME. R. EVID. 616](#) advisers' note to 1976 amendment (“[Demonstrative exhibits] are not admissible in evidence because they themselves have no relevance to the issues in the case. Their utility lies in their ability to convey relevant information which must be provided directly from some actual evidentiary source....”).

⁹ A representative list of such articles may be found in Robert D. Brain & Daniel J. Broderick, [The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status](#), 25 U.C. DAVIS L. REV. 957 nn.145-46 (1992).

¹⁰ *Id.* at 962 n.13. Many states have rules based on the Federal Rules of Evidence. Unless otherwise noted, references to the Federal Rules of Evidence encompass references to those state analogues.

¹¹ See, e.g., Michael Sudman, Comment, [The Jury Trial: History, Jury Selection, and the Use of Demonstrative Evidence](#), 1 J. LEGAL ADVOC. & PRAC. 172, 183-84 (1999) (discussing trends in judicial treatment of demonstrative evidence in trial courts).

¹² See, e.g., Brain & Broderick, *supra* note 9, at 1018-19 (proposing that [Rule 401](#) be revised to recognize different admissibility standards for what the authors term “primarily relevant evidence” and “derivatively relevant proof”).

¹³ A search of the archives of the Advisory Committee on the Federal Rules of Evidence reveals that not only has no one suggested revising the Federal Rules of Evidence to address demonstrative evidence, but also the issue has never been addressed in any comments. See [Archived Rules Comments](#), U.S. COURTS, [http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-comments?committee=44&year\[value\]\[year\]=&page=3](http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-comments?committee=44&year[value][year]=&page=3) (last visited Apr. 1, 2016); [Archived Rules Suggestions](#), U.S. COURTS, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/archived-rules-suggestions?committee=44&year%5Bvalue%CC5D%CC5Byear%5D=> (last visited Apr. 1, 2016).

¹⁴ See *infra* Part II.D for an analysis of the academic confusion surrounding demonstrative evidence and law schools' contributions to the lack of standards in this area.

¹⁵ The Advisory Committee has been criticized as taking an historically “hands off” approach to its oversight responsibilities such that “only the most egregious issues are addressed, leaving many other short-comings in the Rules intact.” See Paul R. Rice & Neals-Erik William Delker, [Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence](#), 191 F.R.D. 678, 682-83 (2000).

¹⁶ See [FED. R. EVID. 611](#). The trial court's broad discretion remains subject to due process and other constitutional principles, of course.

¹⁷ See, e.g., *id.* 403.

¹⁸ [Baugh ex rel. Baugh v. Cuprum S.A. de C.V., 730 F.3d 701, 706 \(7th Cir. 2013\)](#) (“The term ‘demonstrative’ has been used in different ways that can be confusing....”).

¹⁹ See, e.g., Brain & Broderick, *supra* note 9, at 960, n.7 (“[A]lmost all the academic commentary that has focused on demonstrative evidence has mischaracterized it.”); *id.* at 1002-10 (discussing confusion over both the definition and use of demonstrative evidence); see also RICHARD D. FRIEDMAN, *THE ELEMENTS OF EVIDENCE* 153 (3d ed. 2004) (“The term *demonstrative* evidence is sometimes used to include pretty much all non-testimonial evidence. But the term is often used in a narrower sense, to distinguish it from *real* evidence.”).

²⁰ *Demonstrative Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²¹ *Id.*

²² CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 9.32, at 1142 (5th ed. 2012) (footnotes omitted) (first citing Melvin Belli, [Demonstrative Evidence: Seeing Is Believing](#), 16 TRIAL 70 (1980); then citing *Demonstrative Evidence*, BLACK'S LAW DICTIONARY (6th ed. 1990); then citing Brain & Broderick, *supra* note 9, at 968-69; then citing Thomas R. Mulroy, Jr. & Ronald J. Rychlak, [Use of Real and Demonstrative Evidence at Trial](#), 33 TRIAL LAW.'S GUIDE 550, 555 (1989); and then citing [2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 214 \(6th ed. 2006\)](#)).

²³ E.g., [Finley v. Marathon Oil Co.](#), 75 F.3d 1225, 1231 (7th Cir. 1996) (“Physical exhibits (‘demonstrative evidence’) are a very powerful form of evidence....” (emphasis added)).

²⁴ See, e.g., [Gomez v. Great Lakes Steel Div. Nat’l Steel Corp.](#), 803 F.2d 250, 257 (6th Cir. 1986).

²⁵ See, e.g., [State v. Parks](#), 977 So. 2d 1015, 1027-28 (La. Ct. App. 2008) (“Before it can be admitted at trial, demonstrative evidence must be properly identified. A sufficient foundation for the admission of evidence is established when the evidence as a whole shows it is more probable than not that the object is one connected with the crime charged.” (citation omitted)); see also [State v. Mosner](#), 969 A.2d 487, 500 (N.J. Super. Ct. App. Div. 2009).

²⁶ See, e.g., [Hinton v. Outboard Marine Corp., No. 1:09-cv-00554-JAW](#), 2012 WL 243210, at *2 (D. Me. Jan. 25, 2012) (referring to [ME. R. EVID. 616](#), which regulates the use of illustrative aids).

²⁷ E.g., [Pierce v. State](#), 718 So. 2d 806, 809 (Fla. Dist. Ct. App. 1997) (“Under Florida law, in order to admit a demonstrative exhibit, illustrating an expert’s opinion, such as a computer animation, the proponent must establish the foundation requirements necessary to introduce the expert opinion.”); [State v. Foster](#), 967 P.2d 852, 859 (N.M. 1998) (“Demonstrative exhibits are likely to be merely illustrative of other evidence.”); [State v. Lord](#), 822 P.2d 177, 193 (Wash. 1991) (“The use of demonstrative or illustrative evidence is to be favored and the trial court is given wide latitude in determining whether or not to admit demonstrative evidence.”).

²⁸ E.g., [State v. Swinton](#), 847 A.2d 921, 936 n.20 (Conn. 2004) (differentiating between demonstrative and illustrative evidence).

²⁹ See, e.g., [State v. Pangborn](#), 836 N.W.2d 790, 797 (Neb. 2013) (“We historically have discussed the use of demonstrative exhibits in terms of admissibility.... But the use of such terminology can be misleading.”).

³⁰ [FED. R. EVID. 611](#).

³¹ See, e.g., [United States v. Irvin](#), 682 F.3d 1254, 1262-63 (10th Cir. 2012) (explaining that some circuits have construed [Rule 611](#) to authorize summary exhibits for pedagogical purposes); [United States v. Milkiewicz](#), 470 F.3d 390, 398 (1st Cir. 2006) (discussing permissible pedagogical aids under [Rule 611](#)); [United States v. Taylor](#), 210 F.3d 311, 315 (5th Cir. 2000) (same); [United States v. Salerno](#), 108 F.3d 730, 744 (7th Cir. 1997) (stating demonstrative aids are regularly permitted under [Rule 611](#) “to clarify or illustrate testimony”); [United States v. Johnson](#), 54 F.3d 1150, 1159-60 (4th Cir. 1995) (concluding that the trial court’s admission of summary charts pursuant to [Rule 611](#) did not constitute error); [United States v. Pinto](#), 850 F.2d 927, 935 (2d Cir. 1988) (same); [United States v. Possick](#), 849 F.2d 332, 339 (8th Cir. 1988) (same); [United States v. Gardner](#), 611 F.2d 770, 776 (9th Cir. 1980) (same); see also [Gomez v. Great Lakes Steel Div. Nat’l Steel Corp.](#), 803 F.2d 250, 257 (6th Cir. 1986) (distinguishing summaries and charts admitted under [Rule 1006](#) from those “used as pedagogical devices which organize or aid the jury’s examination of testimony or documents which are themselves admitted into evidence”).

³² See, e.g., [N.C. GEN. STAT. ANN. § 8-97](#) (West 2016) (permitting photographic representations after proper foundation); [Duncan v. State](#), 827 So. 2d 838, 850-51 (Ala. Crim. App. 1999) (declaring the “reasonable tendency to prove or disprove some material fact in issue” as the ultimate consideration in admitting demonstrative evidence); [Mayes v. State](#), 887 P.2d 1288, 1313 (Okla. Crim. App. 1994) (finding no error when relevant photographs were admitted); [Commonwealth v. Reid](#), 811 A.2d 530, 552 (Pa. 2002) (permitting the admission of demonstrative evidence if its relevance outweighed its prejudicial effect).

³³ See, e.g., [State v. Parks](#), 977 So. 2d 1015, 1027-28 (La. Ct. App. 2008).

³⁴ Two Washington State Superior Court judges (one, a career public defender, and the other, a career prosecutor before ascending to the bench), team teaching a trial advocacy class this academic year, were surprised to discover that they disagreed on the definition and use of demonstrative evidence.

³⁵ E.g., [United States v. Bray](#), 139 F.3d 1104, 1111-12 (6th Cir. 1998) (“We note in passing that in appropriate circumstances not only may such pedagogical-device summaries be used as illustrative aids in the presentation of the evidence, but they may also be admitted into evidence even though not within the specific scope of [Rule 1006](#).”).

³⁶ E.g., [Baugh ex rel. Baugh v. Cuprum S.A. de C.V.](#), 730 F.3d 701, 708 (7th Cir. 2013) (“Demonstrative exhibits that are not admitted into evidence should not go to the jury during deliberation, at least not without consent of all parties.”); cf. [Johnson](#), 54 F.3d at 1161 n.11 (concluding that properly admitted evidence may be used by the jury during deliberations); [Scales](#), 594 F.2d at 564 n.3 (noting that when demonstrative evidence is not admitted to the jury it is usually because such evidence was not properly admitted).

³⁷ See, e.g., [United States v. Parker](#), 491 F.2d 517, 522-23 (8th Cir. 1973) (permitting the jury to use a document written by a narcotics agent during deliberations because the defense vigorously cross-examined the agent on its contents); [People v. Manley](#), 272 N.E.2d 411, 412 (Ill. App. Ct. 1971) (concluding that “[t]he taking of physical evidence into the jury room by the jury is within the sound discretion of the trial judge,” but requiring close scrutiny because such a “procedure may be prejudicial to the defendant”).

³⁸ E.g., [United States v. Downen](#), 496 F.2d 314, 321 (10th Cir. 1974); [Shane v. Warner Mfg. Corp.](#), 229 F.2d 207, 209-10 (3d Cir. 1956); [In re Lucitte](#), No. L-10-1136, 2012 WL 362002, at *17 (Ohio Ct. App. 2012).

³⁹ E.g., [Commonwealth v. Walter](#), 406 N.E.2d 1304, 1309 (Mass. App. Ct. 1980); [State v. Pangborn](#), 836 N.W.2d 790, 801 (Neb. 2013); [Commonwealth v. Moore](#), 279 A.2d 179, 184-85 (Pa. 1971).

⁴⁰ See [FED. R. EVID. 401-402](#).

⁴¹ See *id.* 901-903.

⁴² *Id.* 801-807.

⁴³ *Id.* 1001-1008.

⁴⁴ See 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 9:22 (4th ed. 2012) (database updated June 2015) (“For illustrative evidence, the foundation may be easier to lay than for substantive evidence, because the proponent need only show that the item is a ‘fair depiction’ or ‘reasonable facsimile.’”).

⁴⁵ See, e.g., [United States v. Salerno](#), 108 F.3d 730, 744 (7th Cir. 1997) (“*Demonstrative aids* are regularly used to clarify or illustrate testimony.” (emphasis added)). The *Salerno* court cited [Roland v. Langlois](#), 945 F.2d 956, 963 (7th Cir. 1991), in which the Seventh Circuit confirmed the trial court’s admission of a life-size model of an amusement park ride into evidence, and [United States v. Towns](#), 913 F.2d 434, 445-46 (7th Cir. 1990), where the court confirmed the admission of a ski mask and gun for the demonstrative purpose of providing examples of the mask and gun used during a bank robbery, to support its conclusion.

⁴⁶ See, e.g., [United States v. Scales](#), 594 F.2d 558, 563-64 (6th Cir. 1979) (“Authority for [admitting] such summaries is not usually cited, but would certainly exist under [Fed. R. Evid. 611\(a\)](#).”); [United States v. Blackwell](#), 954 F. Supp. 944, 971 (D.N.J. 1997) (“Charts that summarize documents or testimony, already admitted into evidence, may be admissible under [Rule 611\(a\)](#)... as demonstrative evidence, as opposed to [Rule 1006](#), as substantive evidence.” (emphasis added)). The issue, of course, is that [Rule 611\(a\)](#) is primarily a rule of procedure, in that it provides the judge control over the evidence presented in his courtroom. It is not a rule of admission. See [United States v. Irvin](#), 682 F.3d 1254, 1263 (10th Cir. 2012) (“In short, resort to [Rule 611\(a\)](#) in no way resolves the hearsay problem that renders Exhibit 1-2 inadmissible.”).

⁴⁷ [Baugh ex rel. Baugh v. Cuprum S.A. de C.V.](#), 730 F.3d 701, 711 (7th Cir. 2013). The prejudicial effect of a nonadmitted exhibit in the jury deliberation room was repeatedly raised (and rejected) by opposing counsel. *Id.* at 704-05.

⁴⁸ Although, it is inevitable that different judges and different juries will produce individualized, and thus perhaps inconsistent, verdicts.

⁴⁹ See, e.g., [United States v. McDermott](#), 245 F.3d 133, 141 (2d Cir. 2001) (“While we may disagree with a district court’s evidentiary ruling, our disagreement is not alone sufficient to reverse an otherwise rational, carefully considered and non-arbitrary decision.”). Codified standards lead to a body of case law, which in turn guides advocates and trial courts. [Federal Rule of Evidence 403](#) (or its state analogue) has broad language merely requiring the trial court to ensure the probative value is not substantially outweighed by other concerns, including unfair prejudice. This amorphous language requires trial courts to examine the entirety of the evidence before ruling on admission or to articulate their balancing on the record. E.g., [United States v. Loughry](#), 660 F.3d 965, 971 (7th Cir. 2011) (requiring examination of the entirety of the evidence); [United States v. Moran](#), 493 F.3d 1002, 1012 (9th Cir. 2007) (encouraging the trial court to state how it balanced the evidence). Case law also provides greater definition for vague terms such as “substantially outweighed” and “unfair prejudice.” See, e.g., [People v. Quang Minh Tran](#), 253 P.3d 239, 244 (Cal. 2011) (elaborating on the term “substantially outweighed”); [Swajian v. Gen. Motors Corp.](#), 916 F.2d 31, 34-35 (1st Cir. 1990) (elaborating on the term “unfair prejudice”).

⁵⁰ The Federal Rules of Evidence and state analogues (with the exception of the state of Maine’s) have not given rule-based guidance to judges regarding the use of such visual aids. The term “demonstrative evidence” is not found in the Federal Rules of Evidence, and it is mentioned only once in the Advisory Committee notes. See *infra* Part IV.B for a discussion of Maine’s approach to the use of demonstrative evidence.

⁵¹ While some scholars use the terms “demonstrative evidence” and “illustrative evidence” interchangeably, others draw a distinction. *See e.g.*, RONALD JAY ALLEN, RICHARD B. KUHNS, ELEANOR SWIFT, DAVID S. SCHWARTZ & MICHAEL S. PARDO, EVIDENCE: TEXT, PROBLEMS, AND CASES 192 (5th ed. 2011) (demonstrative evidence is admitted and illustrative evidence is not admitted into evidence).

⁵² *See* Brain & Broderick, *supra* note 9, at 986-1018 (discussing the history of academic treatment of demonstrative evidence).

⁵³ *Id.* at 960 n.7.

⁵⁴ *Id.* at 988-89.

⁵⁵ *See* 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 932 (1904) (indexing certain evidence as “non-verbal testimony”).

⁵⁶ *Id.* §§ 789, 791, 792, 794, 795, 797; *see also* Brain & Broderick, *supra* note 9, at 997.

⁵⁷ 1 WIGMORE, *supra* note 55, §§ 789, 791, 792, 794, 795, 797.

⁵⁸ *Id.*; *see also* Brain & Broderick, *supra* note 9, at 996.

⁵⁹ 1 WIGMORE, *supra* note 55, § 791; *see also* Brain & Broderick, *supra* note 9, at 996 n.117; *cf.* GRAHAM C. LILLY, DANIEL J. CAPRA & STEPHEN A. SALTZBURG, PRINCIPLES OF EVIDENCE 57 (6th ed. 2012) (suggesting that such a map in a boundary dispute is demonstrative evidence).

⁶⁰ *See* Brain & Broderick, *supra* note 9, at 960-62.

⁶¹ *See infra* Part II.D for an analysis of the academic confusion about demonstrative evidence and law professors’ contributions to the lack of standards in this area.

⁶² *See, e.g.*, Hinshaw, *supra* note 1, at 479-82, 539-43.

⁶³ Conflicting definitions and sanctioned use of demonstrative evidence within and between academic circles and the practicing bar are a byproduct of the fact that the concept was developed as a utilitarian tool in courtrooms, with scholarly commentators reluctantly playing catch up.

[P]ractioners’ contribution to the study of the subject has largely been their consistent use of such proof at trial and their unflinching use of the term “demonstrative” to describe it. As a result, the idea of a separate branch of evidence known as “demonstrative evidence” eventually became so ingrained in our legal system that the academic writers could not ignore it. For the most part, however, practitioner-authored writings on the subject are devoid of detailed analysis of the attributes and proper role of demonstrative proof....

Brain & Broderick, *supra* note 9, at 960 n.7.

⁶⁴ *See infra* note 81 .

⁶⁵ As early as the 1920s, psychologists such as Walter D. Scott applied psychological theory to the field of advertising. LUDY T. BENJAMIN, JR. & DAVID B. BAKER, FROM SÉANCE TO SCIENCE: A HISTORY OF THE PROFESSION OF PSYCHOLOGY IN AMERICA 118-21 (2004).

⁶⁶ *See, e.g.*, MELVIN M. BELLI, READY FOR THE PLAINTIFF (1956); Melvin M. Belli, *Demonstrative Evidence and the Adequate Award*, 22 MISS. L.J. 284 (1951); Melvin Belli, *Demonstrative Evidence: Seeing Is Believing*, TRIAL, July 1980, at 70.

⁶⁷ A simple, but extremely impactful chart was used by John Gotti’s defense attorney Bruce Cutler in 1987, whereby the defense illustrated the multiple convictions of the prosecution’s witnesses.

⁶⁸ [FED. R. EVID. 401](#). Facts “of consequence” are those that are material to the issues in the case and are determined by looking at the claims and defenses set forth in the pleadings, and the underlying law provides the rule of decision in the case. *See Rankin v. State*, 974 S.W.2d 707, 710 (Tex. Crim. App. 1996), *opinion withdrawn in part on reconsideration* (July 8, 1998) (“[I]t appears that ‘fact of consequence’ includes either an elemental fact or an evidentiary fact from which an elemental fact can be inferred. An evidentiary fact that stands wholly unconnected to an elemental fact, however, is not a ‘fact of consequence.’ A court that articulates the relevancy of evidence to an evidentiary fact but does not, in any way, draw the inference to an elemental fact has

not completed the necessary relevancy inquiry because it has not shown how the evidence makes a ‘fact of consequence’ in the case more or less likely.”).

⁶⁹ See [FED. R. EVID. 402](#). While unsupported by the language of [Rule 402](#) itself, some scholars, in analyzing the differential treatment of demonstrative evidence, have fashioned a concept of “derivative relevance.” See, e.g., Brain & Broderick, *supra* note 9, at 967. They concluded that only evidence that is “primarily relevant” is admissible under Federal [Rule 402](#), and that demonstrative evidence is not admissible for all purposes because its relevance is “derivative.” *Id.*

⁷⁰ In allowing jurors to view and consider demonstrative evidence, judges implicitly seemed to have found that the evidence was (1) relevant, thus (2) presumptively admissible, and (3) not barred by any other rule of evidence or the Constitution. See [FED. R. EVID. 402](#). For jurors to view demonstrative exhibits during the presentation of evidence with the approval of the court, the Federal Rules’ (and state analogues’) absolute prohibition of admitting (and thus juror consideration of) irrelevant evidence was presumptively overcome. Further, the balancing mandated by [Federal Rule of Evidence 403](#) (requiring that the probative value of evidence outweigh the potential risks of misuse by jurors or other costs) must also implicitly have been conducted and found to weigh in favor of admissibility.

⁷¹ [FED. R. EVID. 611\(a\)\(1\)-\(3\)](#) (“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 determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.”).

⁷² [Federal Rule of Evidence 105](#) provides that “[i]f the court admits evidence that is admissible against a party or for a purpose -- but not against another party or for another purpose -- the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.” *Id.* 105. Some judges also misguidedly rely on this rule to craft a “limited use” doctrine with respect to demonstrative evidence, allowing it to be admitted into evidence for a limited “illustrative purpose” that restricts the advocate’s use of the exhibit to the direct examination of the foundational witness and prohibits the exhibit to go to the jury during deliberations with other admitted evidence. This misuse of [Rule 105](#) misunderstands the rule’s concept of admission for a “limited purpose.” Such a limit is on the points of proof the jurors may apply the exhibit to, not a limit on the use of the evidence for the point of proof for which it was offered and admitted.

⁷³ See ALLEN ET AL., *supra* note 51, at 701 (“Although [FRE 901](#) does not fully apply because these devices are not exhibits a foundation for the accuracy of illustrative evidence must be laid, and the use of illustrative aids at trial is regulated by [FRE 611\(a\)](#) and [FRE 403](#). Many courts endorse the use of illustrative evidence as a trial management technique so long as an appropriate limiting instruction informs the jury that the chart itself is not evidence but is only an aid in evaluating the evidence.”).

⁷⁴ [Baugh ex rel. Baugh v. Cuprum S.A. de C.V.](#), 730 F.3d 701, 706 (7th Cir. 2013).

⁷⁵ 5 MUELLER & KIRKPATRICK, *supra* note 44, § 9:22. Mueller and Kirkpatrick note that the term has referred to one of three possibilities: (1) evidence that “appeals to the senses,” (2) evidence that conveys a “firsthand sense impression,” or (3) evidence used to illustrate other evidence, but lacking any independent substantive force. *Id.* (first quoting Melvin Belli, *Demonstrative Evidence: Seeing is Believing*, 16 Trial 70 (1980); then quoting [2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 212 \(4th ed. 1991\)](#)).

⁷⁶ [2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 212 \(7th ed. 2013\)](#).

⁷⁷ Brain & Broderick, *supra* note 9, at 997.

⁷⁸ David S. Santee, [More than Words: Rethinking the Role of Modern Demonstrative Evidence](#), 52 SANTA CLARA L. REV. 105, 112 (2012).

⁷⁹ See, e.g., ROGER PARK, DAVID LEONARD, AVIVA ORENSTEIN & STEVEN GOLDBERG, A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 583-84 (3d ed. 2011) (“Demonstrative evidence used for illustrative purposes is handled differently from jurisdiction to jurisdiction and sometimes from courtroom to courtroom.”).

⁸⁰ See, e.g., L ILLY ET AL., *supra* note 59, at 57-58 (“[T]here is an area of overlap between ‘original’ real evidence and demonstrative evidence.”).

⁸¹ See, e.g., ALLEN ET AL., *supra* note 51, at 151-52, 192-95, 219 (“demonstrative evidence” mentioned in seven of 917 pages); CHRISTOPHER W. BEHAN, EVIDENCE AND THE ADVOCATE: A CONTEXTUAL APPROACH TO LEARNING EVIDENCE 49-50 (2012) (one paragraph of 695 pages); GEORGE FISHER, EVIDENCE 50-54 (3d ed. 2013) (four pages of 1085 pages) ; STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE: LAW AND PRACTICE 743

(6th ed. 2014) [hereinafter FRIEDLAND ET AL., EVIDENCE: LAW AND PRACTICE] (one page of 823 pages); STEVEN I. FRIEDLAND & JACK P. SAHL, EVIDENCE PROBLEMS AND MATERIALS 14 (4th ed. 2012) [[[hereinafter FRIEDLAND & SAHL, EVIDENCE PROBLEMS AND MATERIALS] (one page of 570); ERIC D. GREEN, CHARLES R. NESSON & PETER L. MURRAY, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 1017-1018 (3d ed. 2000) (two pages of 1122); DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 10-13, 38 (2d ed. 2012) (five of 983 pages); DAVID P. LEONARD, VICTOR J. GOLD & GARY C. WILLIAMS, EVIDENCE: A STRUCTURED APPROACH 47, 51-52 (3d ed. 2012) (three of 647 pages); LILLY ET AL., *supra* note 59 (two of 456 pages); MUELLER & KIRKPATRICK, *supra* note 22, § 4.2 (sixteen of 1206 pages); PETER NICOLAS, EVIDENCE: A PROBLEM-BASED AND COMPARATIVE APPROACH 411-15 (3d ed. 2014) (four of 846 pages); ROGER C. PARK & RICHARD D. FRIEDMAN, EVIDENCE: CASES AND MATERIALS 36, 964-70 (12th ed. 2013) (seven of 1508 pages); PAUL R. RICE & ROY A. KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 14-15, 200-08 (6th ed. 2009) (ten of 1259 pages); OLIN GUY WELLBORN III, CASES AND MATERIALS ON THE RULES OF EVIDENCE 9, 477-79 (3d ed. 2005) (three of 606 pages); PAVEL WONSOWICZ, EVIDENCE: A CONTEXT AND PRACTICE CASEBOOK, 8, 10, 24 (2012) (three of 518 pages); IRVING YOUNGER, MICHAEL GOLDSMITH & DAVID A. SONENSHEIN, PRINCIPLES OF EVIDENCE 29-31 (3d ed. 1997) (three of 922 pages).

⁸² See FISHER, *supra* note 81, at 50-54 (noting that demonstrative evidence is discussed in the case of [Commonwealth v. Serge](#), 896 A.2d 1170 (Pa. 2006), cert. denied, 549 U.S. 920 (2006), concerning expert opinion and computer-generated animation); NICOLAS, *supra* note 81, at 411-15 (noting that demonstrative evidence is mentioned in the case of [United States v. Bray](#), 139 F.3d 1104 (6th Cir. 1998), concerning summaries authorized under [FRE 1006](#)). As discussed in Nicolas's text, the *Bray* court distinguished 1006 summaries from both "illustrative aids," which are *not* admitted and are *not* evidence, and "secondary evidence summaries," which are a "combination" of 1006 summaries and illustrative aids that *are* admitted into evidence -- despite failing to comply with the requirements of [FRE 1006](#). *Id.* at 415. In its analysis, the *Bray* court notes that a jury should be told that the admitted evidence is *not* independent evidence of the underlying evidence summarized. *Id.*

⁸³ See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS (8th ed. 2014); see also JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN ABRAMS & MARGARET A. BERGER, EVIDENCE: CASES AND MATERIALS 157-60 (9th ed. 1997) (surveying various scholarly and judicial approaches to the evidentiary status and admissibility of photographs).

⁸⁴ See, e.g., LEONARD ET AL., *supra* note 81, at 52.

⁸⁵ E.g., STEVEN LUBET, MODERN TRIAL ADVOCACY 351 (4th ed. 2009).

⁸⁶ See, e.g., ROBERT J. GOODWIN & JIMMY GURULE, CRIMINAL AND FORENSIC EVIDENCE: CASES, MATERIALS, PROBLEMS 991 (4th ed. 2014).

⁸⁷ E.g., FRIEDLAND ET AL., EVIDENCE: LAW AND PRACTICE, *supra* note 81, at 743.

⁸⁸ See, e.g., YOUNGER ET AL., *supra* note 81, at 30; see also ALLEN ET AL., *supra* note 51, at 191-92; KENNETH S. BROWN & WALTER J. BLAKELY, EVIDENCE 95 (2d ed. 1994); ANDRE A. MOENSSSENS, BETTY LAYNE DESPORTES & CARL N. EDWARDS, SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 67 (6th ed. 2013).

⁸⁹ RONALD CARLSON, EDWARD IMWINKELRIED, JULIE SEAMAN & ERICA BEECHER-MONAS, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTESSS 218 (7th ed. 2012).

⁹⁰ *Id.* at 219-20 (reprinting [Bergner v. State](#), 397 N.E.2d 1012 (Ind. Ct. App. 1979)).

⁹¹ *Id.* (reprinting [Bergner](#), 397 N.E.2d at 1016).

⁹² *Id.* at 220.

⁹³ See, e.g., PARK & FRIEDMAN, *supra* note 81, at 36.

⁹⁴ See, e.g., FRIEDLAND & SAHL, EVIDENCE PROBLEMS AND MATERIALS, *supra* note 81, at 15.

⁹⁵ See, e.g., BEHAN, *supra* note 81, at 294.

⁹⁶ See, e.g., MERRITT & SIMMONS, *supra* note 81, at 38.

- ⁹⁷ See, e.g., WELLBORN, *supra* note 81, at 485 (citing [Smith v. Ohio Oil Co., 134 N.E.2d 526 \(Ill. App. Ct. 1956\)](#)).
- ⁹⁸ See, e.g., L. TIMOTHY PERRIN, H. MITCHELL CALDWELL & CAROL A. CHASE, *THE ART & SCIENCE OF TRIAL ADVOCACY* 273 (2003).
- ⁹⁹ *Id.* at 272.
- ¹⁰⁰ MOENSSENS ET AL., *supra* note 88, at 67.
- ¹⁰¹ [F ED. R. E VID. 402](#); see *id.* 401; see also STEVEN GOODE & OLIN GUY WELLBORN III, *COURTROOM EVIDENCE HANDBOOK* 2014-2015, at 51, 54 (2014) (stating that “demonstrative or illustrative evidence... [is] subject to the general relevancy requirements of [Rules 401](#), [402](#), and [403](#),” and underscoring that [Rule 401](#) requires probative value of admitted evidence); WONSOWICZ, *supra* note 81, at 10 (stating that demonstrative evidence may be used “as long as [it is] admissible pursuant to the rules of evidence”).
- ¹⁰² Professor Howard has taught trial advocacy programs coast-to-coast for over fifteen years with law professors, federal judges, state judges, federal and state prosecutors, defense lawyers, and “BigLaw” litigation partners.
- ¹⁰³ KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, D. H. KAYE, ROBERT P. MOSTELLER, E. F. ROBERTS & ELEANOR SWIFT, [MCCORMICK ON EVIDENCE 485 \(7th ed. 2014\)](#).
- ¹⁰⁴ MERRITT & SIMMONS, *supra* note 81, at 38.
- ¹⁰⁵ EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 133 (8th ed. 2012).
- ¹⁰⁶ WILLIAM S. BAILEY & ROBERT W. BAILEY, *SHOW THE STORY: THE POWER OF VISUAL ADVOCACY* 284 (2011).
- ¹⁰⁷ *Id.* at 284 (citing ALAN E. MORRILL, *TRIAL DIPLOMACY* 26 (2d ed. 1973)). The authors do not identify, however, the standard for admission or the nature of a judge’s discretion with respect to the use of such aids.
- ¹⁰⁸ MICHAEL R. FONTHAM, *TRIAL TECHNIQUE & EVIDENCE* 403 (4th ed. 2013).
- ¹⁰⁹ ROGER HAYDOCK & JOHN SONSTENG, *TRIAL: ADVOCACY BEFORE JUDGES, JURORS AND ARBITRATORS* 453 (4th ed. 2011).
- ¹¹⁰ GREEN ET AL., *supra* note 81, at 1017-18.
- ¹¹¹ THOMAS A. MAUET & WARREN D. WOLFSON, *TRIAL EVIDENCE* 317-18 (6th ed. 2016).
- ¹¹² See, e.g., *id.* at 317 (“[T]he proponent must call a competent witness, one having firsthand knowledge of the actual thing at the relevant dates to testify that the exhibit fairly represents or shows the actual thing. To be relevant, the exhibit must help the jury understand some fact of consequence to the case.”).
- ¹¹³ *Id.* (describing the foundation of diagrams and models and concluding that the exhibits are “admissible”). In fairness, Mauet and Wolfson examine the question: “What does it mean when a judge ‘admits’ the exhibit in evidence?” *Id.* Nonetheless, by misstating that demonstrative evidence is “admissible” the seeds of confusion have already been sown.
- ¹¹⁴ See, e.g., 2 [MCCORMICK ON EVIDENCE](#), *supra* note 76, [§ 212](#) (“The term ‘demonstrative aid’ will be employed here to identify these and other types of evidence whose relevance is illustrative, rather than substantive. Some courts refer to these aids as ‘pedagogic aids’ or ‘devices.’”); 2 MICHAEL H. GRAHAM, [HANDBOOK OF FEDERAL EVIDENCE § 401:2 \(7th ed. 2015\)](#) (“Demonstrative evidence... is distinguished from real evidence in that it has no probative value itself, but serves merely as a visual aid to the jury in comprehending the verbal testimony of a witness or other evidence.”).
- ¹¹⁵ See, e.g., [Baugh ex rel. Baugh v. Cuprum S.A. de C.V., 730 F.3d 701, 710 \(7th Cir. 2013\)](#); [State v. Perea, 322 P.3d 624, 637 \(Utah 2013\)](#); [State v. Lord, 822 P.2d 177, 194 \(Wash. 1991\)](#).
- ¹¹⁶ See, e.g., [United States v. Hawkins, 796 F.3d 843, 866 \(8th Cir. 2015\)](#) (characterizing the district court’s erroneous admission of a demonstrative timeline as harmless error); [Baugh, 730 F.3d at 711](#) (concluding that the district court had abused its discretion by overruling objections to the use of an exhibit, on the ground that its use would be limited to demonstrative purposes only, but then allowing the exhibit’s admission into evidence during jury deliberations).

¹¹⁷ See, e.g., COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) 1.43 (2015); FLA. BAR, FLORIDA STANDARD JURY INSTRUCTIONS 301.4 (2015); MINN. DIST. JUDGES ASS'N, COMM. ON CRIMINAL JURY INSTRUCTION GUIDES, JURY INSTRUCTION GUIDES -- CRIMINAL 3.26 (6th ed. 2014); COMM. ON FED. CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS 3.17 (2012); JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CIVIL JURY INSTRUCTIONS, CIVIL JURY INSTRUCTIONS 5020 (2012)...

¹¹⁸ WASH. STATE SUPREME COURT COMM. ON JURY INSTRUCTIONS, WASHINGTON PATTERN JURY INSTRUCTIONS -- CIVIL 6.06 (2013).

¹¹⁹ *Id.*

¹²⁰ At the Washington Pattern Instruction Committee meeting on November 7, 2015, Professor Howard proposed to modify the instruction title from “Exhibit *Admitted* for Illustrative Purposes” to “Exhibit *Used* for Illustrative Purposes” (emphasis added), in an effort to eliminate the internal linguistic inconsistency of the exhibit being referred to as both “admitted [into evidence]” and “not evidence,” and thereby reconcile the title with the substance of the instruction. The proposal was rejected. The committee members noted that the phrasing had long been the lexicon of trial practice and that judges and lawyers understood its meaning. The Seventh Circuit appears to disagree, noting that confusion in trial courts over such demonstrative evidence has resulted in the frustration of several of the goals of the evidence rules. See [Baugh](#), 730 F.3d at 708-10.

¹²¹ [725 ILL. COMP. STAT. 5/115-4 \(West 2016\)](#); [LA. CODE CIV. PROC. ANN. art 1794 \(2015\)](#); [NEB. REV. STAT. ANN. § 25-1107.01 \(West 2016\)](#); [NEV. REV. STAT. ANN. § 175.131 \(West 2015\)](#); [ARIZ. R. CIV. P. 39\(p\)](#); [ARIZ. R. CRIM. P. 18.6](#); [CAL. R. CT. 2.1031](#) (“Jurors must be permitted to take written notes in all civil and criminal trials.”); [HAW. R. CIV. P. 47\(d\)](#) (“Except upon good cause articulated by the court, jurors shall be allowed to take notes during trial.”); [HAW. R. CRIM. P. 24\(e\)](#) (“Except upon good cause articulated by the court, jurors shall be allowed to take notes during trial.”); [IOWA R. CIV. P. 1.926](#); [IOWA R. CRIM. P. 2.19](#); [MO. SUP. CT. R. 69.03](#) (“Upon the court’s own motion or upon the request of any party, the court shall permit jurors to take notes.”); [PA. R. CIV. P. 223.2\(a\)\(1\)](#) (permitting jurors to take notes “whenever a jury trial is expected to last more than two days”); [PA. R. CRIM. P. 644\(A\)](#) (permitting jurors to take notes “when a jury trial is expected to last more than two days”); [TENN. R. CIV. P. 43A.01](#); [TENN. R. CRIM. P. 24.1\(a\)\(1\)](#); [WASH. SUPER. CT. CRIM. R. 6.8](#); [WASH. SUPER. CT. CIV. R. 47\(j\)](#); [WYO. R. CRIM. P. 24.1](#); [WYO. R. CIV. P. 39.1\(a\)](#); [Reece v. Simpson](#), 437 So. 2d 68, 68 (Ala. 1983).

¹²² [LA. CODE CRIM. PROC. ANN. art. 793 \(2015\)](#); [N.C. GEN. STAT. ANN. § 15A-1228 \(West 2015\)](#); [WIS. STAT. ANN. §§ 805.13, 972.10 \(West 2015\)](#); [CONN. SUPER. CT. CIV. R. § 16-7](#); [ME. R. CIV. P. 47](#); [ME. R. CRIM. P. 24](#); [MASS. SUPER. CT. R. 8A](#); [MICH. R. CIV. P. 2.513\(H\)](#); [MISS. CIR. & CTY. CT. R. 3.14](#); [N.H. SUPER. CT. CRIM. R. 64-A](#); [N.H. SUPER. CT. CIV. R. 38\(3\)\(c\)](#); [N.J. CT. R. 1:8-8\(c\)](#); [N.Y. CT. R. § 220.10](#); [N.D. R. CT. 6.7](#); [OHIO R. CIV. P. 47\(E\)](#); [OHIO R. CRIM. P. 24\(I\)](#); [VT. R. CIV. P. 39\(c\)](#); [VA. SUP. CT. R. 123.A](#); [Alaska State Hous. Auth. v. Contento](#), 432 P.2d 117, 122 (Alaska 1967); [People v. Martinez](#), 652 P.2d 174, 177 (Colo. App. 1981); [Williamson v. State](#), 235 S.E.2d 643, 645 (Ga. 1977); [Johnson v. State Highway Comm’n](#), 366 P.2d 282, 285 (Kan. 1961) (“It would seem to be true that there is authority that a trial judge in his discretion may allow the jury to take notes.”); [Travis v. Commonwealth](#), 457 S.W.2d 481, 481 (Ky. 1970); [Wharton v. State](#), 734 So. 2d 985 (Miss. 1998) (permitting juror note taking, but not allowing jurors to take notes into deliberations); [State v. Hage](#), 853 P.2d 1251, 1254 (Mont. 1993); [Sligar v. Bartlett](#), 916 P.2d 1383, 1387 (Okla. 1996); [Cohee v. State](#), 942 P.2d 211, 214 (Okla. Crim. App. 1997); [State v. Rose](#), 748 A.2d 1283, 1286-87 (R.I. 2000); [State v. Trent](#), 106 S.E.2d 527, 530-31 (S.C. 1959); [Price v. State](#), 887 S.W.2d 949, 954 (Tex. Crim. App. 1994); [State v. Triplett](#), 421 S.E.2d 511, 520 (W. Va. 1992).

¹²³ [S.D. CODIFIED LAWS § 15-14-20 \(2016\)](#) (allowing jurors in civil trials to take their notes into deliberations); [ARK. R. CRIM. P. 33.5](#); [IDAHO CRIM. R. 24.1](#); [IND. JURY R. 20](#); [MD. R. CIV. P. CIR. CT. 2-521\(a\)](#) (“The court may, and on request of any party shall, provide paper notepads for use by sworn jurors, including any alternates, during trial and deliberations.”); [MD. R. CRIM. P. 4-326](#) (same); [OR. R. CIV. P. 59.C\(4\)](#) (“Jurors may take notes of the testimony or other proceeding on the trial and may take such notes into the jury room.”).

¹²⁴ [S.D. CODIFIED LAWS § 23A-25-7](#) (remaining silent on juror note taking in criminal trials); see [DEL. SUPER. CT. JUROR USE STANDARD 16](#); [FLA. STANDARD CRIM. JURY INSTRUCTION 2.1\(a\)](#); [MINN. R. CRIM. P. 26.03 subdiv. 13](#); [N.M. R. CRIM. UNIFORM JURY INSTRUCTION 14-9002, 14-7011, 14-7010](#); [Cooney-Koss v. McCracken](#), No. 10C-10-230 WCC, 2012 WL 8962833 (Del. Super. Ct. 2012) (allowing jurors to take notes); [State v. Jeffs](#), No. 061500526, 2007 WL 3033648 (Utah Dist. Ct. 2007) (“During this trial I will permit you to take notes. Many [c]ourts do not permit note-taking by jurors, and a word of caution is in order.”).

¹²⁵ [730 F.3d 701, 708 \(7th Cir. 2013\)](#).

¹²⁶ As a colleague in the University of Washington Computer Science Department, Dr. David Callahan, likes to say, “Multiple anecdotes are not data.”

¹²⁷ [FED. R. EVID. 406](#) advisory committee’s notes to 1972 proposed rules.

¹²⁸ See, e.g., [FED. R. EVID. 402](#), [412](#), [501](#).

¹²⁹ See, e.g., *id.* 412(b)(1)(C) (carving out a constitutional exception within the rape shield law for “evidence whose exclusion would violate the defendant’s constitutional rights”).

¹³⁰ See *supra* Part II.A for a discussion regarding how law professors have attempted to define demonstrative evidence. See *supra* Part II.D for a discussion of how law professors now teach the permissibility of demonstrative evidence usage as within the discretion of the trial court.

¹³¹ See, e.g., Karen D. Butera, [Seeing Is Believing: A Practitioner’s Guide to the Admissibility of Demonstrative Computer Evidence](#), 46 CLEV. ST. L. REV. 511 (1998); Mary Quinn Cooper, [The Use of Demonstrative Exhibits at Trial](#), 34 TULSA L.J. 567 (1999); Don Howarth, Suzelle M. Smith & Mary La Cesa, [Rules Governing Demonstrative Evidence at Trial: A Practitioner’s Guide](#), 20 W. ST. U. L. REV. 157 (1992); Richard J. Leighton, [The Use and Effectiveness of Demonstrative Evidence and Other Illustrative Materials in Federal Agency Proceedings](#), 42 ADMIN. L. REV. 35 (1990).

¹³² See, e.g., 2 MCCORMICK ON EVIDENCE, *supra* note 76 [§ 214](#); LUBET, *supra* note 85, at 335; MERRITT & SIMMONS, *supra* note 81, at 12-13; Brain & Broderick, *supra* note 9; Michael H. Graham, *Real and Demonstrative Evidence, Experiments and Views*, 46 CRIM L. BULL. 792 (2010); Santee, *supra* note 78.

¹³³ See, e.g., Brain & Broderick, *supra* note 9, at 997-98.

¹³⁴ See *infra* Part IV.B for a discussion of [Maine Rule of Evidence 616](#).

¹³⁵ See, e.g., Carrie Leonetti & Jeremy Bailenson, [High-Tech View: The Use of Immersive Virtual Environments in Jury Trials](#), 93 MARQ. L. REV. 1073 (2010); Jennifer L. Mnookin, [Repeat Play Evidence: Jack Weinstein, “Pedagogical Devices,” Technology, and Evidence](#), 64 DEPAUL L. REV. 571, 578 (2015).

¹³⁶ See John J. Delany III, David M. Governo & Mary Noffsinger, *The Generation X and Y Factors*, D.R.I. FOR DEF., Jan. 2013, at 74, 74 (“The same techniques Madison Avenue utilizes to sell products can be adopted by trial attorneys to convey effective trial themes. A trial theme should be a multi-sensual message....”).

¹³⁷ Fredric I. Lederer, *Courtroom Technology: For Trial Lawyers, the Future Is Now*, CRIM. JUST., Spring 2004, at 14, 15 (2004) (noting the availability of technology in federal courts and its use in a variety of cases, ultimately concluding that “[s]ooner than may seem possible, technology use at trial will be commonplace”).

¹³⁸ “The Federal Rules of Evidence are little changed from the first proposed draft in 1969.” Josh Camson, *History of the Federal Rules of Evidence*, A.B.A. LITIG. NEWS (2010), https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html. Absent from the proposed draft are [Rules 412](#), [413](#), [414](#), and [415](#). These rules dealing with sex offense cases, sex assault cases, and child molestation cases weren’t enacted until after the initial adoption of the [Federal Rules of Evidence. Rule 412](#) was added in 1978, and the others were added in 1994. Also missing from the proposed draft is Rule 807, the residual exception to the hearsay rule. This is because in the proposed draft, Rule 807 was the default rule. Amendments in the form of new rules, and changes in wording and meaning have all taken place over the last 35 years. *Id.* In 2010, the Judicial Conference of the United States’ Committee on Rules of Practice and Procedure restyled the language of the rules to simplify and clarify their meaning. *Federal Rules of Evidence -- 2011 Amendment to Restyle the Federal Rules of Evidence*, FED. EVIDENCE REV., <http://federalevidence.com/Restyling> (last visited Apr. 1, 2016).

¹³⁹ Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., [A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the U.S. District Courts](#), 30 F.R.D. 73, 81 (1962) [hereinafter *Preliminary Report*].

¹⁴⁰ 1 RICHARD FRIEDMAN & JOSHUA DEAHL, FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY ix (2015); STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 1 (9th ed. 2006); Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 214, 218 (1942); Camson, *supra* note 138 (citing Edmund M. Morgan, *Practical Difficulties Impeding Reforms in the Law of Evidence*, 14 VAND. L. REV. 725 (1961)).

¹⁴¹ Camson, *supra* note 138.

¹⁴² 1 FRIEDMAN & DE AHL, *supra* note 140, at ix.

¹⁴³ *Id.*

¹⁴⁴ *Preliminary Report*, *supra* note 139, at 75; 1 FRIEDMAN & DE AHL, *supra* note 140, at x.

¹⁴⁵ Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., [Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates](#), 46 F.R.D. 161, 177 (1969) [hereinafter *Proposed Rules for District Courts and Magistrates*].

¹⁴⁶ Camson, *supra* note 138.

¹⁴⁷ *See* 1 FRIEDMAN & DE AHL, *supra* note 140, at x.

¹⁴⁸ There had been several prior reporter’s drafts, beginning in 1965, and several revised drafts afterward, preceding the enactment of the rules on January 2, 1975 and the discharge of the Advisory Committee. *See id.* at ix; *see also FRE Legislative History Overview Resource Page*, FED. EVIDENCE REV., <http://federalevidence.com/legislative-history-overview> (last visited Apr. 1, 2016).

¹⁴⁹ *Proposed Rules for District Courts and Magistrates*, *supra* note 145, at 180.

¹⁵⁰ Camson, *supra* note 138; *see also* 1 FRIEDMAN & DE AHL, *supra* note 140, at xi.

¹⁵¹ Maine Rule 616 nominally addresses the use of “illustrative aids,” although the advisers’ note to the rule acknowledges that these are also referred to as “demonstrative exhibits.” [ME. R. EVID. 616](#) advisers’ note to 1976 amendment.

¹⁵² [Rule 616](#) states that illustrative aids (1) shall be disclosed to opposing counsel in advance; (2) may be used by any party during trial; (3) shall remain the property of the proponent; (4) shall not go back to the jury during deliberations, absent consent of all parties and good cause; and (5) shall be preserved for appeal upon request. *Id.* 616(c)-(d).

¹⁵³ *Id.* The remainder of the rule addresses the administrative aspects of the rule, as discussed in *supra* note 152.

¹⁵⁴ Maine’s evidence rules are modeled on the Federal Rules of Evidence, sharing similar (if not identical) major subject headings. [State v. Williams](#), 388 A.2d 500, 506 (Me. 1978) (observing that the Maine Rules of Evidence were modeled on the Federal Rules).

¹⁵⁵ This discretion is, of course, subject to the requirements of due process and other constitutional considerations.

¹⁵⁶ [ME. R. EVID 611\(a\)](#).

¹⁵⁷ *See, e.g., United States v. Irvin*, 682 F.3d 1254, 1263 (10th Cir. 2012) (“In short, resort to [Rule 611\(a\)](#) in no way resolves the hearsay problem that renders Exhibit 1-2 inadmissible.”).

¹⁵⁸ The advisers’ note to the rule acknowledges that “illustrative aids” are also referred to as “demonstrative exhibits.” [ME. R. EVID. 616](#) advisers’ note to 1976 amendment.

¹⁵⁹ *Id.* 616(a) (emphasis added).

¹⁶⁰ *Id.* 616 advisers’ note to 1976 amendment (emphases added).

¹⁶¹ *See id.* 616(a)-(b). The advisers’ note to [Rule 616](#) states: Paragraph (b) of the proposed rule makes clear, however, that the court retains the discretion to condition, restrict or exclude the use of any illustrative aid in order to avoid the risk of unfair prejudice, surprise, confusion or waste of time. This is similar to the discretion exercised by the court under [Rule 403](#) in dealing with objects which are admissible in evidence. Because of the multiplicity of potential problems which may be encountered, it is deemed wiser to allow the court a measure of discretion in applying general standards rather than to establish a legal test for utilization of these media. *Id.* 616 advisers’ note to 1976 amendment.

¹⁶² *Id.* 402 (“Irrelevant evidence is not admissible.”).

¹⁶³ See *supra* Part II.C for an in-depth discussion of the admissibility balancing test.

¹⁶⁴ RICHARD H. FIELD & PETER L. MURRAY, MAINE EVIDENCE (6th ed. 2007).

¹⁶⁵ Professor Murray and Professor Richard H. Field were co-consultants to the Maine Advisory Committee from its inception in 1973. See *Peter Murray*, MURRAY PLUMB & MURRAY, <http://www.mpmlaw.com/lawyer/peter-murray/> (last visited Apr. 1, 2016).

¹⁶⁶ E-mail from Peter L. Murray, Visiting Professor of Law, Harvard Law Sch., to Maureen A. Howard, Assoc. Professor of Law, Univ. of Wash. Sch. of Law (Dec. 29, 2015) (on file with authors).

¹⁶⁷ Susan Sturm, [Law Schools, Leadership, and Change](#), 127 HARV. L. REV. F. 49, 49 (2013) (“Law schools’ rhetoric celebrates lawyers’ leadership role.”).

¹⁶⁸ E.g., *Mission and History*, N.Y. L. SCH., http://www.nyls.edu/about_the_school/mission_and_history/ (last visited Apr. 1, 2016).

¹⁶⁹ Professor Howard has proposed demonstrative evidence as a topic for an AALS Discussion Group at the January, 2017 annual meeting, and she is organizing a workshop at the University of Washington School of Law in autumn 2016.

¹⁷⁰ LEONARD ET AL., *supra* note 81, at 5-6.

¹⁷¹ [CAL. EVID. CODE § 140](#).

¹⁷² The BBC television series *Garrow’s Law* illustrates this point in its portrayal of trials at the Old Bailey in Georgian London. In addition to being educational (it is based on real legal cases from the late eighteenth century), the drama is well scripted and boasts exceptional talent, including Rupert Graves. See Press Release, BBC, Award-Winning Drama *Garrow’s Law* Starts Shooting Second Series in Scotland (Oct. 29, 2014), http://www.bbc.co.uk/pressoffice/pressreleases/stories/2010/07_july/07/garrow.shtml; see also *The Proceedings of the Old Bailey, 1674-1913*, OLD BAILEY PROCEEDINGS ONLINE, <http://www.oldbaileyonline.org/> (last visited Apr. 1, 2016).

¹⁷³ Similarly, the burgeoning number of exhibits at trial provided the impetus for [Rule 1006](#), which allows, under certain circumstances, the admission of summaries to prove content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. [FED. R. EVID. 1006](#).

¹⁷⁴ *Id.* 102.

¹⁷⁵ *Id.*

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TAB 8

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Memorandum To: Advisory Committee on Evidence Rules
From: Liesa L. Richter, Academic Consultant
Re: Possible Amendment to Rule 1006 Governing Summaries to Prove Content
Date: April 1, 2021

Rule 1006 of the Federal Rules of Evidence is an exception to the Best Evidence rule that permits the use of “a summary, chart, or calculation” to prove the content of writings, recordings, or photographs so “voluminous” that they cannot be conveniently examined in court. The Rule is designed to allow a summary to substitute for proof of the underlying writings, recordings, or photographs themselves. Of course, the underlying writings, recordings, and photographs must be “admissible” -- even if not admitted -- in order for a summary of them to be admitted at trial. The proponent of a Rule 1006 summary must lay a proper foundation for its admission as well, demonstrating that the summary accurately reflects the underlying documents. And Rule 1006 requires that the proponent of the summary make the underlying originals (or duplicates of them) available for examination or copying by other parties. Finally, the court has discretion under Rule 1006 to require the proponent of the summary to “produce” the underlying writings, recordings, or photographs “in court.”

There is some confusion in the federal courts regarding the proper role of a Rule 1006 summary, however. In large part, this stems from opinions that conflate the principles governing use of a Rule 611(a) demonstrative or pedagogical aid with the requirements for using a Rule 1006 summary. The Reporter has drafted a separate memorandum regarding the proper use of Rule 611(a) demonstrative aids. This memorandum will, therefore, focus exclusively on interpretive difficulties in the application of Rule 1006.¹ The question for the Committee is whether to explore potential amendments to Rule 1006 as a result of these interpretive challenges.

Federal courts sometimes struggle with four issues under Rule 1006. Part I of this memorandum will highlight confusion over the evidential status of a Rule 1006 summary and will describe decisions holding that Rule 1006 summaries are “not evidence” and may be relied upon merely as aids to understanding. Part II will address related confusion over the use of the underlying voluminous writings or recordings at trial. Some courts mistakenly demand admission of the underlying material, while others prohibit resort to a Rule 1006 summary if the underlying records have been admitted into evidence. Part III will describe opinions that permit

¹ Many thanks to Supreme Court Fellow, Kathleen Foley, who updated research on Rule 1006 and supplied helpful insights and ideas for this Agenda memorandum.

Rule 1006 summaries – which are supposed to be true and accurate summaries reflecting the “content” of the voluminous underlying material – to include assumptions, conclusions, and arguments not found in the underlying material. Part IV will briefly touch on the rare use of testimonial summaries pursuant to Rule 1006. Finally, Part V will offer a preliminary drafting option for an amendment to Rule 1006 designed to clarify these areas of confusion.

I. Courts that Mistakenly Hold that Rule 1006 Summaries are “Not Evidence”

As noted above, a Rule 1006 summary is designed to substitute for proof of writings and recordings that are too voluminous to be conveniently examined in court. To serve this purpose, the summary must be admitted as evidence and the jury must be permitted to rely upon it for proof of the content on the underlying materials. The Advisory Committee’s 1973 note to Rule 1006 reinforces the use of summaries as proof: “The *admission* of summaries of voluminous books, records, or documents offers the only practicable means of making their content available to the jury.”² Most courts have recognized the proper status of a Rule 1006 summary as evidence.³ As the Fourth Circuit explained in *United States v. Janati*:

Because the underlying documents need not be introduced into evidence, the chart itself is admitted as evidence in order to give the jury evidence of the underlying documents.⁴

Recent opinions in the Second and Sixth Circuit Court of Appeals have held, however, that a Rule 1006 summary does not constitute evidence and must, therefore, be accompanied by a limiting instruction restricting the jury’s use of it. In *United States v. Ho*, the Second Circuit held that it is “proper[]” for the jury to be instructed that Rule 1006 charts “d[o] not themselves constitute independent evidence.”⁵ The court went on to note:

This court has long approved the use of charts in complex trials, and has allowed the jury to have the charts in the jury room during its deliberations, ‘so long as the judge properly instructs the jury,’ as the judge did here, ‘that it is not to consider the charts as evidence.’⁶

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

² Advisory Committee’s 1973 note to Fed. R. Evid. 1006 (emphasis added).

³ See, e.g., *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013) (“[T]he summary itself is substantive evidence—in part because the party is not obligated to introduce the underlying documents themselves.”); *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004) (“Because the underlying documents need not be introduced into evidence, the chart itself is admitted as evidence in order to give the jury evidence of the underlying documents.”); *United States v. Weaver*, 281 F.3d 228, 232–33 (D.C. Cir. 2002) (“As to Weaver’s claim that the court should have issued some sort of ‘safeguards’ with respect to [a Rule 1006 summary], we think he misapprehends the Rules of Evidence. . . . We therefore do not understand Weaver’s point that an instruction was needed because the exhibit constituted inadmissible evidence.”).

⁴ *United States v. Janati*, 374 F.3d 263, 272–73 (4th Cir. 2004).

⁵ *United States v. Ho*, 984 F.3d 191, 210 (2d Cir. 2020).

⁶ *Id.* (quoting *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989)).

the jury of the summary’s purpose and *that it does not constitute evidence.*”⁷ Although it deemed it harmless, the Sixth Circuit found that the district court had erred in admitting a summary of voluminous recordings without such a limiting instruction.⁸

The Fifth Circuit has conflicting precedent on the status of a Rule 1006 summary and the need for a limiting instruction. In *United States v. Bishop*, the Fifth Circuit held that a Rule 1006 summary “should be accompanied by a cautionary jury instruction.”⁹ That same year, in *United States v. Williams*, however, the Fifth Circuit wrote that a “summary chart that meets the requirements of Rule 1006 is itself evidence and no instruction is needed.”¹⁰ More recently, the court in *United States v. Spalding* acknowledged the confusion in the Fifth Circuit caselaw, ultimately concluding that a Rule 1006 summary constitutes “substantive evidence” that jurors may bring to the jury room.¹¹

It seems clear that the opinions denying Rule 1006 summaries substantive evidentiary status are confusing them with pedagogical aids and summaries of trial evidence submitted pursuant to Rule 611(a). A potential amendment to Rule 1006 that would clarify the role and purpose of a Rule 1006 summary as alternate proof of content appears in Part V.

II. Admission of the Underlying Documents or Recordings

Rule 1006 is designed to allow a summary of voluminous writings or recordings to be admitted *in lieu of* admitting the voluminous writings or recordings themselves. Some federal courts have mistakenly held that the underlying voluminous writings or recordings themselves *must be admitted* into evidence before a Rule 1006 summary may be used. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings *have been* admitted into evidence.

Several Circuits have correctly held that the voluminous materials underlying a Rule 1006 summary themselves need not be introduced into evidence. For example, in *United States v. Appolon*, the First Circuit explained, as follows:

Federal Rule of Evidence 1006 does not require that the documents being summarized also be admitted. . . . Accordingly, whether the documents themselves were introduced is of no consequence.¹²

⁷ *United States v. Bailey*, 973 F.3d 548, 567 (6th Cir. 2020) (emphasis added) (quoting *United States v. Vasilakos*, 508 F.3d 401, 412 (6th Cir. 2007)).

⁸ Cases conflict within the Sixth Circuit, however. In *United States v. Bray*, the Sixth Circuit explained that “[s]ince Rule 1006 authorizes the admission in evidence of the summary itself, it is generally inappropriate to give a *limiting* instruction for a Rule 1006 summary.” 139 F.3d 1104, 1111–12 (6th Cir. 1998). The court acknowledged that the Sixth Circuit had been “less than clear” on this point.

⁹ *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001); see also *United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985) (approving admission of Rule 1006 summary with instruction that it was “not to be considered the evidence in the case”).

¹⁰ *United States v. Williams*, 264 F.3d 561, 575 (5th Cir. 2001).

¹¹ *United States v. Spalding*, 894 F.3d 173, 185 n.17 (5th Cir. 2018).

¹² 715 F.3d 362, 374 (1st Cir. 2013) (citations omitted).

Similarly, the Seventh Circuit, in *United States v. White*, emphasized that a party relying upon a proper Rule 1006 summary “is not required to introduce the underlying evidence.”¹³ In *United States v. Hemphill*, the D.C. Circuit rejected an argument that the proponent must introduce the documents underlying a Rule 1006 summary, noting that the point of Rule 1006 is to *avoid* introducing all the documents where an appropriate foundation has been laid.¹⁴

In contrast, multiple cases in the Eighth Circuit set forth a standard for admitting a Rule 1006 summary that requires admission of underlying materials:

Summary evidence is properly admitted when (1) the charts ‘fairly summarize’ voluminous *trial evidence*; (2) they assist the jury in ‘understanding the *testimony already introduced*’; and (3) ‘the witness who prepared the charts is subject to cross-examination *with all documents used to prepare the summary*.’¹⁵

Several cases from the Fifth Circuit also hold that Rule 1006 summaries must be “based on competent evidence already before the jury.”¹⁶ In *United States v. Mazkouri*, the court upheld the use of Rule 1006 summary charts, in part, because “the charts were based on data in two spreadsheets that the court admitted into evidence.”¹⁷ In *United States v. Harms*, the Fifth Circuit explained that Rule 1006 “applies to summary charts based on evidence previously admitted but which is so voluminous that in-court review by the jury would be inconvenient.”¹⁸

Paradoxically, other Fifth Circuit cases suggest that a Rule 1006 summary may *not* be used when the underlying evidence has already been admitted:

Fifth Circuit precedent conflicts on whether rule 1006 allows the introduction of summaries of evidence that is already before the jury, or whether instead it is limited to summaries of voluminous records that have not been presented in court.¹⁹

The Eighth Circuit has suggested a similar limitation on the use of Rule 1006. In *United States v. Grajales-Montoya*, the court found that the trial judge had erred in admitting a summary exhibit pursuant to Rule 1006, in part, because it was based upon evidence already admitted at trial.²⁰

Other Circuits have held that the admission of the underlying voluminous records themselves does not *prevent* admission of a Rule 1006 summary, however. The First Circuit

¹³ *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013).

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

¹⁵ See, e.g., *United States v. Green*, 428 F.3d 1131, 1134 (8th Cir. 2005) (emphasis added); *United States v. Fechner*, 952 F.3d 954, 959–60 (8th Cir. 2020) (applying this standard). Again, it appears that this misapprehension of Rule 1006 stems from the intermingling of standards applicable to Rule 611(a) aids. See *United States v. Shorter*, 874 F.3d 969, 978 (7th Cir. 2017) (noting that the *Green* opinion mistakenly recited the requirements for admission of a 1006 summary because it “misapplied its earlier decision ... which was a case involving the admissibility of pedagogical charts”).

¹⁶ See, e.g., *United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018); *United States v. Mazkouri*, 945 F.3d 293, 301 n.1 (5th Cir. 2019).

¹⁷ *United States v. Mazkouri*, 945 F.3d 293, 301 n.1 (5th Cir. 2019)

¹⁸ 442 F.3d 367, 375 (5th Cir. 2006) (quoting *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000)).

¹⁹ *United States v. Armstrong*, 619 F.3d 380, 383 (5th Cir. 2010); see also *United States v. Stephens*, 779 F.2d 232, 239 (5th Cir. 1985) (“The fact that the underlying documents are already in evidence does not mean that they can be “conveniently examined in court.”).

²⁰ 117 F.3d 356, 361 (8th Cir. 1997) (“The rule appears to contemplate, however, that a summary will be admitted instead of, not in addition to, the documents that it summarizes.”).

explained why admission of both the voluminous records and a summary might be appropriate under Rule 1006 in *United States v. Milkiewicz*.²¹ In that case, the trial court refused to admit a summary that otherwise would have qualified under Rule 1006 because many of the underlying documents had been admitted at trial. The First Circuit held that the admission of underlying documents does not foreclose use of Rule 1006 if all the requirements of the Rule are otherwise satisfied:

[S]ummaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence The discretion accorded the trial court to order production of the documents means that the evidence underlying Rule 1006 summaries need not be introduced into evidence, but nothing in the rule forecloses a party from doing so. For example, we can imagine instances in which an attorney does not realize until well into a trial that a summary chart would be beneficial, and admissible as evidence under Rule 1006, because the documents already admitted were too voluminous to be conveniently examined by the jury.

Consequently, while in most cases a Rule 1006 chart will be the *only* evidence the fact finder will examine concerning a voluminous set of documents, in other instances the summary may be admitted *in addition to* the underlying documents to provide the jury with easier access to the relevant information.

This latter practice has drawn criticism as inconsistent with the purpose of Rule 1006 to provide an exception to the “best evidence rule” because, “[i]f the underlying evidence is already admitted, there is no concern that a summary is used in lieu of the ‘best evidence.’” We agree with the Fifth Circuit, however, that “[t]he fact that the underlying documents are already in evidence does not mean that they can be ‘conveniently examined in court.’” Thus, in such instances, Rule 1006 still serves its purpose of allowing the jury to consider secondary evidence as a substitute for the originals.²²

Similarly, the Seventh Circuit in *United States v. White* explained that a “party is not required to introduce the underlying evidence” supporting a Rule 1006 summary, but held that a “summary fulfilled every requirement of Rule 1006” even though the proponent “introduced the [summarized] documents themselves into evidence.”²³

Again, decisions *requiring* the admission of the underlying records themselves misapprehend the purpose of a Rule 1006 summary to stand in for those records once the trial judge has determined that they are so voluminous that they cannot be conveniently examined in court. These decisions also appear to arise out of confusion concerning the distinction between Rule 611(a) pedagogical aids (which must be based upon record evidence and are not themselves evidence) and Rule 1006 summaries (which offer alternate proof of the “content” of voluminous records). Although Rule 1006 is certainly designed to permit introduction of a summary without

²¹ 470 F.3d 390, 395–98 (1st Cir. 2006).

²² *United States v. Milkiewicz*, 470 F.3d 390, 395–98 (1st Cir. 2006) (citations omitted).

²³ 737 F.3d 1121, 1135–36 (7th Cir. 2013); *see also United States v. Anekwu*, 695 F.3d 981-82 (9th Cir. 2012) (trial court did not abuse its discretion in admitting chart summarizing foreign bank records when records were already in evidence).

admission of the underlying records, the opinions suggesting that *both* the records (or some portion thereof) *and* a Rule 1006 summary might be admitted in appropriate cases seem better reasoned. As the First Circuit recognized, records might be too voluminous to be “conveniently examined in court” even though they have been moved into evidence. These misunderstandings regarding the treatment of the underlying voluminous records under Rule 1006 might be addressed in an amendment, as well as through an Advisory Committee note. Part V contains one preliminary amendment possibility.

III. Courts that Allow Rule 1006 Summaries Containing Assumptions and Conclusions Not Included in Underlying Writings or Recordings

Because a Rule 1006 summary is designed to substitute for evidence of originals too voluminous to be examined conveniently themselves, many federal courts have held that a Rule 1006 summary must accurately reflect the underlying documents and must not include assumptions, conclusions, or arguments not reflected in those underlying documents.²⁴ The Seventh Circuit in *United States v. White* explained:

Because a Rule 1006 exhibit is supposed to substitute for the voluminous documents themselves, however, the exhibit must accurately summarize those documents. It must not misrepresent their contents or make arguments about the inferences the jury should draw from them.²⁵

Recently, the Sixth Circuit in *United States v. Bailey* echoed these principles, stating that “[a] party seeking the admission of a summary under Rule 1006 must demonstrate, . . . that the summary is accurate and nonprejudicial.”²⁶ Similarly, in an unpublished opinion in 2018, the Third Circuit explained:

In this Circuit, a district court’s finding that the exhibits qualified under Rule 1006 is itself a determination that they are not infected with the preparer’s own subjective views. Prior to permitting the use of a summary document under Rule 1006, the district court must assure that ‘the summation accurately summarizes the materials involved by not referring to information not contained in the original.’²⁷

Due again to apparent confusion between Rule 1006 summaries and Rule 611(a) pedagogical aids, however, the Fifth, Eighth, and Eleventh Circuits have held that Rule 1006 summaries *may* include assumptions and conclusions so long as they are based on record evidence. In *United States v. Mazkouri*, the Fifth Circuit explained that: “[w]e have held that for Rule 1006, the ‘essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record.’”²⁸ The Eighth Circuit recently agreed in

²⁴ See, e.g., *United States v. White*, 737 F.3d 1121, 1135–36 (7th Cir. 2013); *United States v. Milkiewicz*, 470 F.3d 390, 395–98 (1st Cir. 2006) (“Charts admitted under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently, they must fairly represent the underlying documents and be ‘accurate and nonprejudicial.’”).

²⁵ 737 F.3d 1121, 1135–36 (7th Cir. 2013).

²⁶ 973 F.3d 548, 567 (6th Cir. 2020); see also *United States v. Fahnbulleh*, 752 F.3d 470, 479 (D.C. Cir. 2014) (“For a summary of documents to be admissible . . . the summary must be accurate and nonprejudicial.”).

²⁷ *United States v. Lynch*, 735 F. App’x 780, 787 (3d Cir. 2018) (citation omitted).

²⁸ 945 F.3d 293, 301 (5th Cir. 2019) (quoting *Armstrong*, 619 F.3d 380, 384 (5th Cir. 2010)); but see *United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018) (“[B]ecause summaries are elevated under Rule 1006 to the position

United States v. Fechner.²⁹ And the Eleventh Circuit also expressed the view that Rule 1006 summaries may contain assumptions and conclusions not reflected in the original records in its recent opinion in *United States v. Melgen*.³⁰

An amendment to Rule 1006 might also emphasize that a summary admitted pursuant to the Rule must accurately reflect underlying voluminous materials due to its substantive evidentiary status and its purpose to substitute for the underlying records which need not be introduced into evidence.³¹ Part V also provides a preliminary amendment possibility along these lines.

IV. Testimonial Summaries

Most summaries admitted under Rule 1006 are written summaries admitted in the form of a chart or other record that captures the content of the underlying “voluminous writings, recordings, or photographs that cannot conveniently be examined in court.” Rule 1006 does not expressly require a *written* summary, however, providing only that the proponent “may use a summary, chart, or calculation.” Occasionally, cases arise in which a proponent relies upon Rule 1006 in offering an *oral testimonial* summary. And sometimes testimonial summaries accompany the presentation of other written summary materials, such as charts or calculations.³² Although courts seem to accept the propriety of testimonial summaries under Rule 1006, application of the Rule 1006 requirements in that context seems to be a further source of confusion.

In *United States v. Lucas*, an agent orally summarized portions of the defendant’s twelve to thirteen-hour deposition testimony from a related civil proceeding during the defendant’s criminal fraud trial.³³ Although the Fifth Circuit found the particular testimonial summary inappropriate

of evidence,” we have warned, “care must be taken to omit argumentative matter in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes.”)

²⁹ 952 F.3d 954, 959 (8th Cir. 2020) (“Any assumptions or conclusions contained in a Rule 1006 summary must be based on evidence already in the record.” (citing *Green*, 428 F.3d 1131, 1134 (8th Cir. 2005)).

³⁰ 967 F.3d 1250, 1260 (11th Cir. 2020) (“Under [FRE 1006], ‘the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record.’” (citation omitted)).

³¹ Relatedly, there is some conflict in the federal courts concerning the foundation necessary for the introduction of a Rule 1006 summary. Some circuits mandate that a person involved in preparing the summary testify. *See, e.g., United States v. Fechner*, 952 F.3d 954, 959 (8th Cir. 2020) (“[Rule 1006 s]ummaries are properly admissible when . . . the witness who prepared it is subject to cross-examination with all documents used to prepare the summary.”); *United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018) (“[Rule 1006] charts are admissible when . . . the chart preparer is available for cross-examination.”); *United States v. Fahnbulleh*, 752 F.3d 470, 479 (D.C. Cir. 2014) (“[T]he witness who prepared the summary should introduce it.”); *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998) (“In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation.”). At least one circuit has rejected that premise in an unpublished opinion. *See United States v. Lynch*, 735 F. App’x 780, 786 (3d Cir. 2018) (stating that “Lynch argues that Rule 1006 requires that the summary preparer be made available to testify. Rule 1006 contains no such requirement” and allowing an FBI agent who did not participate in preparing a chart to lay its foundation with his testimony). A Committee note to an amendment might weigh in on this debate were the Committee to pursue an amendment to Rule 1006.

³² *See, e.g., United States v. Lebedev*, 932 F.3d 40, 49–50 (2d Cir. 2019); *S.E.C. v. Amazon Nat. Treasures, Inc.*, 132 F. App’x 701, 703 (9th Cir. 2005).

³³ 849 F.3d 638, 645 (5th Cir. 2017).

due to the government’s ability to present clips of the deposition, the court generally approved the use of testimonial summaries pursuant to Rule 1006, as follows:

Under our precedents, the rule allows the summarization of voluminous writings, recordings, or photographs *through testimony* if the case is sufficiently complex and the evidence being summarized is not “live testimony presented in court.” The summary testimony must be accompanied by a limiting jury instruction, and the underlying evidence must be admitted and available to the jury.³⁴

The court went on to acknowledge conflicting precedent as to whether the evidence relied upon for the testimonial summary must be presented to the jury or “merely admitted.”³⁵ The court concluded that summary evidence testimony is permissible when it is “based on evidence that is admitted and available, but not necessarily presented, to the jury.”³⁶ Thus, testimonial summaries under Rule 1006 may be treated differently than written summaries and may require that the underlying records be admitted into evidence. Of course, the Fifth Circuit is one that has confused the standards for admitting written summaries, which could account for the opaque standards surrounding testimonial summaries.

In *United States v. Fullwood*, the Fifth Circuit emphasized the danger and impropriety of allowing testimonial summaries under Rule 1006 that merely summarize and organize trial testimony, rather than voluminous writings and recordings:

While such witnesses may be appropriate for summarizing voluminous records, as contemplated by Rule 1006, rebuttal testimony by an advocate summarizing and organizing the case for the jury constitutes a very different phenomenon, not justified by the Federal Rules of Evidence or our precedent. For example, summary witnesses are not to be used as a substitute for, or a supplement to, closing argument.³⁷

Although the plain language of Rule 1006 appears to contemplate a testimonial summary, the appropriate use of a purely oral testimonial summary pursuant to Rule 1006 is ill-defined in the caselaw. Further, as noted by the Fifth Circuit above, reliance on Rule 1006 to permit a

³⁴ *Id.* (emphasis added).

³⁵ *Id.*

³⁶ *Id.* at n. 3; *see also United States v. Harms*, 442 F.3d 367, 376 (5th Cir. 2006) (“After reviewing the Government’s exhibits and Hager’s testimony, we believe the district court did not abuse its discretion in permitting Hager’s summary testimony. The evidence at issue presented an appreciable degree of complexity and the district court gave a limiting instruction to the jury.”); *United States v. Okoronkwo*, 46 F.3d 426, 435 (5th Cir.1995) (use of summary witness not reversible error where merely cumulative of substantive evidence); *United States v. Winn*, 948 F.2d 145, 157–58 (5th Cir.1991) (use of summary chart and testimony not reversible error where prejudice neutralized by instruction).

³⁷ 342 F.3d 409, 414 (5th Cir. 2003). Federal courts have sometimes disapproved testimony by “overview witnesses” in criminal cases describing criminal conduct, and a defendant’s role in it, without first-hand knowledge of underlying events. These courts have held that such overview testimony is impermissible lay opinion testimony pursuant to Rule 701 because it is not rationally based upon the witness’s perception and does not help the jury. *See, e.g., United States v. Meises*, 645 F.3d 5 (1st Cir 2010) (overview testimony by law enforcement agent describing defendants’ roles in drug conspiracy was impermissible lay opinion testimony not rationally based upon agent’s personal perception). Any amendment to Rule 1006 retaining a role for a testimonial “summary” would have to comport with this line of cases as well.

“summary witness” may be fraught with peril and an inappropriate application of the Rule if the witness seeks to summarize and effectively argue the proponent’s case based upon the admitted evidence. If the Committee were inclined to amend Rule 1006 to address the other trouble areas identified above, an amendment clarifying the appropriate use, if any, of oral testimonial summaries could be considered.³⁸ Extensive additional research into the appropriate use of a summary witness under Rule 1006 could be done if the Committee were inclined to pursue this issue. For this reason, the preliminary amendment possibility outlined below does not include a change to address the use of testimonial summaries.

V. *Amendment Alternatives for Rule 1006*

The most common misunderstandings regarding the evidential status of a Rule 1006 summary and the treatment of the underlying voluminous records could be dealt with in modest amendments to Rule 1006 accompanied by an explanatory Advisory Committee’s note, as follows:

RULE 1006. SUMMARIES TO PROVE CONTENT

The proponent may offer as evidence ~~use an~~ accurate summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court or introduced into evidence. 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.³⁹

Adding “offer as evidence” language to Rule 1006 could clarify the status of a proper Rule 1006 summary as “substantive evidence.” Such an amendment would address recent cases in the Sixth and Second Circuits requiring courts to instruct the jury that Rule 1006 summaries are not evidence. Adding the modifier “accurate” to the Rule could address the law in the Fifth, Eighth, and Eleventh Circuits approving Rule 1006 summaries that include baked-in assumptions and/or conclusions not reflected in the underlying records. An Advisory Committee note could emphasize the proponent’s burden of demonstrating that the summary accurately reflects the underlying materials without adding argument or inference. Adding the “or introduced into

³⁸ One option would be to limit Rule 1006 to “written or recorded” summaries if the Committee were inclined to eliminate the risks associated with ill-defined oral testimonial summaries.

³⁹ One additional issue the Committee could consider were it to proceed with an amendment to Rule 1006 would be updating the “in court” language in the Rule. Some federal courts have authorized virtual trials pursuant to their Rule 611(a) authority during the pandemic. *See, e.g. In re RFC and ResCap Liquidating Trust Action*, 444 F. Supp.3d 967 (D. Minn. 2020) (finding that global pandemic created good cause for remote testimony in ongoing civil trial and that the court’s discretion to order remote testimony is supplemented by its “wide latitude” in determining the manner in which evidence is presented under Rule 611(a)). Although trial courts conducting a virtual trial could navigate a virtual “production” of underlying materials pursuant to Rule 1006, “in court” has a certain locational connotation that could cause some confusion. Although there is no indication of confusion in any existing federal cases, the Committee might consider a change of terminology if other amendments to Rule 1006 were proposed. Employing language, such as “during court proceedings” or “in court, or otherwise as the court directs” could head off any future issues related to virtual presentation.

evidence” language could signal in rule text that the underlying voluminous records themselves need not be introduced into evidence and that a Rule 1006 summary may be used as proof without admission of the underlying records. Retaining the “cannot be conveniently examined in court” language as an alternative could help clarify that a Rule 1006 summary may be used even when the underlying records are “in evidence” if they cannot be conveniently examined and reviewed at trial. An Advisory Committee’s note could elaborate on these purposes for the textual changes.

TAB 9

TAB 9A

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Possible Amendment to 801(d)(2) for Statements Made by a Predecessor in Interest
Date: April 1, 2021

Attached to this memo is a law review note highlighting a circuit split on the admissibility of hearsay statements made by a decedent in actions brought by the decedent's estate. The question addressed is whether a statement made by the decedent, that would be admissible against the decedent as a party-opponent statement had he lived, remains admissible against the estate when he dies.

The note gives a personal injury action as an example. Here is another example: Jim is arrested by Officers Smith and Peters. Jim alleges that he was beaten by the officers after he was placed under arrest. Jim brings a section 1983 action against both officers. Officer Smith seeks to admit a statement that Jim made to his mom while he was in the hospital --- the statement was, "Officer Smith had nothing to do with my injury." Jim objects that it is hearsay. That objection is overruled, because the statement is admissible against Jim as a party-opponent statement, under Rule 801(d)(2)(A). But if Jim has died by the time of trial --- and it is irrelevant whether or not the death is related to the injury --- some courts would find that Jim's hearsay statement is not admissible against Jim's estate. Other courts disagree and find the statement admissible against the estate.

The Advisory Committee has often acted to propose an amendment to rectify circuit splits. The rationale is obvious --- the whole idea of having the Federal Rules of Evidence was to promote uniformity of result throughout the federal courts. While of course it is not realistic to think that there will be no variances among federal courts in applying the Evidence Rules, when a circuit split does arise, the Advisory Committee has often moved to resolve it.¹

¹ Examples include the 2006 amendments to Rule 408, rectifying three separate circuit splits concerning the application of that rule; the current proposal to amend Rule 106; and the 2010 amendment to Rule 804(b)(3), which resolved a conflict over whether the government was required to provide corroborating circumstances when offering a declaration against penal interest.

Presumably the Committee would not act to resolve a conflict if there was a likelihood that the Supreme Court would do so. But the Supreme Court has only taken a handful of cases on the proper interpretation of the

This memorandum is divided into three parts. Part One discusses the conflicting case law on whether a party-opponent statement is admissible against a successor-in-interest of the party who made it. Part Two briefly evaluates the arguments in favor of and against admitting the decedent's statement against the estate, and concludes, as does the note, that the statements should be admissible if they would have been admissible against the predecessor-in-interest. Part Three sets forth a draft amendment that would provide for admissibility of a hearsay statement against the declarant's successor in interest under Rule 801(d)(2).²

A final introductory point: the attached note concerns the particular fact situation of a decedent's statement offered against an estate. But that question of admissibility is potentially applicable to other contexts --- for example, a hearsay statement of an assignor of a claim offered against an assignee; or a statement attributable to a corporation, offered against the receiver. This memo concludes that if the rule is to be amended, it should apply to any situation in which a predecessor in interest's statement is offered under Rule 801(d)(2) against the successor in interest.

I. The Division in the Case Law on the Admissibility of a Decedent's Hearsay Statements Against the Estate

Rule 801(d)(2) provides that a hearsay statement is admissible over a hearsay objection if the statement is "offered against an opposing party." Where the statement has been made by a decedent and offered against the estate, the text of the rule does not clearly mandate the statement's admissibility. The statement was not really made by "the opposing party" because the party is technically the estate.

This vague wording has led several courts to hold that a decedent's hearsay statements cannot be admitted against the estate under Rule 801(d)(2)(A). The leading case rejecting admissibility, as discussed in detail in the note, is *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979). Courts following the *Huff* view reason that if the decedent's statement is to bind the estate, that can only be because the estate and the decedent are in "privity" --- specifically that the estate is a successor-in-interest to the decedent. And these courts reason that Rule 801(d)(2) does not, by its terms, cover statements asserted to be admissible on grounds of privity/successor-in-interest. These courts observe that the common law did provide for admissibility of privity-based admissions, and they posit that by not specifically including them within the text of Rule 801(d)(2), the Advisory Committee was deciding to reject this common-law ground of admissibility.

Assuming all this is true, the result in *Huff* is completely based on rules construction --- which is not a bad thing, but which clearly doesn't control the result if the rule is amended. Put another way, the court in *Huff* is right that Rule 801(d)(2) is ambiguous about whether the

Federal Rules of Evidence. And it is extremely unlikely that it would seek to resolve whether a decedent's hearsay statements are admissible against the estate under Rule 801(d)(2).

² This memo will be brief. A more complete discussion of most of the issues raised will be found in the attached law review note. And further development and research on the issues in this memo will be undertaken if the Committee decides to proceed further in developing an amendment.

common-law successor in interest rule is maintained. (And as the note observes, the Advisory Committee Note is ambiguous as well.) But all that means is that the solution would be to amend the rule to resolve the ambiguity.

The only real policy argument for the *Huff* position is that there is a risk that a witness relating the decedent's statement may misstate it --- or create it out of whole cloth --- and the decedent by definition is not around to challenge the witness's account. But that concern applies to the hearsay statements of *any* dead witness, which are admitted if they fit under some other hearsay exception --- like a dying declaration, or a state of mind statement of a deceased victim. There is no reason to single out decedent's statements under Rule 801(d)(2) for any different treatment. In all cases of hearsay of unavailable declarants, the concern about the *witness's* account is handled by the fact that the witness to the statement is testifying under oath and subject to cross-examination --- which is designed to elicit any suspect motivations of the witness. In essence the risk of in-court witnesses lying about hearsay statements is not a hearsay problem --- as was recognized by this Committee in the Committee Note to the 2019 amendment to Rule 807:

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.³

Cases on the other side essentially consider the decedent to be a "party" within the meaning of Rule 801(d)(2) --- they take what the note refers to as a "functional approach" to the term "party." See, e.g., *Estate of Shafer v. Comm'r*, 749 F.2d 1216, 1219–20 (6th Cir. 1984) ("a decedent, through his estate, is a party to [an] action" and the decedent's statements "are a classic example of an admission"). As a matter of rule interpretation, the *Shafer* court reasoned that decedents were considered parties under common law, and "[s]ince the purpose of Rule 801(d)(2) is to increase the admissibility of representative admissions, see Fed.R.Evid. 801(d)(2) advisory committee note (calling for 'generous treatment of this avenue to admissibility'), a decedent should be considered a 'party' within the Rule." Accord 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 801(d)(2)(A)[01].

Like the *Huff* approach, the "functional approach" is a form of rule interpretation for a rule that is ambiguous. Both sides of the divide provide plausible accounts of the text and its background. If the rule is changed to be more specific --- i.e., that a predecessor's hearsay statement is admissible against the successor --- then the conflict will be resolved.

³ In any event, the concern about witness untrustworthiness is not applicable to written or recorded statements of the declarant. And presumably the *Huff* rule prohibits admission of the decedent's written and recorded statements as well.

II. Policy Arguments

The question, then, is which position is better grounded in policy. As stated above, the only policy justification for the *Huff* limitation on Rule 801(d)(2) is the misguided one of a risk of witnesses lying about the statement.⁴ In contrast, a rule providing that statements of a decedent are admissible against the estate is supported by solid policy grounds:

1. The decedent is essentially the real party in interest. It is the decedent's actions that are relevant to the matter, not the estate's. It blinks reality to say that the decedent is somehow not sufficiently involved in the matter to have his own relevant statements admitted under Rule 801(d)(2). Successors in interest are bound by judgments against the decedent predecessor in interest under the doctrines of claim and issue preclusion. So it makes little sense to *bind* the estate to things the decedent has done, yet prohibit mere admission of his statements.

2. The rationale for admitting party-opponent statements is that it is consistent with the adversary system: you can't complain about statements you made that are now being offered against you. That adversarial interest is also applicable when the estate has been substituted for the decedent. The estate should not be able to complain about statements offered against it that are made by the very person whose injuries (or defense) the estate is proving at trial.

3. Another take on the rationale of party-opponent statements is this: the hearsay rule is intended to protect parties from unreliable declarants whom the party does not control --- as Sir Walter Raleigh put it, the declarant might be some "Wild Jesuit who should not be allowed to speak against me" without being produced for cross-examination. But with party-opponent statements, there is no uncontrollable wild Jesuit. And it is absurd to argue that "my statement should not be admitted against me because it is unreliable." Likewise, in the estate-decedent situation, the estate can hardly claim that the decedent is some kind of unreliable individual, when the estate is standing in the shoes of the decedent and pressing the decedent's claim or defense. It is inconsistent and unfair for an estate to argue that the decedent's statement is unreliable hearsay when it is pursuing the claim or defense of that same decedent.

4. The contrary rule, that a statement of a deceased is not admissible against the estate, gives rise to arbitrary and random application. Take two cases involving allegations of police brutality, both happening on the same day, both tried on the same day, and the victim in each case made a statement that his injuries weren't very severe. Victim 1 is alive at the time of trial --- so his statement is easily admitted against him under Rule 801(d)(2)(A). But assume Victim 2 is run over by a car and killed a month before trial.

⁴ The note addresses a second policy argument: it is not necessary to treat decedent statements as party-opponent statements because they can be admitted as declarations against interest or under the residual exception. But as the note shows, admission of a decedent's statements under those exceptions is anything but a sure bet. And it makes no sense to require the opponent expend the resources and argument to try to satisfy the detailed requirements of those exceptions, because the statement should be admissible simply because the decedent made it.

Under the *Huff* rule, Victim 2's statement, identical in all respects to that of Victim 1, is inadmissible hearsay. This makes no sense.

5. The *Huff* view would logically apply to all situations in which an injured person has their interests represented by someone or something else. So actions brought by a trustee, or a receiver, or an assignee of the injured person's claim are potentially also granted an unreasoned protection against admissibility of the declarant's hearsay statement.

For the above reasons, if the Committee decides that the conflict in the courts about the admissibility of decedents' statement under Rule 801(d)(2) is to be resolved by an amendment, then that amendment should state clearly that if hearsay statements are admissible against a declarant as party-opponent statements, they are equally admissible against a successor in interest.

III. Draft Amendment

It turns out that it is tricky to draft an amendment to provide for admissibility of a decedent's statements against the estate. Surely you don't want to add a clause such as "including statements by a decedent when offered against the decedent's estate." The language has to be more general than that --- especially since the goal would be to cover any situation in which a statement is offered against a successor in interest on the ground that it would have been admissible against the predecessor. If the amendment treats only the deceased-estate situation, it is highly probable that cases involving assignees and receivers will arise; and the argument will be: "the statement is not admissible because the amendment dealt only with decedents and estates, thus indicating an intent to reject admissibility in any other predecessor-successor situation."

So here is a try:

- (2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:
 - (A) was made by the party in an individual or representative capacity;
 - (B) is one the party manifested that it adopted or believed to be true;
 - (C) was made by a person whom the party authorized to make a statement on the subject;
 - (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party’s coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E). A statement that would be admissible under this rule if the declarant were a party is admissible when offered against the declarant’s successor-in-interest.

Reporter’s Notes:

1. The Black’s Law definition of predecessor-in-interest is “a person or entity who has succeeded to rights or interests previously held by another.” That seems to fit the situation here.

2. Why is the amendment placed at the end of the rule? Why not put it in Rule 801(d)(2)(A)? Because there is a possibility that the statement offered against the successor might not have been made by the predecessor himself, but rather was adopted by the predecessor, or made by the predecessor’s agents. If the predecessor’s own statements are admissible against the successor, it would be crazy to have other Rule 801(d)(2) statements *not* admissible against the successor.

3. Stylists hate hanging paragraphs, and this fix acerbates their problem because it is essentially two different provisions in the same hanging paragraph. But they would have a heart attack if there were two *separate* hanging paragraphs in the same rule. It is possible that the rule could be completely reconfigured, with multiple subparts. But Rule 801(d)(2) is a frequently used rule, and everyone knows how it is structured. Changing the structure raises significant transaction costs that are probably not justified by the narrow scope of the amendment.

At any rate, should the Committee be interested in pursuing an amendment under Rule 801(d)(2), the stylists will get a crack at it, and they often come up with good solutions to difficult drafting problems.

Draft Committee Note

The rule has been amended to clarify that if a party to a litigation is a successor in interest to a person or entity, then any statement that could have been admitted against the predecessor under Rule 801(d)(2) is equally admissible against the successor. For example, if an estate is bringing a claim for damages suffered by the decedent, any statement that would have been admitted against the decedent under this rule is equally admissible against the estate. The common law provided for admission of party-opponent statements against successors in interest, but some courts have found that Rule 801(d)(2) did not incorporate the “privity” principles of the common law rule. The common law rule is justified because the successor’s only interest is through the predecessor, and so the successor should not be placed in a better position as to the admissibility of hearsay. The successor is subject to all the substantive limitations applicable to the predecessor; the same should go for the evidence rules.

TAB 9B

THE TALKING DEAD: SHOULD DECEDENTS’ STATEMENTS FALL UNDER RULE 801(D)(2)(A)?

MATTHEW W. TIEMAN*

There is a circuit split as to whether a decedent’s statements can be entered into evidence under the exclusion from hearsay provided for party-opponent statements under Federal Rule of Evidence 801(d)(2)(A). The courts disagree as to the best characterization of decedents’ statements—whether they should be understood as privity-based admissions that, while admissible under the common law, are no longer admissible under the Federal Rules of Evidence, or if the decedent should be considered a party to the litigation, in which case the statements are admissible under Rule 801(d)(2)(A). This Note first discusses the circuit split by explaining the concept of privity-based admissions, conducting a statutory interpretation of the Federal Rules to determine if the enactment of the rules abrogated the common law admissibility of privity-based admissions, and analyzing whether it is appropriate for a decedent to be considered a party to the litigation. The Note then discusses policy reasons for a rule favoring exclusion—namely, the concerns about perjury and ensuring equitable treatment of the estate that gave rise to states’ Dead Man’s acts, and the fact that there may be other rules under which to admit the evidence. The Note concludes that a rule favoring admissibility is preferable because the claims would not be in front of the court but for the decedent, and a rule favoring admissibility will lead to more consistent outcomes.

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INTRODUCTION

A woman is driving a commercial truck down a winding road. Something goes wrong, and the truck jackknifes and catches fire. The woman survives the accident, but she is severely burned. Nine days later she dies in the hospital from the injuries she sustained in the accident. The woman's widowed husband is convinced that the fire that caused his wife's death was the result of a defect in the truck's design, so as administrator of his wife's estate, he brings a wrongful death product liability lawsuit against the truck's manufacturer on her behalf.

During the trial, the defendant manufacturing company calls the decedent's brother and wants to introduce into evidence a conversation he and his sister had during the decedent's stay in the hospital. During that conversation, the decedent purportedly told her brother that prior to the accident, her clothing had somehow caught fire, and in her effort to put it out, she lost control of her truck. The widowed husband's attorney objects to the testimony as hearsay, and the defendant truck manufacturer rebuts this objection by calling the court's attention to Federal Rule of Evidence 801(d)(2)(A), which says that statements made by a party opponent that are offered against that opposing party are not hearsay.¹ It is quite likely—for the sake of argument, let us presume it is dispositive—that if this evidence is admitted, the defendant will not be found liable, but if it is excluded, the defendant will be found liable. This issue presents two interrelated questions: Is the decedent a party to this action? Should the court allow the evidence under 801(d)(2)(A)?²

¹ FED. R. EVID. 801(d)(2)(A).

² The facts of this hypothetical are representative of *Huff v. White Motor Corp.*, 609 F.2d 286, 289–91 (7th Cir. 1979). In *Huff*, “[t]he district court excluded this testimony as

The Federal Rules of Evidence are a complex set of statutory rules.³ These rules can be difficult to understand, and none more so than the definition of hearsay and the exceptions to the prohibition of admitting hearsay into evidence.⁴ Parties must determine if the subject matter being discussed is in fact hearsay as defined by the rules, and potentially how many levels of hearsay are involved—such that every level either is not hearsay or meets an exception to the hearsay prohibition.⁵ This analysis can get confusing even when the facts and procedural circumstances are relatively straightforward; adding unusual facts and procedural postures can make the correct application of the rules seemingly opaque. Given the standard by which trial-level evidentiary decisions are reviewed on appeal, it makes little sense for potential appellants to challenge the trial-level rulings unless changes to these rulings would be dispositive on the trial's outcome.⁶ This pro-

hearsay, rejecting defendant's argument that Huff's statement was an admission under Rule 801(d)(2) or admissible under the residual exception, Rules 803(24) and 804(b)(5).” *Id.* at 290. The Seventh Circuit agreed with the district court that the testimony was inadmissible under Rule 801(d)(2). *Id.* at 290–91. But the court found that the testimony should have been allowed under the residual exception—currently styled Rule 807—subject to a determination by the trial court on remand that the decedent “possessed the requisite mental capacity” when the statements were made. *Id.* at 294.

³ The Federal Rules of Evidence were first enacted on January 2, 1975. An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. at 347–434 (2012)). Prior to this act of Congress, the evidentiary rules were governed by common law. *See Huff*, 609 F.2d at 290 (recognizing that the Federal Rules of Evidence were controlling and altered the former common law evidentiary rules).

⁴ *See* Richard A. Posner, *On Hearsay*, 84 *FORDHAM L. REV.* 1465, 1467 (2016) (“The hearsay rule, with its multitude of exceptions, is too complex.”); *CLE Mastering Hearsay and Hearsay Exceptions*, HARTFORD CTY. BAR ASS'N, http://hartfordbar.org/th_event/cle-mastering-hearsay-and-hearsay-exceptions/ (last visited Sept. 29, 2018) (“The rule against hearsay seems simple enough, but is confusing to understand and is difficult to apply, not to mention peppered with exceptions.”).

⁵ *See* FED. R. EVID. 805 (“Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.”); *Estate of Shafer v. Comm’r*, 749 F.2d 1216, 1220 (6th Cir. 1984) (“In order to be admissible, both levels of [hearsay] statements within the affidavits must be excluded from the hearsay definition.”).

⁶ On appeal, evidentiary rulings are generally subject to an abuse of discretion review standard. *See* *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (“We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings.”). *But see* Matthew J. Peterson, *Discretion Abused: Reinterpreting the Appellate Standard of Review for Hearsay*, 6 *CHARLOTTE L. REV.* 145, 146–47 (2015) (discussing that there is a circuit split between reviewing hearsay objections under the abuse of discretion or reviewing these objections de novo). The abuse of discretion standard is highly deferential. *See* *Joiner*, 522 U.S. at 142 (“[C]ases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.” (quoting *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879))). Even if an appellant can overcome this standard of review, the court then conducts a harmless error review. *See* *United States v. Owens*, 789

cedural hurdle, likely leading to the strategic decision not to contest evidentiary rulings that are not dispositive, presumably leads to relatively fewer appellate decisions analyzing the correct application of these rules. Practitioners and trial-level judges alike are often left with little guidance and clarification. And given both the lack of clarity and the infrequency of evidentiary appeals, there is bound to be split authority in the exceptional, “gray-area” cases.

Such is the case with whether decedents can be considered party-opponents for purposes of Federal Rule of Evidence 801(d)(2)(A).⁷ Given the unique circumstances that must present themselves for this question to be at issue in the first instance, it is of little surprise that there is quite scant case law addressing this particular issue.⁸ The limited number of written opinions that have addressed the subject of decedent statements in contexts where the claim has been brought by the estate—either as wrongful death claims⁹ or other claims related to the settlement of the decedent’s estate¹⁰—have split as to whether the decedent is properly characterized as being in privity with the named party (the estate), or whether the decedent is a party in interest.¹¹ This split leads to the courts either analyzing the statements as privity-based admissions—based on a technical (or formalistic) approach as to who is considered a party—and therefore not admissible under

F.2d 750, 757 (9th Cir. 1986) (ruling that testimony was erroneously admitted under a hearsay exception, but then finding that the error was harmless), *rev’d*, 484 U.S. 554 (1988). Given the difficulty appellants face in having trial-level evidentiary rulings overturned based on this bifurcated review process, little is gained from challenging the trial-level rulings unless overturning the evidentiary ruling would be dispositive to the case’s outcome.

⁷ See *Ervine v. Desert View Reg’l Med. Ctr. Holdings LLC*, No. 2:10-CV-1494 JCM, 2011 WL 6139532, at *3–4 (D. Nev. Dec. 8, 2011) (recognizing the split authority on whether a decedent is a party for purposes of Rule 801(d)(2)(A) when an action is brought by the decedent’s estate on behalf of the decedent), *vacated in part, rev’d in part*, 753 F.3d 862 (9th Cir. 2014).

⁸ See 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 7019 (Interim ed. 2011) (finding only four circuit court and two district court decisions that dealt with the decedent as a potential party).

⁹ See *Phillips v. Grady Cty. Bd. of Cty. Comm’rs*, 92 F. App’x 692 (10th Cir. 2004) (wrongful death claim); *Huff v. White Motor Corp.*, 609 F.2d 286, 289 (7th Cir. 1979) (same); *Ponzini v. Monroe Cty.*, No. 3:11-CV-00413, slip op. at 6–7 (M.D. Pa. Aug. 24, 2016) (same); *In re Cornfield*, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004) (same), *aff’d*, 156 F. App’x 343 (2d Cir. 2005); *Schroeder v. de Bertolo*, 942 F. Supp. 72 (D.P.R. 1996) (same).

¹⁰ See *Estate of Shafer*, 749 F.2d 1216 (deciding an evidentiary issue related to the estate tax owed by the beneficiaries of the decedent’s estate).

¹¹ Compare *Huff*, 609 F.2d at 290–91 (discussing the decedent’s statements under the theory of privity-based admissions and declining to allow them under Rule 801(d)(2)(A)), *Ponzini*, slip op. at 6–7 (same), and *In re Cornfield*, 365 F. Supp. 2d at 277 (same), with *Phillips*, 92 F. App’x at 696 (stating that the decedent was a party through her estate), *Estate of Shafer*, 749 F.2d at 1220 (same), and *Schroeder*, 942 F. Supp. at 78 (same).

Rule 801(d)(2)(A),¹² or as having been made by a party to the case—based on a more contextual (or functional) approach to who is considered a party—and therefore admissible as a party-opponent statement.¹³

This Note argues that because the claims under which this issue arises flow from the decedent's rights and because of the need to ensure consistency in verdicts, the statements of a decedent who was either a party when the action was instituted or would be the proper party if alive should be admitted under Rule 801(d)(2)(A). This Note proceeds in three parts. Part I discusses the differing rationales that have created the circuit split: Are the decedent's statements privity-based admissions or is the decedent a party? In assessing this split, Part I discusses the nature of privity-based admissions, their admissibility at common law, and their admissibility under Federal Rule of Evidence 801(d)(2)(A). Part I also discusses the functional versus formalistic approach the courts have taken when assessing whether the decedent is a party. Part II addresses policy arguments against allowing decedent statements to be admitted as party-opponent statements. First, Section II.A examines state-law Dead Man's acts and the motivating policy concerns. Then, Section II.B assesses other ways in which these statements could be introduced: as Rule 804(b)(3) statements against interest¹⁴ or under the Rule 807 residual exception.¹⁵ Finally, Part III discusses the arguments for admitting a decedent's statements under Rule 801(d)(2)(A)—namely, that the claim is the decedent's chose in action¹⁶ and allowing the statements will result in more consistent, predictable outcomes—and asserts that these reasons favor a rule of admissibility.

I

THE SPLIT AUTHORITY: PRIVACY OR PARTY

The distinguishing feature between courts' analyses as to whether the decedent's statements should be admitted as party-opponent statements boils down to whether the court characterizes the decedent as a party to the litigation or considers the decedent's statements to be

¹² *Huff*, 609 F.2d at 290–91 (discussing the decedent's statements under the theory of privity-based admissions and declining to allow them under Rule 801(d)(2)(A)); *Ponzini*, slip op. at 6–7 (same); *In re Cornfield*, 365 F. Supp. 2d at 277 (same).

¹³ *Phillips*, 92 F. App'x at 696 (stating that the decedent was a party through her estate); *Estate of Shafer*, 749 F.2d at 1220 (same); *Schroeder*, 942 F. Supp. at 78 (same).

¹⁴ See FED. R. EVID. 804(b)(3).

¹⁵ See FED. R. EVID. 807.

¹⁶ A chose in action, in this case, is defined as a "proprietary right in personam, such as . . . a claim for damages in tort." *Chose in Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

privity-based admissions made by a predecessor in interest.¹⁷ Privity-based admissions are statements that, while made by a nonparty to the litigation, are held to be admissions made by a party to the litigation.¹⁸ For example, in *Huff v. White Motor Corp.*, the defendants argued that statements made by the decedent, Mr. Jesse Huff, to the plaintiff's cousin's husband, Mr. Melvin Myles, were privity-based admissions, and, therefore, admissible against the plaintiff, Mrs. Helen Huff, as party-opponent admissions.¹⁹ The court rejected this argument,²⁰ initiating the distinction that has driven this circuit split. But why did the defendant argue these statements as privity-based admissions instead of arguing that Mr. Huff should really have been considered a party? And why does this distinction matter? To understand the answers to these questions, one must first look at how privity-based admissions were treated under the common law rules of evidence and then look at how the enactment of the Federal Rules of Evidence affected that common law treatment.

A. Privity-Based Admissions at Common Law

Privity is “[t]he connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property).”²¹ This “mutuality of interest”²² typically arises in a number of legal contexts, such as contracts, estates beneficiaries, property, and commercial transactions.²³ In the cases that have declined to allow a decedent's statements under Rule 801(d)(2)(A), the privity is said to exist between the decedent and the estate, as the estate is the successor in interest²⁴ of the decedent's claim.²⁵

¹⁷ See *supra* note 11.

¹⁸ CHARLES TILFORD McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 268 (2d ed. 1972).

¹⁹ 609 F.2d 286, 290 (7th Cir. 1979). For purposes of clarification, the Federal Rules of Evidence originally styled “[a]n opposing party's statements” as “[a]dmissions by [a] party-opponent.” See *infra* note 26.

²⁰ *Huff*, 609 F.2d at 291.

²¹ *Privity*, BLACK'S LAW DICTIONARY, *supra* note 16.

²² *Id.*

²³ The various sub definitions in Black's Law Dictionary illustrate the various legal contexts in which privity usually arises. *Id.*

²⁴ *Successor in Interest*, BLACK'S LAW DICTIONARY, *supra* note 16 (“Someone who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance.”).

²⁵ See *Huff*, 609 F.2d at 290–91 (discussing the issue of privity between the decedent and his estate); *In re Cornfield*, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004) (same), *aff'd*, 156 F. App'x 343 (2d Cir. 2005).

Originally, the Federal Rules of Evidence styled “[a]n opposing party’s statements” as “[a]dmissions by [a] party-opponent.”²⁶ The idea that admissions could be used against a party had a long history in common law. In his famous treatise on the common law rules of evidence, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, John Henry Wigmore explained that admissions “pass[ed] the gauntlet of the Hearsay rule.”²⁷ Wigmore further explained that such admissions were not covered by the rule against hearsay because of the adversarial nature of the process:

[T]he party’s testimonial utterances . . . pass the [Hearsay] gauntlet when they are offered *against* him as opponent, because he himself is in that case the only one to invoke the Hearsay rule and because he *does not need to cross-examine himself*. . . . [T]he Hearsay rule is satisfied; . . . he now as opponent has the full opportunity to put himself on the stand and explain his former assertion. The Hearsay rule, therefore, is not a ground of objection when an opponent’s assertions are offered *against* him; in such case, his assertions are termed Admissions.²⁸

Even though a decedent does not have the opportunity to take the stand, prior to the enactment of the Federal Rules of Evidence, as noted by the *Huff* court, privity-based admissions were also generally admissible under the common law rules of evidence.²⁹ This common law rule was also explained in Wigmore’s treatise.³⁰ In his treatise, Wigmore cited excerpts from three court opinions in which “both

²⁶ Compare An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926, 1939 (1975) (codified as amended at 28 U.S.C. app. at 347-434 (2012) (titled Rule 801(d)(2) “Admission by party-opponent”), with FED. R. EVID. 801(d)(2) (“An Opposing Party’s Statement”), and FED. R. EVID. 801 advisory committee’s note to 2011 amendments (“Statements falling under the hearsay exclusion . . . are no longer referred to as ‘admissions’ The term ‘admissions’ is confusing because not all statements covered by the exclusion are admissions in the colloquial sense No change in application of the exclusion is intended.”).

²⁷ 2 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1048, at 505 (2d ed. 1923). John Henry Wigmore was the preeminent expert in the law of evidence prior to the adoption of the Federal Rules of Evidence. His treatise, also commonly known as *Wigmore on Evidence*, is still cited today.

²⁸ *Id.*; see also Edmund M. Morgan, *Admissions*, 12 WASH. L. REV. & ST. B.J. 181, 182 (1937) (conceding that admissions are receivable and “can be explained only as a corollary of our adversary system of litigation”).

²⁹ See *Huff*, 609 F.2d at 290 (“At common law, privity-based admissions have been ‘generally accepted by the courts’” (quoting McCORMICK, *supra* note 18, at 647)); see also *Savarese v. Agriss*, 883 F.2d 1194, 1200-01 (3d Cir. 1989) (rejecting defendants’ argument “that since Bogen is now deceased, the admission into evidence of his statements is not justified as it cannot be accomplished within an ‘adversary’ context” (quoting FED. R. EVID. 801(d)(2) advisory committee’s note on proposed rules)).

³⁰ WIGMORE, *supra* note 27, § 1080, at 594-95.

[the] principle and policy [of admitting statements based on privity of title] are lucidly expounded from various points of view.”³¹ The third excerpt mentions the possibility of admitting a decedent’s statements:

[The owner’s] estate or interest in the same property, afterwards coming to another, . . . by any kind of transfer, whether it be the act of law or the act of the parties, whether the subject of the transfer be . . . choses in possession or *choses in action*, the successor is said to claim under the former owner; and whatever he may have said affecting his own rights, before departing with his interest, is evidence equally admissible against his successor [I]t makes no difference whether the declarant be alive or dead; . . . his admissions are receivable. This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived; . . . [T]he law will not allow third persons to be deprived of that evidence by any act of transferring the right to another.³²

As Wigmore made clear through choosing to cite this passage, the policy of admitting privity-based admissions was to ensure that parties could not escape the statements made by a predecessor in interest simply by transferring ownership of property, including choses in action. Finally, Wigmore went on to discuss decedents specifically, stating, “No modern Court doubts that a decedent, whose rights are transmitted intact to his successor, is a person whose admissions are receivable against a party claiming the decedent’s rights as heir, executor, or administrator.”³³ Thus, prior to the Federal Rules of Evidence, the distinction between statements made by a party opponent and privity-based admissions was irrelevant: both types of statements were admissions that satisfied exceptions to the rules against hearsay.³⁴

³¹ *Id.* at 594.

³² *Id.* at 595 (emphasis added) (quoting ESEK COWEN & NICHOLAS HILL, JR., NOTES TO PHILLIPPS’ TREATISE ON THE LAW OF EVIDENCE 644–45 n.481 (Gould, Banks & Co. 2d ed. 1843)). *But see* Morgan, *supra* note 28, at 196–200 (criticizing Wigmore’s justification of vicarious admissions based on privity of title).

³³ WIGMORE, *supra* note 27, § 1081, at 598 (emphasis omitted). *But see id.* (discussing that a statutory wrongful death action is “of an anomalous nature; in some features it is an action for a surviving claim of the deceased, while in others it is an action for an injury to the dependent relatives; there is therefore some ground for holding that the deceased’s admissions are not receivable”). The *Huff* court refused to base the party-opponent statement admissibility decision on the fact that state law may dictate whether a wrongful death claim may either be derivative—essentially, a claim flowing through the deceased—or not derivative and thus held by the surviving family members. *See Huff*, 609 F.2d at 290 (“We agree with McCormick that [whether or not the action is derivative] should not be controlling, and that the exclusion by ‘some courts’ of statements of the deceased in wrongful death cases because the action is not ‘derivative’ is based on ‘a hypertechnical concept of privity.’” (quoting McCORMICK, *supra* note 18, at 648 n.51)).

³⁴ The historical admissibility of privity-based admissions at common law likely drove the defense’s decision to argue that Mr. Huff’s statements to Mr. Myles were admissible

But then in the 1960s, the federal courts decided to establish a standard set of rules to govern evidentiary decisions in federal courts, culminating in the enactment of the Federal Rules of Evidence in 1975.³⁵ With the passage of the Federal Rules of Evidence, the common law rules of evidence were replaced with statutory rules that governed district court decision making.³⁶ And at that point, the importance of the distinction between party-opponent statements and privity-based admissions emerged. This distinction raises two questions: Is the decedent a party, and if not, are privity-based admissions covered by Rule 801(d)(2)(A)? The answers to both questions depend on whether courts take a strict, technical, and textual approach, or whether courts look at the practical effects of interpreting the statutory rules.

B. Are Privity-Based Admissions Allowed Under the Federal Rules of Evidence?

We start by analyzing whether privity-based admissions are covered by Rule 801(d)(2)(A), because if they are, the distinction between the decedent being considered a party and the decedent's statements being characterized as privity-based admissions is of little practical consequence. This determination requires a statutory interpretation of Rule 801(d)(2)(A), which involves analyzing the plain meaning of the text, the language used in other parts of the Federal Rules of Evidence, and the advisory committee's notes to Rule 801 to glean their intent when writing the rule, as well as Congress's understanding of the rule's meaning at the time of enactment.

Rule 801, which provides definitions that apply to the rest of Article VIII, also sets forth statements excluded from the prohibition against hearsay.³⁷ Rule 801(d)(2) lists two main subheadings of statements that are not considered hearsay: "(1) A Declarant-Witness's

under Rule 801(d)(2)(A) under this theory instead of arguing that Mr. Huff himself should be considered a party to the action.

³⁵ Josh Camson, *The Federal Rules of Evidence: Half a Century in the Making*, PROOF: A.B.A. SEC. LITIG., Spring 2010, at 1, 1.

³⁶ See An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. at 347-434 (2012)) ("[The Federal Rules of Evidence] apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice . . .").

³⁷ See FED. R. EVID. 801 (defining the terms statement, declarant, and hearsay in subsection (a)-(c) and providing a list of types of statements that are excluded from being considered hearsay).

Prior Statement”³⁸ and “(2) An Opposing Party’s Statement.”³⁹ Rule 801(d)(2) in turn lists five categories of opposing party statements:

(2) *An Opposing Party’s Statement*. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party’s conspirator during and in furtherance of the conspiracy.⁴⁰

As the text indicates, there is no explicit mention of statements made by a nonparty solely on the basis of privity, such as a predecessor or successor in interest.⁴¹ Interestingly, all the other types of statements Wigmore discusses as being admissions not subject to the hearsay rule are present in Rule 801(d)(2), with the notable exception of privity-based admissions.⁴² This would seem to imply that Congress intentionally abrogated the common law rule allowing privity-based admissions, as all other types of admissions allowed at common law are explicitly mentioned.⁴³

Another section of the Federal Rules of Evidence buttresses the interpretation that Congress intentionally abrogated the common law rule favoring admitting privity-based admissions. Federal Rules of Evidence Article V covers privileges generally, including attorney-client privilege.⁴⁴ Rule 501 explicitly mentions and incorporates the common law rules of evidence, stating, “The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules pre-

³⁸ FED. R. EVID. 801(d)(1).

³⁹ FED. R. EVID. 801(d)(2).

⁴⁰ FED. R. EVID. 801(d)(2).

⁴¹ See *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979) (“Privity-based admissions . . . are not among the specifically defined kinds of admissions that despite Rule 801(c) are declared not to be hearsay in Rule 801(d)(2).”).

⁴² See WIGMORE, *supra* note 27 (discussing admissions that appear in Rule 801(d)(2) as well as privity-based admissions, which do not appear in Rule 801(d)(2)).

⁴³ This interpretation is based on the *expressio unius est exclusio alterius* canon of statutory interpretation—“the principle that when a statutory provision explicitly expresses or includes particular things, other things are implicitly excluded.” JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 208 (2d ed. 2013).

⁴⁴ FED. R. EVID. art. V.

scribed by the Supreme Court.”⁴⁵ The express adoption of the common law rules governing privilege implies that other rules that do not expressly mention the common law have abrogated such common law rules.⁴⁶

Similarly, Rule 804(b)(1)(B) provides further support that Congress’s omission of privity-based admissions in Rule 801(d)(2)(A) was intentional. Rule 804(b)(1)(B) allows former testimony given under oath to be admitted “against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.”⁴⁷ Similar to the party-opponent statement rule, the former testimony rule allows the adverse party to offer the evidence.⁴⁸ Unlike Rule 801(d)(2)(A), however, Rule 804(b)(1)(B) specifically includes the term “predecessor-in-interest” when detailing when former testimony will be allowed as an exception to the hearsay rule.⁴⁹ The express inclusion of the predecessor-in-interest phrase in Rule 804(b)(1)(B) implies that the omission of any similar phrase in Rule 801(d)(2)(A) was intentional and meant to exclude privity-based admissions from the scope of the Rule 801(d)(2)(A) hearsay exclusion.

A counterargument to interpreting that the Federal Rules of Evidence abrogated the common law admissibility of privity-based admissions is that this interpretation violates the anti-derogation rule—the canon of statutory construction which states that if a statute doesn’t explicitly depart from common law, then a court should construe the statute narrowly to avoid conflict.⁵⁰ This argument, as

⁴⁵ FED. R. EVID. 501. The rule goes on to state, “But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” *Id.*

⁴⁶ Again, the express mention that common law governs privilege would imply, using *expressio unius est exclusio alterius*, that the absence of language expressly adopting common law rules means those common law rules have been abrogated. See *Chicago v. Evtl. Def. Fund*, 511 U.S. 328, 338 (1994) (“‘[I]t is generally presumed that Congress acts intentionally and purposely’ when it ‘includes particular language in one section of a statute but omits it in another.’” (alteration in original) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993))); cf. Edward J. Imwinkelried, *A Brief Defense of the Supreme Court’s Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 278 (1993) (applying the *expressio unius* canon to show that “the omission of ‘common law’ in Rule 402 signals the demise of the common law power to enunciate evidentiary doctrine”).

⁴⁷ FED. R. EVID. 804(b)(1)(B).

⁴⁸ Compare FED. R. EVID. 801(d)(2) (“The statement is offered against an opposing party”), with FED. R. EVID. 804(b)(1)(B) (allowing “[testimony that] is now offered against a party”).

⁴⁹ FED. R. EVID. 804(b)(1)(B).

⁵⁰ The anti-derogation rule encompasses two individual canons: “Statutes in derogation of the common law will not be extended by construction” and “[s]tatutes are to be read in the light of the common law and a statute affirming a common law rule is to be construed in accordance with the common law.” Karl N. Llewellyn, *Remarks on the Theory of*

applied to the Federal Rules of Evidence, can be supported by Supreme Court cases like *United States v. Abel*⁵¹ and *Beech Aircraft Corp. v. Rainey*.⁵² In *Abel*, the Court decided that the omission of rules explicitly dealing with impeachment for bias did not abrogate the practice, which had been available under the common law rules of evidence.⁵³ And in *Rainey*, the Court recognized that the common law rule of completeness was intrinsic to Federal Rule of Evidence 106.⁵⁴

For every canon of construction, however, there is an equal and opposite canon.⁵⁵ The opposing canon to the anti-derogation rule is that “[t]he common law gives way to a statute which is in consistent [sic] with it and *when a statute is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law.*”⁵⁶ And the two cases that would support the anti-derogation rule’s use as applied to the hearsay exclusions question are distinguishable. *Abel* and *Rainey* both dealt with evidentiary issues where the statutory rules were permissive, not exclusionary, and the court extended this permissiveness to actions that had also been allowed under the common law. This comports with the idea that “[r]elevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.”⁵⁷ Rule 801(d)(2)(A), on the other hand, deals specifically with exclusions to a prohibition. Therefore, the general prohibition of hearsay “provides otherwise,” subject only to the specific exclusions listed in Rule 801(d)(2), as well as the specific exceptions provided for throughout the rest of the hearsay rules. Further, the *expressio unius est exclusio alterius* canon’s opposite—that

Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401 (1950).

⁵¹ 469 U.S. 45, 50–52 (1984).

⁵² 488 U.S. 153, 171–72 (1988).

⁵³ *Abel*, 469 U.S. at 49, 51 (holding that “it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption” despite the fact that the “Rules do not by their terms deal with impeachment for ‘bias’”); see also Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978) (“In principle, under the Federal Rules no common law of evidence remains. ‘All relevant evidence is admissible, except as otherwise provided’ In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.” (footnote omitted)).

⁵⁴ *Rainey*, 488 U.S. at 171–72 (“The common law ‘rule of completeness,’ which underlies Federal Rule of Evidence 106, was designed to prevent exactly the type of prejudice of which *Rainey* complains.”).

⁵⁵ See Llewellyn, *supra* note 50, at 401 (“Hence there are two opposing canons on almost every point.”).

⁵⁶ *Id.* (emphasis added).

⁵⁷ FED. R. EVID. 402.

“[t]he language may fairly comprehend many different cases where some only are expressly mentioned by way of example”⁵⁸—is inapplicable when interpreting Rule 801(d)(2), as the exclusions are meant to be an exhaustive list.⁵⁹

Finally, looking at the advisory committee’s notes to the 1972 proposed rules doesn’t clarify whether or not the exclusion of privity-based admissions was intentional. On the one hand, the advisory committee’s notes state, “The freedom which admissions have enjoyed from technical demands . . . when taken with the apparently prevalent satisfaction with the results, *calls for generous treatment of this avenue to admissibility.*”⁶⁰ On the other hand, the advisory committee’s notes on the 1972 proposed rules cite to John S. Strahorn, Jr.’s article *A Reconsideration of the Hearsay Rule and Admissions*, which takes a critical view of admitting vicarious admissions—a larger category of admissions which includes privity-based admissions—for narrative purposes.⁶¹ On balance, despite the advisory committee’s calling for generous treatment of admissions, general principles of statutory interpretation would counsel that privity-based admissions did not survive the enactment of the Federal Rules of Evidence.

The Seventh Circuit’s opinion in *Huff* comports with this statutory interpretation.⁶² As previously mentioned, the defendants presented the argument that Mr. Huff’s statements to Mr. Myles were

⁵⁸ Llewellyn, *supra* note 50, at 405.

⁵⁹ See *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979) (“Moreover, the very explicitness of Rule 801(d)(2) suggests that the draftsmen did not intend to authorize the courts to add new categories of admissions to those stated in the rule. No standards for judicial improvisation or discretion are provided in Rule 801(d)(2) . . .”).

⁶⁰ FED. R. EVID. 801 advisory committee’s note on the 1972 proposed rules (emphasis added) (citations omitted); see also *Savarese v. Agriss*, 883 F.2d 1194, 1201 (3d Cir. 1989) (“However, we also note that the Advisory Committee called for ‘generous treatment to this avenue of admissibility.’” (quoting FED. R. EVID. 801(d)(2) advisory committee’s note on the 1972 proposed rules)).

⁶¹ John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 564, 583–84 (1937) (“[T]he true explanation of vicarious admissions is not in terms of their trustworthiness as narrative, but rather in terms of their relevancy as the circumstantial conduct of persons whose conduct acquires relevance by virtue of the relation between the speaker and the party against whom the statement is offered.”). Strahorn limits his analysis of what should be admissible to statements made by a predecessor in title where “verbal conduct of an alleged former owner in denying or belittling his title.” *Id.* at 583.

⁶² While the *Huff* court did not conduct a thorough statutory interpretation analysis, the court did rely on the fact that the Federal Rules of Evidence controlled the decision, and the lack of an explicit reference to privity-based admissions in the Rule 801(d)(2)(A) exclusions meant that these types of statements did not survive the transition from the common law rules of evidence to the new statutory rules. See *infra* notes 64–65 and accompanying text. The *Huff* court’s statements are consistent with the first part of this Note’s statutory interpretation, which found that the list of exclusions is meant to be exhaustive. See *supra* notes 40–43, 59 and accompanying text. *Huff* is also consistent with

privity-based admissions and therefore should be admissible as party-opponent admissions under Rule 801(d)(2)(A).⁶³ The court, confronted with the argument presented this way, determined that the common law rules of evidence had been abrogated by the Federal Rules of Evidence.⁶⁴ And, because Rule 801(d)(2)(A) did not contain an explicit reference excluding privity-based admissions from the general rule prohibiting hearsay, the statements could not be entered under that rule.⁶⁵ Similarly, the District Court for the Eastern District of New York and the District Court for the Middle District of Pennsylvania followed the *Huff* court's characterization of decedent statements as privity-based admissions, as well as the *Huff* court's interpretation that privity-based admissions are no longer generally admissible under the Federal Rules of Evidence.⁶⁶ Thus, courts that have addressed a decedent's statements under the theory that the statements are privity-based admissions have found them to be inadmissible under the Federal Rules of Evidence, in line with the above statutory interpretation.

C. *Can a Nonnamed Party Be Considered a Party to the Litigation?*

Assuming that this interpretation is correct—that privity-based admissions are no longer admissible under the Federal Rules of Evidence—the privity-party distinction becomes relevant and the analysis turns back to whether the decedent can be properly characterized as a party to the action. The question of whether the decedent is a party depends on whether the court assumes that the term “party” refers only to the named parties to the suit (the technical or formalistic approach), or whether the term “party” can be defined more broadly (the contextual or functional approach).⁶⁷ The Supreme Court has not opined on who is a party for purposes of interpreting

the conclusion that privity-based admissions did not survive the enactment of the Federal Rules of Evidence.

⁶³ *Huff*, 609 F.2d at 290.

⁶⁴ *Id.*

⁶⁵ *Id.* at 291.

⁶⁶ *Ponzini v. Monroe Cty.*, No. 3:11-CV-00413, slip op. at 6–7 (M.D. Pa. Aug. 24, 2016); *In re Cornfield*, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004), *aff'd*, 156 F. App'x 343 (2d Cir. 2005).

⁶⁷ For instance, Black's Law Dictionary defines “party” many ways, including “[o]ne by or against whom a lawsuit is brought; anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment; litigant” and “[s]omeone concerned in or privy to a matter.” *Party*, BLACK'S LAW DICTIONARY, *supra* note 16. The numerous sub-definitions contained in this Black's Law Dictionary entry illustrate that the term “party” is used in many ways in the law, not necessarily only as a technical term of art meaning the named party.

the Federal Rules of Evidence. But this question is not unique to interpreting the Federal Rules of Evidence. The term “party” is used in other procedural statutes, such as the Federal Rules of Civil Procedure⁶⁸ and the Federal Rules of Appellate Procedure,⁶⁹ and the Court has not always limited the definition of a party in those statutory rules to only those parties that are actually named in the case.⁷⁰

For example, the Supreme Court dealt with the issue of determining who was a party when interpreting the interaction between Rule 23(e) of the Federal Rules of Civil Procedure, which governs class action settlement agreements,⁷¹ and the right to appeal final decisions under the Federal Rules of Appellate Procedure. In *Devlin v. Scardelletti*, the question of who was a proper party to a case was litigated in a class action in the context of whether nonnamed class members had standing to appeal class action settlements without first intervening.⁷² The Court held that “nonnamed class members like [the] petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.”⁷³ In working through the analysis, the Court chose not to establish a bright-line rule defining the rights of named versus nonnamed parties, stating instead that “[n]onnamed class members, however, may be parties for some purposes and not for others. The label ‘party’ does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.”⁷⁴ Thus, in the class action setting, the Court took a functional approach to defining who could be considered a party for purposes of deciding various procedural issues.

In his *Devlin* dissent, Justice Scalia favored a more formal, bright-line interpretation of the term “party.” Justice Scalia argued that the

⁶⁸ See FED. R. CIV. P. 23(e) (stating that “parties seeking approval [of a class action settlement] must file a statement identifying any agreement made in connection with the proposal,” but that “[a]ny class member may object to the proposal if it requires court approval under this subdivision”).

⁶⁹ See FED. R. APP. P. 3(c)(1) (requiring that the notice of appeal must “specify the party or parties taking the appeal by naming each one in the caption or body of the notice”).

⁷⁰ See *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (determining that nonnamed class members who did not intervene could still appeal class action settlements as a matter of right despite not being named parties in the case, abrogating four circuit court cases that held that nonnamed class members must be granted the right to intervene, and thus become named parties, before they had the right to appeal).

⁷¹ FED. R. CIV. P. 23.

⁷² 536 U.S. at 3–4.

⁷³ *Id.* at 14.

⁷⁴ *Id.* at 9–10.

“‘parties’ to a judgment are those named as such—whether as the original plaintiff or defendant in the complaint giving rise to the judgment, or as ‘[o]ne who [though] not an original party . . . become[s] a party by intervention, substitution, or third-party practice.’”⁷⁵ Justice Scalia also addressed the privity-party distinction, rejecting the idea that those nonnamed parties in privity with a named party may appeal, “notwithstanding his or her interest in the subject matter of the case.”⁷⁶ Thus, in *Devlin*, the Court chose to determine the applicability of the term “party” by conducting a contextual, functional analysis over the objections of dissenters who preferred a formal, bright-line rule. All of this is to say that, notwithstanding the fact that the Federal Rules of Evidence are a distinct set of procedural rules, in the context of other procedural statutes, the Court has employed a functional approach rather than a formal approach to determine who can be considered a party to the action.

Similar to the majority opinion in *Devlin*, courts that have admitted decedents’ statements under Rule 801(d)(2)(A) have done so under the theory that though the decedent is not a named party, they are a real party in interest, and, therefore, their statements are admissible as party-opponent statements. For example, in *Estate of Shafer v. Commissioner*—the first circuit court case to admit decedent statements under Rule 801(d)(2)(A)—the Sixth Circuit, citing Wigmore, stated, “Since [the decedent], through his estate, is a party to this action, his statements are a ‘classic example of an admission.’”⁷⁷ Similarly, the Tenth Circuit in *Phillips v. Grady County Board of County Commissioners* quoted the previous passage from *Estate of Shafer* when finding the decedent’s statements admissible under Rule 801(d)(2)(A).⁷⁸ Thus, courts that take a functional approach to the definition of “party,” considering the decedents themselves to be parties, have admitted the statements under Rule 801(d)(2)(A).⁷⁹

It is this disagreement—whether the term “party” should be defined narrowly or broadly in the context of the definition of

⁷⁵ *Id.* at 15 (Scalia, J., dissenting) (alterations in original) (quoting *Karcher v. May*, 484 U.S. 72, 77 (1987)). Justice Scalia was joined in his dissent by Justices Kennedy and Thomas. *Id.* Justice Scalia also stated, “As the Restatement puts it, ‘[a] person who is named as a party to an action and subjected to the jurisdiction of the court is a party to the action.’” *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 34(1) (AM. LAW INST. 1980)).

⁷⁶ *Id.* at 19 n.3 (internal citation omitted).

⁷⁷ *Estate of Shafer v. Comm’r*, 749 F.2d 1216, 1219–20, 1219 n.6 (6th Cir. 1984) (quoting FED. R. EVID. 801(d)(2)(A) advisory committee’s note).

⁷⁸ 92 F. App’x 692, 696 (10th Cir. 2004).

⁷⁹ *See id.*; *Estate of Shafer*, 749 F.2d at 1220; *Schroeder v. de Bertolo*, 942 F. Supp. 72, 78 (D.P.R. 1996).

hearsay—that illuminates the privity-party distinction in cases involving decedent statements. A contextual analysis has informed courts’ opinions that have admitted decedents’ statements under Rule 801(d)(2)(A).⁸⁰ In contrast, courts that have considered the decedent’s statements to be privity-based admissions use a narrow, technical definition of the term “party.”⁸¹ Both ways of defining the term have merits. But given that the claim in front of the court flows from the decedent’s rights—as the real party in interest—and not the named party, it would seem to make sense that in cases initiated by the estate on the decedent’s behalf, or where the estate is substituted as a party in place of the decedent, the decedent could be considered a party.⁸² This idea will be discussed further in Section III.A.

II

POLICY ARGUMENTS AGAINST ADMITTING DECEDENTS’ STATEMENTS AS PARTY-OPPONENT STATEMENTS

Part I addressed the major point of contention driving the circuit split concerning admitting decedent statements under Rule 801(d)(2)(A): Are these statements best characterized as privity-based admissions or is it instead appropriate to characterize the decedent as a party? Part II addresses additional arguments against admitting a decedent’s statements under the party-opponent statement rule—namely, the concern over perjury when people attest to the

⁸⁰ See *Phillips*, 92 F. App’x at 696 (discussing how the court in *Estate of Shafer* stated that “[a] decedent, ‘through his estate, is a party to [an] action,’ so that the decedent’s statements ‘are a classic example of an admission’” (alterations in original) (quoting *Estate of Shafer*, 749 F.2d at 1220)); *Estate of Shafer*, 749 F.2d at 1220 (“Since Arthur, through his estate, is a party to this action, his statements are a ‘classic example of an admission.’” (quoting FED. R. EVID. 801(d)(2)(A) advisory committee’s note) (citing WIGMORE, *supra* note 27, § 1081, at 598)); *Schroeder*, 942 F. Supp. at 78 (stating that the decedent, Rosita, was a party to the action despite being deceased because “[i]f plaintiffs had succeeded in obtaining a verdict against defendants, Rosita’s estate would have received a monetary award”). *Savarese v. Agriss* is an outlier because the decedent at issue, Dan Bogen, “was a party to [the] action in his official capacity despite the fact that he was deceased at the time of trial.” 883 F.2d 1194, 1201 (3d Cir. 1989).

⁸¹ The very fact that these courts assess the decedents’ statements as privity-based admissions means that the courts assumed the decedents were not a party to the action for purposes of the party-opponent statement rule.

⁸² The argument that the decedent is a party is strengthened in a situation where the decedent is substituted by the estate as a party after the litigation has already initiated; however, as Justice Scalia recognized, in that situation a decedent would likely be considered a party even under a more formal definition. See *Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002) (Scalia, J., dissenting) (“The ‘parties’ to a judgment are those named as such—whether as the original plaintiff or defendant in the complaint giving rise to the judgment, or as ‘[o]ne who [though] not an original party . . . become[s] a party by intervention, substitution, or third-party practice.’” (alterations in original) (emphasis added) (quoting *Karcher v. May*, 484 U.S. 72, 77 (1987))).

statements of deceased persons, which drove the enactment of state-level Dead Man's acts, and the fact that if the evidence is so probative there are other ways to admit it.

A. Policy Considerations Driving States' Dead Man's Acts

The problem of how to treat decedent statements is not unique to the federal forum. State courts have also had to deal with this issue, most often in the probate context.⁸³ The claims most often arise when survivors contest wills or when plaintiffs file state-law tort claims against a decedent's estate.⁸⁴ The concern is that allowing self-interested witnesses to testify about conversations with decedents creates a substantial risk of perjury and potential harm to decedents' estates.⁸⁵ As mentioned in Section I.A, however, at the common law, decedent statements were generally admissible as admissions against estates and successors in interest.⁸⁶

In the nineteenth century, in order to combat the risks of self-interested witnesses perjuring themselves, many states passed Dead Man's acts.⁸⁷ These statutes negated the common law rule of admission in order to put the estate on equal footing as the claimants.⁸⁸ The common saying was, "when the lips of one party to a transaction are

⁸³ See Sylvie L.F. Richards, *New York's Dead Man's Statute: Some Preliminary Considerations*, FROM THE LAW OFFICE OF SYLVIE L.F. RICHARDS, PLLC (Apr. 28, 2011), <https://richardsesq.wordpress.com/2011/04/28/new-yorks-dead-mans-statute-some-preliminary-considerations/> (recognizing that the legislative concern that drove the enactment of the New York Dead Man's statute was keeping self-interested parties from perjuring themselves because the witness's "self-interest would prevail when [that witness] testified in a civil matter involving conversations with a now-deceased person where the witness had a pecuniary interest in the outcome of the case" and that "concern persists today and is *particularly evident in the area of Wills and trusts*" (emphasis added)).

⁸⁴ See Ed Wallis, *An Outdated Form of Evidentiary Law: A Survey of Dead Man's Statutes and a Proposal for Change*, 53 CLEV. ST. L. REV. 75, 76 (2005) ("[T]he majority of Dead Man's statute case law centers around an interested witness being refused the right to testify in a probate proceeding.").

⁸⁵ See *id.* at 78–79 (2005) (discussing legislatures' desire to protect estates after getting rid of interested witness prohibitions, and discussing that, in cases involving decedents, the "temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf" (quoting *Owens v. Owens's Adm'r*, 14 W. Va. 88, 95 (1878))).

⁸⁶ See *supra* Section I.A (discussing the admissibility of decedent's statements against the estate and Wigmore's justification for the common law rule).

⁸⁷ See Wallis, *supra* note 84, at 78–79 (stating that states began abolishing interested witnesses prohibitions in the mid-1800s and began enacting Dead Man's statutes in their place).

⁸⁸ See Jerry C. Lagerquist, *Exceptions to the Dead Man's Act*, 45 CHI.-KENT L. REV. 60, 62 (1968) ("The rationale for allowing a witness disqualified by the Dead Man's Act to testify to facts occurring after the death of the decedent is that the *inequality in availability of proof, which the Act seeks to prevent*, does not exist between the parties as to facts that occur after death." (emphasis added)).

closed by death, the lips of the other party are closed by law.”⁸⁹ These statutes declared otherwise competent witnesses who could testify about discussions with the decedent to be incompetent.

A key distinction between the application of the Dead Man’s acts and the issue related to hearsay is that the Dead Man’s acts only exclude testimony by *interested* witnesses.⁹⁰ These statutes generally dictate who is competent to testify, as opposed to dealing with the hearsay issue. Notably, the main concern—that *interested* witnesses would perjure themselves—is not present in every case where the decedent statement may be introduced over a hearsay objection. A perfect example is the testimony in *Huff*. The witness in *Huff*, who was the plaintiff’s cousin’s husband,⁹¹ would likely not have been considered an interested witness under a Dead Man’s Act, as he had no stake in the outcome of the trial, and therefore was not a “party in interest.”⁹² This distinction alone, however, is not sufficient to completely dismiss the concerns that led to the enactment of Dead Man’s acts because there will be situations captured by the hearsay rule of inclusion proposed where the testifying witness will also be an interested party.⁹³

More important to this discussion is that the support for these statutes has waned over time. Notably, the statutes were complicated and full of exceptions.⁹⁴ As a result, the rationales supporting the Dead Man’s acts have been consistently attacked by many critics.⁹⁵ The main criticisms of the Dead Man’s acts are that they “encourage litigation, prevent the enforcement of many honest claims, and are

⁸⁹ *Satterthwaite v. Estate of Satterthwaite*, 420 N.E.2d 287, 289 (Ind. Ct. App. 1981) (citing 1A G. Henry, *THE PROBATE LAW AND PRACTICE* 158 (Grimes ed., 1978)).

⁹⁰ See Steve Planchon, Comment, *The Application of the Dead Man’s Statutes in Family Law*, 16 J. AM. ACAD. MATRIM. LAW. 561, 563 (2000) (discussing the statutes’ sole concern with the admissibility of testimony of interested witnesses).

⁹¹ *Huff v. White Motor Corp.*, 609 F.2d 286, 290 (7th Cir. 1979).

⁹² See, e.g., WASH. REV. CODE § 5.60.030 (2018) (stating that “a party in interest or to the record” is not competent to testify to a decedent’s statements). Black’s Law Dictionary defines a party in interest as a “person entitled under the substantive law to enforce the right sued on and who generally, but not necessarily, benefits from the action’s final outcome.” *Real Party in Interest*, BLACK’S LAW DICTIONARY, *supra* note 16.

⁹³ There are a host of situations where this issue will not arise, however. Much hearsay that could be brought in under the party-opponent statement rule could be documentary, such as texts, emails, etc., and not direct testimony by a witness.

⁹⁴ See Wallis, *supra* note 84, at 79 (“In time, however, commentators began to point to the confusing nature and unfairness of these statutes . . .”); see also Lagerquist, *supra* note 88 (detailing the exceptions to the Illinois Dead Man’s statute). One of the notable exceptions is that when there is corroborative evidence, the interested witness is allowed to testify. *Id.* at 70–72.

⁹⁵ See Wallis, *supra* note 84, at 100–01 (stating that “Dead Man’s statutes have been criticized by nearly all famous legal scholars over the past 150 years,” including by Wigmore).

ineffective to prevent perjury by witnesses whose interest does not fall within the statutory ban.”⁹⁶ For example, Wigmore thought these types of rules were flawed because they showed a preference for the dead over the living and presupposed that there would be no other way to root out dishonest claims.⁹⁷ Therefore, “for the sake of defeating the dishonest man who may arise, the rule is willing to defeat the much more numerous honest men who are sure to possess just claims.”⁹⁸ Wigmore also thought Dead Man’s acts “encumber[ed] the profession with a profuse mass of barren quibbles over the interpretation of mere words.”⁹⁹ Edmund Morgan agreed and stated that Dead Man’s acts did more to injure valid, honest claims than they did to prevent perjury.¹⁰⁰ And Professor McCormick stated that “refusing to listen to the survivor is . . . a ‘blind and brainless’ technique,” which, in an effort to “avoid injustice to one side,” “creat[es] injustice to the other.”¹⁰¹ McCormick went further to state that “[t]he temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard.”¹⁰² Therefore, three of the leading evidentiary scholars thought the statutory solution to the threat of perjured testimony against a decedent’s estate—Dead Man’s acts—did more harm than good, particularly in light of the fact that there were other ways to deal with the issue, including the weight and credibility the factfinder would give the proffered evidence.

Today, very few states have Dead Man’s statutes that act as an absolute bar to interested witnesses testifying to conversations with decedents.¹⁰³ In contrast, thirty-two states have explicitly rejected the

⁹⁶ 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 601.05[1][a] (Mark S. Brodin ed., 2d ed. 2018); *see also* Wallis, *supra* note 84, at 76 (“More importantly, these statutes are unfairly prejudicial to those truly honest people who have valid claims but are nevertheless prevented from testifying in court.”).

⁹⁷ 4 WIGMORE, *supra* note 27, § 2065, at 389.

⁹⁸ *Id.* In contrast, the rule of inclusion advanced *infra* Section III.B is supported by Wigmore’s critique because it avoids excluding all evidence on the basis that some potentially problematic situations may arise.

⁹⁹ Wallis, *supra* note 84, at 101 (quoting 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 578, at 823 (James H. Chadbourn ed., 1979)).

¹⁰⁰ *See id.* at 101 (stating that Dead Man’s acts “persist in spite of experience which demonstrates that they defeat the honest litigant and rarely, if ever, prevent the dishonest from introducing the desired evidence” (quoting EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 188 (1956))).

¹⁰¹ *Id.* at 101 (quoting CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 65, at 251 (John William Strong ed., 4th ed. 1992)).

¹⁰² *Id.* at 101 (quoting MCCORMICK, *supra* note 101).

¹⁰³ *See* Shawn K. Stevens, Comment, *The Wisconsin Deadman’s Statute: The Last Surviving Vestige of an Abandoned Common Law Rule*, 82 MARQ. L. REV. 281, 282 n.5

premise of having a Dead Man's Act, and either no longer have provisions governing this issue or expressly allow for interested witnesses to testify to conversations with a decedent.¹⁰⁴ Given that so many states have rejected a rule of exclusion to address the policy concerns underlying the Dead Man's acts, it makes little sense for the Federal Rules of Evidence to embrace these same policy concerns as a basis for a rule of exclusion regarding the treatment of decedents' statements as hearsay.

B. *There Are Other Ways to Admit the Evidence*

Another counterargument against a rule of admissibility is that if the evidence is highly probative, there are other exceptions to the hearsay rule under which the evidence could be admitted. The two main exceptions that would be available for a decedent's statements are Rule 804(b)(3)¹⁰⁵—statements against interest—and Rule 807¹⁰⁶—the residual exception. Each of these rules is discussed in turn.

1. *Rule 804(b)(3): Statements Against Interest*

The Federal Rules of Evidence allow for a host of exceptions to the rule prohibiting hearsay.¹⁰⁷ The exceptions contained in Rule 804 apply when a declarant is unavailable as a witness.¹⁰⁸ Rule 804(b)(3) contains an exception to hearsay when a declarant makes a statement that is against the declarant's interest.¹⁰⁹ These statements are consid-

(1998) ("There are currently only eleven other states in addition to Wisconsin that have Deadman's Statutes that serve as an absolute bar prohibiting testimony from an interested witness as to transactions with the deceased."). Since Stevens's comment was published in 1998, three of the eleven states listed in his footnote have gotten rid of their Dead Man's statutes. Alabama's Dead Man's Act was superceded by the enactment of Alabama Rule of Evidence 601. *See* Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc., 895 So. 2d 225, 258 (Ala. 2004). Florida's legislature repealed its statute in 2005. *See* FLA. STAT. § 90.602, repealed by Act of July 1, 2005, ch. 2005-46, 2005 Fla. Laws 1. And in 2013, the Supreme Court of Appeals of West Virginia invalidated its state statute. *See* State Farm Fire & Cas. Co. v. Prinz, 743 S.E.2d 907, 918 (W. Va. 2013). Additionally, Wisconsin repealed its Dead Man's Act in 2017. *See* WIS. STAT. ANN. §§ 885.16–.17 (West Supp. 2017).

¹⁰⁴ *See* Memorandum in Support of Petition of Wisconsin Judicial Council for an Order Repealing Wis. Stats. §§ 885.16, 885.17, 885.205; and Amending Wis. Stat. § 906.01 at app. 1, *In re* Wis. Statutes §§ 885.16, 885.17, 885.205, 906.01 (Wis. 2017) (No. 16-01) (noting thirty-one states other than Wisconsin in which Dead Man's statutes have either been repealed by the state legislatures, abrogated by court rules or decisions, or in which there are express rules permitting testimony of interested witnesses).

¹⁰⁵ FED. R. EVID. 804(b)(3).

¹⁰⁶ FED. R. EVID. 807.

¹⁰⁷ *See* FED. R. EVID. 802–807.

¹⁰⁸ FED. R. EVID. 804.

¹⁰⁹ FED. R. EVID. 804(b)(3).

ered to be acceptable despite the general rule against hearsay because it is presumed that a declarant would not say anything that contradicts his personal interests unless the statement were true.¹¹⁰

Unlike party-opponent statements, which do not need to satisfy any further criteria to be admitted,¹¹¹ in civil cases,¹¹² statements against the interest must meet three criteria. In order to meet the hearsay exception for statements against the interest, the declarant must: 1) be unavailable at the time of trial;¹¹³ 2) be aware at the time of making the statement that the statement is against the declarant's interest;¹¹⁴ and 3) lack an alternate, self-serving motivation (in order to attribute sufficient reliability of truthfulness to the statement).¹¹⁵ A

¹¹⁰ See FED. R. EVID. 804(b)(3) (stating that the exception is for when a declarant makes a statement that “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 . . . expose[d] the declarant to civil or criminal liability”).

¹¹¹ See *Savarese v. Agriss*, 883 F.2d 1194, 1200–01 (3d Cir. 1989) (discussing that party-opponent statements are not subject to trustworthiness or against the interest analyses and should be allowed generous treatment when determining admissibility).

¹¹² Subparagraph (B) requires an additional criterion to be met for evidence to be admitted under this exception in criminal cases. See FED. R. EVID. 804(b)(3)(B) (requiring that the statement “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”). The rule’s former version read, “[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” FED. R. EVID. 804(b)(3) (2009) (amended 2010). The purpose of the 2010 Amendment was “to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal trials.” FED. R. EVID. 804 advisory committee’s note to 2010 amendment. Thus, the corroborating circumstances requirement in subparagraph (B) should only apply to statements that implicate a penal interest. The amendment is silent on whether the corroboration requirement is necessary for statements against a penal interest offered in civil cases. *Id.*

¹¹³ Rule 804 exceptions only apply when the witness is unavailable to testify at trial, as reflected by the title of the rule “Exceptions to the Rule Against Hearsay—*When the Declarant Is Unavailable as a Witness*” and the criteria for unavailability listed in Rule 804(a). FED. R. EVID. 804 (emphasis added). This rule contrasts with Rule 803, which provides “Exceptions to the Rule Against Hearsay—*Regardless of Whether the Declarant Is Available as a Witness*.” FED. R. EVID. 803 (emphasis added).

¹¹⁴ See *Roberts v. City of Troy*, 773 F.2d 720, 725 (6th Cir. 1985) (“Hearsay under the declaration against interest exception is unreliable *unless the declarant is aware at the time of making the statement* that it is against his interest.” (emphasis added) (first citing *Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir. 1982); then citing *Workman v. Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562 (N.D. Ohio 1975))). *But see* *United States v. Lozado*, 776 F.3d 1119, 1128 n.6 (10th Cir. 2015) (construing *Roberts* to require proof of subjective awareness of danger to the declarant’s interest and declining to follow, instead applying an objective standard of what a reasonable person would know because of the frequent unavailability of proof of state of mind).

¹¹⁵ See *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1280 (11th Cir. 2009) (finding that the declarant’s interest in spreading blame, even falsely, for criminal liability may have been at least as significant of a factor when he made the statement as the declarant’s

decendent will always meet the exceptions criteria for unavailability.¹¹⁶ Therefore, the main issues complicating a party's attempt to enter a decendent's statements into evidence under 804(b)(3) will be the second and third requirements.

The first hurdle a party will face when attempting to enter a decendent's statement into evidence under 804(b)(3) is showing that the decendent was aware that the statement was opposed to the decendent's interest at the time the decendent made the statement.¹¹⁷ This means that the party offering the evidence will have to present additional evidence that shows the decendent's subjective understanding and state of mind at the time the decendent made the statement, or in the absence of information regarding subjective understanding, evidence that would lead an objective person to believe the decendent understood the impact of the statement at the time the statement was made.¹¹⁸ Gathering information regarding the decendent's subjective understanding will be difficult and will create a significant hurdle to entering the statements under 804(b)(3), particularly in courts that favor the subjective approach.

In addition to gathering additional evidence regarding the decendent's subjective understanding—that at the time the decendent made the statement, that statement would be against his interest—a party proffering the statement would also have to make a showing that the statement was “so contrary” to the declarant's financial interest or “had so great a tendency to invalidate the declarant's claim.”¹¹⁹ This part of the rule presents two important issues. First, the statement must be against the declarant's interest, and not some other party's

potential financial loss given his part ownership in one of the companies, and therefore the evidence was inadmissible because it did not bear the requisite indicia of reliability); *Donovan*, 689 F.2d at 877 (finding that an immigrant worker's statement that he was paid properly could reasonably be motivated by the desire to “avoid the wrath of his employer” and was therefore inadmissible as a statement against the interest to prove the employer was paying the employees properly in a Fair Labor Standards Act case).

¹¹⁶ FED. R. EVID. 804(a)(4).

¹¹⁷ *Roberts*, 773 F.2d at 725.

¹¹⁸ When there is evidence substantiating a declarant's subjective belief, courts have utilized a subjective determination. See *Lozado*, 776 F.3d at 1126–29 (discussing the rationale for favoring the application of the subjective standard when evidence of subjective belief is available). Absent evidence of a declarant's subjective understanding, however, the *Lozado* court found that this requirement may be relaxed. See *id.* at 1129–30 (stating that absent evidence of the declarant's subjective awareness, the rule allows the court to utilize an objective reasonable person standard). In so finding, the court recognized a disagreement over whether a subjective awareness was required to meet the Rule 804(b)(3) exception and decided not to extend the subjective awareness requirements of previous courts and commentators. *Id.* at 1128 n.6.

¹¹⁹ FED. R. EVID. 804(b)(3)(A).

interest.¹²⁰ Second, the declarant must not have other plausible, self-serving motives for making the statement.¹²¹

As can be seen from these additional requirements, the exception for statements against the interest is much narrower than the exclusion from the hearsay rule for party-opponent statements. While some probative decedent statements may be able to meet these additional restrictions, a vast swath of statements will likely be excluded if the courts rely solely on admitting such statements under Rule 804(b)(3). Thus, relying on this exception, as opposed to creating a rule favoring admissibility under the party-opponent exclusion, will not adequately resolve the issue, as it will only allow the evidence in under serendipitous circumstances that allow the party offering the evidence to show subjective awareness and an absence of other plausible motives for making the statement.

2. *Rule 807: Residual Exception*

In addition to Rule 804(b)(3), the Rule 807 residual hearsay exception is another avenue that parties may use to introduce decedent statements.¹²² In order for statements that would otherwise be prohibited as hearsay to be entered into evidence, five requirements must be met: 1) “the statement has equivalent circumstantial guarantees of trustworthiness;” 2) “it is offered as evidence of a material fact;” 3) “it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;” 4) “admitting it will best serve the purposes of these rules and the interests of justice;” and 5) “before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the

¹²⁰ See *Williamson v. United States*, 512 U.S. 594, 604 (1994) (holding that only truly self-inculpatory declarations and remarks are admissible under Rule 804(b)(3)); *Goodman v. Kimbrough*, 718 F.3d 1325, 1333 n.2 (11th Cir. 2013) (“[T]he statements at issue must also be against the interest of the *declarant* . . . in order to fall within the exception’s terms.” (citing *United Techs. Corp.*, 556 F.3d at 1279–80)). Only the portion of the statement that is against the declarant’s interest is admissible, and absent severability, the entire statement should be excluded. *Williamson*, 512 U.S. at 599–602 (considering the admissibility of so-called “collateral statements” in extended declarations and concluding that only the self-inculpatory statements within extended declarations are admissible); *id.* at 606 (Scalia, J., concurring) (same).

¹²¹ See *supra* note 115.

¹²² In fact, this is the method the *Huff* court used as a potential avenue for the defendants to enter the decedent’s statements into evidence, provided that on remand the district court found Mr. Huff was competent at the time he made the statement to Mr. Myles. *Huff v. White Motor Corp.*, 609 F.2d 286, 294 (7th Cir. 1979).

statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it."¹²³

The residual exception seems like a plausible solution to admit decedent statements given its purpose to allow judges to deal with new evidentiary situations.¹²⁴ Using the residual exception as a solution, however, creates two potential problems: It will severely curtail the number of statements that will be deemed admissible, despite being reliable and probative, and it is subject to significant judicial discretion. Both of these issues will potentially exacerbate the issue of inconsistent outcomes.

First, the residual exception was intended to be used only in rare and exceptional cases.¹²⁵ As with the potential for using the statements against the interest exception, utilizing this rule in place of a rule favoring admissibility as party-opponent statements would lead to very few decedent statements being admissible.¹²⁶ This assertion is supported by a survey of cases in which Rule 807 was invoked to admit potentially probative hearsay evidence.¹²⁷ The survey showed that "[c]ourts are excluding well more than admitting" and that it can be "tentatively concluded that the residual exception in many courts is applied in such a way as to exclude reliable and necessary hearsay."¹²⁸

Second, the residual exception is left largely to the court's discretion, which may lead to varying standards based on how the courts

¹²³ FED. R. EVID. 807; *see also Huff*, 609 F.2d at 292–95 (listing and applying the five requirements that "[h]earsay evidence must fulfill . . . to be admissible under the residual exception"). The *Huff* court was analyzing the former residual exceptions under Rules 803(24) and 804(b)(5). *Id.* at 291 & n.4. These two separate residual exceptions were combined and transferred to Rule 807 in the 1997 Amendments, and "[n]o change in meaning was intended." FED. R. EVID. 807 advisory committee's note.

¹²⁴ *See United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977) ("Rule 803(24) was designed to encourage the progressive growth and development of federal evidentiary law by giving courts the flexibility to deal with new evidentiary situations which may not be pigeon-holed elsewhere.").

¹²⁵ *See Huff*, 609 F.2d at 291 ("We also recognize that Congress 'intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances.'" (quoting S. REP. NO. 93-1277, at 20 (1974), *as reprinted in* 1974 U.S.C.A.N. 7051, 7066)); *see also United States v. Kim*, 595 F.2d 755, 764–65 (D.C. Cir. 1979) (reaching the same conclusion based on the same legislative history); *United States v. Bailey*, 581 F.2d 341, 346–47 (3d Cir. 1978) (same). Professor Capra has noted that "[t]o a number of courts, the phrase 'rare and exceptional' is part of the text of the Rule rather than just legislative history." Daniel J. Capra, *Expanding (or Just Fixing) the Residual Exception to the Hearsay Rule*, 85 *FORDHAM L. REV.* 1577, 1604 (2017).

¹²⁶ *Cf. Capra*, *supra* note 125, at 1579 (discussing the pushback the Advisory Committee received over the potential for eliminating the ancient documents hearsay exception because of the "perceived difficulty of trying to fit ancient documents into the existing, limited residual exception").

¹²⁷ *See id.* at 1601–08 (describing the survey of cases and the results of the survey).

¹²⁸ *Id.* at 1603–04 (emphasis omitted).

within different jurisdictions have to strain to fit clearly probative evidence within the residual exception.¹²⁹ The *Huff* court felt that “such circumstances [were] present”¹³⁰ to invoke the residual exception, but the court was presented with a unique procedural position whereby the defendants had waived their argument to admit the evidence under the Rule 804(b)(3) statements against the interest exception.¹³¹ Yet, the court still relied on Rule 804(b)(3) to reason that the statements should be entered under the residual exception. In the court’s trustworthiness analysis,¹³² the court utilized the requirements of the statements against the interest exception¹³³ in order to meet the “equivalent circumstantial guarantees of trustworthiness” requirement of the residual exception.¹³⁴ The court specifically stated that Huff’s statement was against his pecuniary interest and thus had equivalent circumstantial guarantees of trustworthiness.¹³⁵

Although the *Huff* court was presented with unique circumstances that allowed it to analogize to another rule that seemed to be on point, this reasoning illustrates how the “circumstantial guarantees of trustworthiness” requirement of Rule 807 could be subject to varying standards in order to fit clearly probative evidence into the residual exception. While the *Huff* court’s analysis is viable in some circuits to admit the statement under Rule 804(b)(3) because it shows that an objective reasonable person should have been aware that the statement was against his pecuniary interest, in other circuits the state-

¹²⁹ Professor Capra has suggested that relaxing Rule 807 would “alleviat[e] the pressure on a court to distort the contours of a standard exception by admitting ill-fitting but reliable hearsay that should instead be admissible under a flexible residual exception.” *Id.* at 1580. For a related discussion on the phenomenon of courts trying to fit proffered electronic communications evidence into existing rules, see Jeffrey Bellin, *The Case for eHearsay*, 83 *FORDHAM L. REV.* 1317, 1321 (2014).

¹³⁰ *Huff*, 609 F.2d at 291.

¹³¹ *See id.* at 290 (“On appeal, defendant argues that the evidence was admissible . . . as a statement against interest under Rule 804(b)(3). We do not consider the latter argument, because Rule 804(b)(3) was not mentioned to the district court as a basis for admitting the evidence.” (footnote omitted)).

¹³² *See id.* at 292–94 (applying the residual exception’s trustworthiness requirement to Huff’s statement).

¹³³ *See Huff*, 609 F.2d at 292 (“There was no reason for him to invent the story of the preexisting fire in the cab. The story was contrary to his pecuniary interest, *cf.* Rule 804(b)(3) . . .”).

¹³⁴ *FED. R. EVID.* 807(a)(1).

¹³⁵ *Huff*, 209 F.2d at 292. The court noted that Huff’s statement was against his pecuniary interest regardless of his awareness of a possible future claim against the vehicle manufacturer because “[a] fire of unexplained cause on Huff’s clothing would tend to indicate driver error and to fix the responsibility for the accident, with attendant adverse pecuniary consequences, on him.” *Id.*

ment would fail to meet the 804(b)(3) requirements due to a lack of evidence of the declarant's subjective awareness.¹³⁶

Courts have noted the need to guard against using the residual exception too liberally as well as avoid inconsistent or ill-defined standards.¹³⁷ However, the *Huff* court's analysis shows that courts have significant discretion to choose what constitutes "equivalent circumstantial guarantees of trustworthiness," and using this method to admit decedent statements could lead courts to use Rule 807 more liberally to admit clearly probative statements.¹³⁸ Ultimately, the *Huff* court recognized that "[u]nless the hearsay is admitted, there will be no direct evidence on [whether there was a fire in the cab immediately before the crash]," and that excluding this evidence "was so prejudicial as to require a new trial."¹³⁹ Thus, using the residual exception in the way the *Huff* court did illustrates the significant problems the federal courts face in relying on Rule 807 to admit decedent statements.¹⁴⁰ These problems could be avoided by instead using a party-opponent rule of admissibility for decedent statements.

III

PREVAILING POLICY REASONS FOR ADMITTING DECEDENT STATEMENTS AS PARTY-OPPONENT STATEMENTS

Part II addressed the major counterarguments to admitting a decedent's statements under Rule 801(d)(2)(A)—policy concerns related to the potential for perjury that drove the enactment of state Dead Man Acts, and the fact that there are other hearsay exceptions that may provide for the admissibility of decedent statements. In Part III, this Note argues that because of the fact that the claim arises

¹³⁶ See *supra* notes 117–18 and accompanying text.

¹³⁷ See *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977) (noting that while the residual exception's purpose was to give "courts the flexibility to deal with new evidentiary situations which may not be pigeon-holed elsewhere . . . tight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules"). For a discussion of relaxing Rule 807 such that it would "swallow much of Rules 801 through 806 and thus many of the exclusions from evidence, exceptions to the exclusions, and notes of the Advisory Committee," see Posner, *supra* note 4, at 1467.

¹³⁸ Professor Capra has stated, "[t]he major problem is that, given the wide range of options for comparison, a court can use 'equivalence' as a result-oriented device. So if the court wants to admit the hearsay, it can rely on comparison with exceptions that are at the bottom of the reliability barrel." Capra, *supra* note 125, at 1582.

¹³⁹ *Huff*, 609 F.2d at 295.

¹⁴⁰ See Capra, *supra* note 125, at 1580 ("Many lawyers believe that any increase in reliable hearsay that might be admitted by an expansion of the residual exception is far outweighed by the costs that would be raised by injecting more judicial discretion into the hearsay system.").

through the decedent's rights—i.e., but for the decedent, the claim would not even be litigated—and because of the threat of inconsistent outcomes, the appropriate rule is to admit all decedent statements under Rule 801(d)(2)(A) when the decedent is a real party in interest.

A. *The Claim Is the Decedent's Chose in Action*

A chose in action is “[t]he right to bring an action to recover a debt, money, or thing.”¹⁴¹ As the definition states, a chose in action is an intangible right to bring an *action*, not a possessory right.¹⁴² This distinction is important to understand, especially in terms of claims that are brought by an estate on behalf of a decedent, because such personal injury tort claims are often inalienable and unassignable.¹⁴³ Generally, in cases of wrongful death and survival actions, the chose in action for the personal injury tort that gives rise to the statutory claim lies with the decedent.¹⁴⁴ The decedent was the one harmed, and the damages are due to the decedent as a result of the interaction between the decedent and the tortfeasor.¹⁴⁵

So why does it matter that the claim at issue is the decedent's chose in action? Because this principle illustrates one reason why the decedent should be considered a party. Fundamentally, these cases are only in front of the court as a result of the decedent and the decedent's tort rights.¹⁴⁶ In other words, but for the decedent and the circumstances involving the decedent that led to the decedent's estate

¹⁴¹ *Chose in Action*, BLACK'S LAW DICTIONARY, *supra* note 16.

¹⁴² See W.S. Holdsworth, *The History of the Treatment of Choses in Action by the Common Law*, 33 HARV. L. REV. 997, 997 (1920) (defining a chose in action as a “legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession” (quoting *Torkington v. Magee* [1902] 2 KB 427 at 430 (Eng.)); Patrick T. Morgan, Note, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 MO. L. REV. 683, 688 (2001) (recognizing that a chose in action is not historically a possessory right).

¹⁴³ See Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 74–82 (2011) (stating that “the most important current limitation [on assignability] . . . prohibits the assignment of causes of action for personal injuries” and discussing that the prohibition against assignment of personal injury claims is based on the “common law maxim *actio personalis moritur cum persona* (“a personal cause of action dies with the person)”) (quoting ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 354 (2d ed. 2008)); Morgan, *supra* note 142, at 683 (“Tort rights are personal and cannot be separated from the person.”).

¹⁴⁴ See Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 564 (1985) (recognizing that regardless of whether the action is a statutory survival action or wrongful death action, the cause of action is “the one the decedent would have had if the wrongful act had not taken his life”).

¹⁴⁵ See Morgan, *supra* note 142, at 683 (“This is unlike the proprietary right between an owner and his *res*: tort rights are interpersonal, existing between the tort victim and the tortfeasor.”).

¹⁴⁶ See Steinglass, *supra* note 144.

filing the action, there would be no claim at all.¹⁴⁷ Therefore, including the decedent as a party would recognize the decedent's rights in the action.

Holding that a decedent is a party to the litigation, and therefore subject to having statements entered under the party-opponent statement exclusion to hearsay recognizes that the decedent is the real "owner" of the original cause of action.¹⁴⁸ This comports with the idea expounded upon by Wigmore that a person's rights, such as a chose in action, should not be subject to different rules of evidence simply because they appear to have been transferred to a successor in interest.¹⁴⁹ Instead, the same rules should apply with equal force to a person's claims, whether that person is alive to pursue their own claim, or is deceased and a claim is brought on their behalf.¹⁵⁰ In other words, because the chose is owned by the decedent in either case, it should be subject to the same rules, no matter the procedural posture in which it is brought.

Furthermore, even if personal injury tort claims become more freely alienable,¹⁵¹ treating the decedent as a party under the Federal Rules of Evidence would still be consistent with the way decedents' claims are already treated for the purposes of diversity of citizenship in federal court and the defense of contributory negligence more generally. When determining the citizenship of a decedent's estate for purposes of federal diversity of citizenship subject matter jurisdiction, "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent."¹⁵² Additionally, while comparative and contributory negligence rules vary by state, the majority rule is that a decedent plaintiff's contributory negligence, while not a bar to recovery, is usually imputed to the estate and the beneficiaries, diminishing the amount that may be recovered.¹⁵³

¹⁴⁷ See *id.* ("[T]he action is the one the decedent would have had but for his death . . .").

¹⁴⁸ As previously discussed, the chose in action is an intangible right, not a typical property right. See Morgan, *supra* note 142 (discussing the differences between property and tort rights). Because choses in action are not typical property rights, the term "owner" is used here to distinguish the idea that, as an intangible right, the chose in action should follow the decedent, and should not be wholly transferred to a third party.

¹⁴⁹ See *supra* note 32 and accompanying text.

¹⁵⁰ See *supra* notes 32–33 and accompanying text.

¹⁵¹ See Sebok, *supra* note 143, at 74–82 (noting that the original common law rule prohibiting assignment of tort claims has almost been completely abandoned and arguing that even personal injury claims should be freely alienable).

¹⁵² 28 U.S.C. § 1332(c)(2) (2012).

¹⁵³ See, e.g., 46 U.S.C. § 30304 (2012) (reducing the amount a decedent's estate can recover in maritime actions); MISS. CODE ANN. § 11-7-15 (West 2008) (requiring that the jury diminish damages in proportion to the negligence of the person injured); N.Y.

Therefore, recognizing that a decedent is a party for purposes of the Federal Rules of Evidence aligns with the other procedural and substantive rules governing decedents' actions that recognize the decedent as a real party in interest.

B. A Rule of Admissibility Leads to Consistency in Verdicts

So far, this Note has recounted the ways in which real cases have played out in court. As discussed above, this issue tends to present itself in very narrow circumstances, such as wrongful death and estate cases.¹⁵⁴ While the rule this Note advocates can be applied to the previously mentioned cases with equal force and would result in optimal outcomes, a hypothetical construct better illustrates why a rule favoring admissibility is superior to a rule of exclusion.

In this hypothetical, plaintiff *P* has a potential claim against defendant *D*. For the sake of argument, let us say *P* is bringing a § 1983 case¹⁵⁵—alleging some type of police misconduct—to unquestionably bring it within federal question jurisdiction, so that the Federal Rules of Evidence apply and we can avoid dealing with any issues of substantive state law.¹⁵⁶ *P*'s case appears strong, containing plenty of circumstantial evidence benefitting *P*'s version of events as well as an emotional narrative. Now, let us also assume that at some time, in close proximity to the event that led to the lawsuit, *P* made a statement to witness *W* that would lead any reasonable juror to find that defendant *D* was in fact not liable.¹⁵⁷ Finally, let us assume that nothing at the time the decedent made the statement to *W* would have tended to make anyone think *P* was either aware that the statement was against his pecuniary interest or that it would give rise to any other circumstantial guarantees of trustworthiness.¹⁵⁸

C.P.L.R. 1411 (CONSOL. 2012 & Supp. 2017) (diminishing otherwise recoverable damages proportionally to the culpable conduct of the claimant or decedent).

¹⁵⁴ See cases cited *supra* notes 9–10.

¹⁵⁵ This hypothetical relies on a claim being survivable; otherwise there would be no issue regarding the decedent's statements at trial. Section 1983 claim survival depends on state survival laws, so long as those laws do not conflict with the underlying policies of Section 1983. *Robertson v. Wegmann*, 436 U.S. 584, 589–90 (1978). Though a full analysis of this issue is outside the scope of this Note, “[m]ost courts that have entertained § 1983 actions involving wrongful killings have rejected state policies that require the decedent’s personal action to abate.” Steinglass, *supra* note 144, at 635.

¹⁵⁶ See discussion *supra* note 33. This Note does not deal with the various substantive laws governing derivative versus non-derivative state law claims.

¹⁵⁷ This assumption is used to ensure that the dispositive statement, if entered, would make the outcome subject to judgment as a matter of law, either by the trial judge, regardless of a jury’s verdict, or on appeal. FED. R. CIV. P. 50(a)(1).

¹⁵⁸ Circumstances that either implicate Rule 804(b)(3) (statements against the interest) or Rule 807 (the residual exception) would present the court with alternative grounds for admitting the decedent’s statements. This Note uses this hypothetical to show that these

Applying two scenarios to this hypothetical will help illustrate why a rule that favors admitting the statements under Rule 801(d)(2)(A) is superior to a rule that rejects the statements under the privity-based admissions characterization. Add to the factual details above a rule of law that allows for party-opponent statements to be admitted when the person is a named party but treats statements made by nonnamed parties strictly as privity-based admissions that are not excluded from the hearsay prohibition. In Scenario 1, *P* is alive, brings the lawsuit on her own behalf, and *W* is allowed to take the stand and testify to the statement *P* made eliminating *D*'s culpability. Given that the statement is dispositive—in that any reasonable juror hearing it would have to find that *D* was not liable—*P* would lose her own case and not be entitled to any damages.

In Scenario 2, however, *P* passes away some time before the claim is initiated.¹⁵⁹ Estate *E* now brings the claim on behalf of *P*. Given that *P* is no longer a named party, *W* will not be able to testify to *P*'s statement negating *D*'s responsibility. And given that the statement was the dispositive piece of evidence determining liability, *P*'s estate, *E*, will win a judgment against *D*, something that *P* herself could not have done had she survived and initiated the action on her own, as explained in Scenario 1. We are left with inconsistent results because the admissibility of *P*'s statement is contingent on *P* surviving through the litigation's initiation.¹⁶⁰

statements should be admitted as party-opponent statements irrespective of whether the statements meet these other recognized grounds for admission. For a discussion of why the requirements for these alternative methods of admitting evidence would likely not be present, see *supra* Section II.B.

¹⁵⁹ It is irrelevant, for the purposes of this hypothetical, whether the cause of death is directly related to the circumstances that created the potential claim.

¹⁶⁰ This Note has only dealt with situations in which the decedent's estate has initiated the action after the decedent's death. A similar situation could arise, however, if the decedent originally survived and instigated the action on his own, but then passed away prior to trial. For example, in *Savarese v. Agriss*, one of the named parties, Dan Bogen, "was a party to [the] action in his official capacity despite the fact that he was deceased at the time of trial." 883 F.2d 1194, 1200 (3d Cir. 1989). This case is an outlier, however, because most decedents will not continue as named parties in action. Typically, in such a case, the estate would be substituted as a party in order for the action to continue. See, e.g., *Givens v. U.S. R.R. Ret. Bd.*, 469 U.S. 870 (1984) (mem.) (granting a party's motion to substitute the estate in place of the decedent). At this point, the decedent would no longer be a named party, and the issue might then arise as to whether the decedent would be in privity with the estate or whether they would still be a real party in interest. The same arguments made in Part III would apply with equal force to the situations in which the decedent initially instigates the action prior to passing away and then is substituted as a party by the decedent's estate. The argument that the decedent should be considered a party is strengthened in such a situation, however, as even Justice Scalia recognized that a decedent would likely be considered a party under a more formal definition. See discussion *supra* note 82.

If we change the rule of law applied to the hypothetical, such that the decedent could still be considered a party and the court would not characterize the statement as a privity-based admission, this inconsistency is resolved. In both cases, *P* would be considered a party for the purposes of Rule 801(d)(2)(A), and *W* would be able to take the stand and testify about *P*'s statement. Regardless of the procedural technicalities, both *P* and *E* would lose in either of the respective scenarios while defendant *D* would, quite rightly, escape liability.

There is an argument that this rule could also lead to consistently incorrect outcomes. This argument is based on the premise that a statement's dispositive nature, as relayed by *W*, could be taken out of context or otherwise be explained away—for example, that *P* was being sarcastic or under the influence of medication. In Scenario 1, where *P* survives, *P* could take the stand and provide the context that either reduces the weight of the evidence or eliminates its significance altogether. In Scenario 2, where *P* is a decedent, *E* will likely not have the benefit of providing this context. Given a rule of law excluding a decedent *P*'s statements under the privity-based admission characterization, *E* is protected from a potential inconsistent outcome that may result if *P* could successfully explain away the purported dispositive statement in Scenario 1.

While this counterargument raises a legitimate concern, it fails to illustrate why a rule of exclusion would be superior to a rule of inclusion. A rule of exclusion, based solely on protecting the courts from potentially admitting statements that may be taken out of context or otherwise explained away, would remove all statements from the factfinder, both the correct and probative as well as the potentially problematic. This would provide absolute protection against potentially problematic statements at the expense of all potentially dispositive probative statements, leaving no way for the latter to become admissible (outside of meeting the further requirements imposed by Rule 804(b)(3) and Rule 807). A rule of inclusion, however, would allow the probative statements to be admitted under the party-opponent statement rule, while also allowing for the possibility of mitigating the impact of problematic statements by allowing parties to present additional evidence that would impact the weight and credibility of the party-opponent statements. For example, if *P* could have been under the influence of medication or was suffering from a similar debilitation that would bring the purported dispositive statement into question, *E* would likely be able to present evidence to that effect, destroying the otherwise dispositive nature of the statement. Ultimately, this issue is best addressed, not as a question of the rule of admissibility, but as a question of the appropriate weight such state-

ments should be given by triers of fact after these statements have been admitted.¹⁶¹ Given the Federal Rules of Evidence's general inclination toward admitting relevant evidence rather than excluding it, a rule favoring admissibility best comports with this general principle.

In addition to creating a rule that promotes consistent outcomes, irrespective of unforeseeable contingencies, a rule favoring admissibility would also preclude undesirable strategic litigation behavior. For example, if there was known to be an unfavorable statement made by a plaintiff that could be admitted as a party-opponent statement, a plaintiff would be more likely to either delay filing a lawsuit—subject, of course, to relevant statutes of limitation—or would be more likely to engage in stall tactics if there was a reasonable chance that the plaintiff would not survive through trial. This would be especially true in the cases where the plaintiff has life-threatening injuries, suffers from a terminal illness, or is elderly. While these parades-of-horrible may seem far-fetched, one only needs to look back at the narrow set of circumstances that implicate such a rule to see that these are realistic policy considerations.

CONCLUSION

There is currently a circuit split in the federal courts as to whether a decedent's statements can be admitted into evidence under Federal Rule 801(d)(2)(A), which excludes party-opponent statements from the definition of hearsay. It is clear from surveying the cases involved in this circuit split that the courts diverge based on whether they determine that the decedent should be treated as a party, and thus their statements considered within the scope of the rule, or whether they determine that the decedent should be considered a predecessor in interest, and thus their statements characterized as privity-based admissions not within any of the excluded categories defined by the rule.

Prior to the enactment of the Federal Rules of Evidence, this distinction was of little consequence, as both privity-based admissions and party-opponent statements were admitted over hearsay objections. However, as the statutory rules have replaced the common law rules, this distinction has become important. A statutory interpretation of Rule 801(d)(2)(A) shows that courts that characterize these types of statements as privity-based admissions are probably correct

¹⁶¹ Cf. Joseph A. Colquitt & Charles W. Gamble, *From Incompetency to Weight and Credibility: The Next Step in an Historic Trend*, 47 ALA. L. REV. 145, 152–56 (1995) (arguing for the abrogation of statutory definitions of witness competency, such as Dead Man's statutes, in favor of having such issues be assessed by the trier of fact under principles of weight of evidence and credibility).

that the statements should not be admissible under Rule 801(d)(2)(A). An analysis using the *expressio unius est exclusio alterius* canon of statutory interpretation indicates that the Supreme Court and Congress intentionally abrogated the rule allowing privity-based admission because all of the other common law exceptions are specifically listed as subcategories under Rule 801(d)(2)(A) and because another section of the Federal Rules of Evidence, dealing with privilege, specifically calls out adherence to the common law rules of privilege. The advisory committee notes are ambiguous, and thus, on balance, privity-based admissions are likely not covered by the Federal Rules of Evidence's exclusions from hearsay.

There are, however, strong arguments in favor of the decedent being considered a party. The Supreme Court has, in the class action context, deemed nonnamed parties to have rights in cases. And given that the claims at issue in these cases flow from the decedent's rights, it seems equitable that the decedent be considered a party to the action for the purposes of the party-opponent statement rule.

There are, of course, issues with admitting statements by decedents. Almost all states at some point passed Dead Man's acts, which disallow statements made by decedents under the presumption that allowing such statements would lead to greater risk of perjury. The fact that the deceased would not be able to refute what is being said would appear to conflict with the common law understanding that party-opponent statements are admissible because of the adversarial nature of our system. Yet most states have rescinded these Dead Man's acts, instead preferring rules that favor admissibility.

Additionally, if the evidence is probative, there may be other ways to admit it, such as Rule 804(b)(3) and Rule 807—the statements against interest and residual exceptions, respectively. But it is unlikely that many statements that could be admitted as party-opponent statements would meet the heightened requirements of these other rules. And given that the claim is essentially the decedent's chose in action, it seems inequitable to disadvantage the defendant based solely on whether the claim survives the decedent.

Applying a rule of exclusion in a case where the decedent's statement would be dispositive in proving liability would lead to absurd results, with the plaintiff losing while alive and winning in death. But applying a rule of admissibility would result in a consistent outcome in both scenarios. Further, it would discourage undesirable strategic litigation behavior. Given the prevailing legal and policy arguments, courts should find decedents to be parties for purposes of admitting decedents' statements under Rule 801(d)(2)(A) in order to promote consistent, predictable outcomes.

**Suggestions Made by the DOJ and Arun Subramanian on the Text of the
Proposed 702 Amendment and the Committee Note**

Suggestions on the text of the proposed 702 amendment and the Committee Note:

Suggestions made by the DOJ and Arun Subramanian

April 25, 2021

Committee Members:

The DOJ and Arun Subramanian (a new Committee member) have provided some suggestions about the proposed amendment to Rule 702, and the Committee Note. The working draft can be found at page 16 of the Reporter's memo, page 105 of the agenda book. I thought it a good idea to send these suggestions to you in advance of the meeting. And I have included my reactions to the suggestions. I have conferred with Judge Schiltz and we are in agreement about all of my responses.

The discussion below is divided into text and Committee Note. With respect to the Committee Note, the rationale for the suggestions, and the Reporter's comments, are in footnotes.

Thanks to Betsy Shapiro and Arun for providing these suggestions in advance of the meeting. I think it will save a lot of time now that the Committee will be aware of the discussion points in advance of the meeting. I apologize if I have mischaracterized the explanations for these proposed changes. I think I got the suggestions right, but I am not sure I did justice to all the explanations.

Changes proposed to the text:

1. ***The Rule 104(a) proposal:*** Arun suggests the following change:

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 court finds that the proponent has demonstrated by a preponderance of the evidence that:

Arun's explanation is that a reference to "evidence" might lead some to think that admissibility rules apply to Rule 104(a) hearings, and that the judge in a *Daubert* hearing must decide solely on the basis of the admissible evidence presented.

Reporter's comment: This amendment is not designed to get into the procedures and requirements of the *Daubert* hearing. It is merely designed to restore the original conception: that the burden is on the proponent to show that the admissibility requirements have been met. Referring to a “preponderance” might be sufficient to do that.

The counterargument is that lawyers and practitioners generally know that admissible evidence is not required in a Rule 104(a) hearing --- Rule 104(a) actually says that (unlike the applicable standard of proof, which is does not specifically set out). So there might be little risk that courts are litigants would be misled into thinking that only admissible evidence may be considered at a Rule 104 hearing.

Another counterargument is that “preponderance of the evidence” is language that is used commonly by lawyers. That phrase is used by the Supreme Court in *Bourjaily*. Leaving the language at “preponderance” could lead some to think that something has been dropped. Preponderance of what?

If the Committee wishes to retain the phrase “a preponderance of the evidence,” then a short paragraph to the Committee Note might be added:

The amendment’s reference to “a preponderance of the evidence” is not meant to indicate that the information presented to the judge at a Rule 104(a) hearing must meet the rules of admissibility. It simply means that the judge must find, on the basis of the information presented, that the proponent has shown the requirements of the rule to be satisfied more likely than not.

I have added that paragraph to the Committee Note below.

2. **Rule 702(d):** The proposed amendment to the text of Rule 702(d) in the Reporter’s memorandum provides as follows:

(d) the ~~expert- witness’s~~ has reliably applied opinion is limited to what may be drawn from reliably applying the principles and methods to the facts of the case or data.

The DOJ would change the existing rule as follows:

(d) the expert’s ~~has reliably applied~~ opinion reflects a reliable application of the principles and methods to the facts of the case.

Here is an explanation of the proposed changes from the DOJ, and the Reporter's comments:

1. Change “expert” to “witness”?

DOJ Comment: The Committee Note to the 2000 amendment states that the Committee considered and rejected the idea of deleting all references to “experts” in Rule 702. [That Committee Note states that the amendment “continues the practice of the original rule in referring to a qualified witness as an ‘expert.’ This was done to provide continuity and minimize change.”] So if there is going to be a change now, it needs to be explained. The DOJ observes that no explanation for the change is given in the Committee Note.

Reporter's Comment: The rule reads just fine with “expert” there. It picks up on the reference to expert's earlier in the rule. It is really a question of style, and the style subcommittee approved the use of the term “expert” in Rule 702(d) back in 2000. So there is not a great reason for change. The amendment is intended to be minimal and clarifying, so, as in 2000, the term “expert” should probably be retained to minimize change. There is nothing that has happened in the last 21 years to change the Committee's approach to the term “expert.”

This also means that substituting “witness” for “expert” in Rule 702(a) should be abandoned.

2. Use of “reflects” rather than “is limited to”:

DOJ Comment: In the text, we much prefer the word “reflects” rather than “limits.” They are basically the same in terms of meaning here, except that one is a positive limitation (it must reflect) and the other is a negative limitation. Subsections (a), (b) and (c) are all positive limitations. It is jarring to then have a negative limitation on (d). It is asymmetrical to the rest of the rule. And, by making it asymmetrical, we are butchering the language to make it less clear and harder to understand. “Reflects a reliable application” is much clearer than “is limited to what may be drawn from reliably applying.” . . . We favor doing as little violence to that language as is consistent with achieving the stated objective. The word “reflects” does that, and it doesn't really matter that “limits” is used more time than “reflects” in other rules of evidence. Both are used.

[Arun agrees that the amendment should use “reflects” rather than “limits.” He is concerned that the proposal in the memorandum would lead to substantial procedural hurdles, and lengthy inquiries into the expert's testimony.]

Reporter's Comment: The use of “limited to” seems to have more teeth and is more definitive than “reflects.” But really the two terms are very close, and the DOJ is right that, as the Reporter's memorandum notes, the use of “reflects” results in an economy of words

in comparison to “limits.” If the amendment is intended to be minimal --- as it is --- then probably the fewer words the better.

3. Do not change “the facts of the case” to “the facts or data.”

DOJ Comment: This is unrelated to the whole forensics issue, and you characterized it as a minor add-on. It seems to us, though, that this is a substantive change, and not a small one. * *
* I could find nothing to say that “facts or data” in subsection (b) is meant to be synonymous with “facts of the case” in subsection (d). And there is lots to support the opposite. For starters, Rules 703 and 705 talk about the “facts or data” referred to subsection (b). Those rules and accompanying notes make clear that the facts and data can come from outside the case. For example, the note to 703 talks about presentation of data from outside of court, like a physician who bases his diagnosis on numerous outside sources. Subsection (d) requires a reliable application of the opinion to the facts of the case. That is manifestly narrower and different than the facts and data on which the opinion can be based. And as noted above, the “facts of the case” language is ubiquitous in the case law and the parlance of trial lawyers. See, e.g., *Estate of Mikal R. Gaither v. District of Columbia*, 831 F.Supp.2d 56 (D.D.C. 2011). There, the court denied a witness from testifying as an expert, and went through the analysis subsection by subsection. It was clear that the “facts and data” underlying the witness’ proffered opinion came from a variety of sources, including experience outside of the case at hand. On subsection (d), though, the court talked about how the witness could not reliably apply the proffered opinion to the facts of the case being litigated. Those are very different things. If nothing else, we are changing plain language that looks like a substantive change even if an evidence scholar concludes that it’s not. (And there is nothing in the note to explain the change).

Reporter’s Comment:

The “facts of the case” language is intended to make sure that the basis and methodology “fit” the facts of the case. For example, assume an expert testifies that exposure to talc caused the plaintiff’s sinus infection. The basis is talc studies, and the methodology is reading the studies. But the studies say that talc can cause sinus infection only in large doses over a long period of time. And the facts of the case are that the plaintiff was exposed to talc only briefly and in a small amount. So the expert’s conclusion, given the basis, is not a reliable application of the methodology *to the facts of the case*.

On further reflection, it seems important to retain the language “the facts of the case” especially when it comes to regulating overstatement. Because overstatement is about overpromising a result as it relates to the actual facts. Moreover, an expert does not really “apply” facts or data. Rather the expert bases the opinion on facts or data. So the language of the existing rule should probably be retained. Any concern about misapplication of the facts or data is handled by the fact that if there is a misapplication, it will not square with the facts of the case. The difference, if any, between “the facts of the case” and “facts or data” appears to be very complicated, and a change is likely to create uncertainty, for no clear benefit. And the amendment is intended to be minor and clarifying.

The Chair, who raised the possibility of the change to “facts or data,” has withdrawn the suggestion.

Proposed Committee Note With DOJ Suggestions, and Arun Subramanian’s suggestions, with the rationale for the suggestions and the Reporter’s Comments in Footnotes:

Rule 702 has been amended in two respects. First, the Rule has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established to the court by a preponderance of the evidence. *See* Rule 104(a). Of course, the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. *See Bourjaily v. United States*, 483 U.S. 171 (1987). But ~~unfortunately~~¹ many courts have held that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are ~~generally~~² questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a) and are rejected by this amendment.

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying the reliability requirements of that Rule.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000. But of course other admissibility requirements in the rule --- such as that the expert must be qualified --- are governed by the Rule 104(a) standard as well. The amendment focuses on subdivisions (b)-(d) because those are the requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard.

Of course, some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert’s basis ~~generally~~² or always go to weight and not admissibility. Rather it means that once the court has found the admissibility

¹ This seems to be a fair deletion --- “unfortunately” is a bit of a value judgement.

² Arun suggests that in practice, these issues are “generally” questions of weight --- because in reality most experts do satisfy the preponderance standard. If “generally” sounds like an empirical assessment, Arun is right that it should be dropped. It seems that nothing is lost in dropping the word. A similar use of “generally” is deleted in the Note below.

requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusion based on contested sets of facts. Where that is so, the preponderance of the evidence standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit.

[Rule 702 requires that the expert's knowledge must "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.]

Rule 702(d) has also been amended to ~~provide~~ emphasize that a trial judge should exercise gatekeeping authority with respect to the opinion ultimately expressed by a testifying expert.³ A testifying expert's opinion should stay within the bounds of what can be concluded by a reliable application of the expert's basis and methodology.

[Option 1: For example, a forensics expert may not be permitted to testify to a "zero rate of error" if the methodology is subjective and thus necessarily is subject to error.]

~~[Option 2: For example, a forensics expert who states or implies that a method or conclusion is "infallible," "certain," or "error-free" will by definition be stating an opinion that cannot reasonably be drawn, because such statements cannot be empirically supported. Also, many forensic processes do not comport with the scientific method, so testimony that such a process is "scientific" is not supported—and is prohibited under this amendment.—]~~⁴

New option regarding forensics:

[Option 3: The amendment is especially pertinent to the testimony of forensic experts. Forensic experts often (explicitly or implicitly) express opinions about probabilities — for example, when assessing the possible origin of a bullet, fingerprint, carpet fiber, or strand of hair. In deciding whether to admit such testimony, the judge should (when possible) receive a fair assessment of the rate of error of the methodology employed, based (where appropriate) on empirical studies of how often the method produces correct results. The judge should also consider any significant limitations inherent in the methodology. If the judge decides to admit the testimony, the judge should ensure that the forensic expert—like any expert—expresses probabilistic conclusions in probabilistic terms, avoiding phrases such as "certain" or "error-free," and instead using

³ DOJ says that the rule already provides for the gatekeeping function, and this amendment simply emphasizes that. The Reporter has no quarrel with the change.

⁴ For reasons expressed over four years of meetings, the DOJ opposes a Committee Note that seeks to put specific limitations on forensic experts. DOJ apparently will accept option 1. At this point, it is up to the Committee to determine whether this is an issue to keep fighting about.

phrases --- depending on the circumstances --- such as “cannot be ruled out” or “more likely than not.”] ⁵

~~Testimony that mischaracterizes the conclusion that an expert’s basis and methods can reliably support undermines the purposes of the Rule and requires intervention by the judge. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critically the conclusions of an expert that go beyond what the expert’s basis and methodology may reliably support.~~ ⁶

Nothing in the amendment imposes any specific procedures or requires the court to state its findings orally or in writing. Rather, the amendment is simply intended to clarify that Rule 104(a)’s requirement that a court must determine admissibility by a preponderance applies to expert opinions under Rule 702. ⁷ Similarly, ~~Nothing~~ in the amendment requires the court to nitpick an expert’s opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make extravagant claims that are unsupported by the expert’s basis and methodology.

The amendment’s reference to “a preponderance of the evidence” is not meant to indicate that the information presented to the judge at a Rule 104(a) hearing must meet the rules of admissibility. It simply means that the judge must find, on the basis of the information presented, that the proponent has shown the requirements of the rule to be satisfied more likely than not. ⁸

⁵ Option 3 is new. It has been drafted by the Chair and Reporter to respond to DOJ’s concerns about Option 2, and to respond to the Chair’s and Reporter’s concern that Option 1 is too timid to be very helpful. Option 3 imposes no requirements on forensic experts. It is intended to provide trial judges with a short description of the problems posed by forensic experts and to set forth some possible suggestions about how the jury may be assisted in evaluating forensic expert testimony.

DOJ has not had an opportunity to comment on Option 3.

⁶ As to this paragraph, DOJ states that “[t]he idea that the expert’s opinion must reflect a reliable application of principles and methods to the facts of the case is already explained in the paragraph before option 1 and in option 1.” And the DOJ is “not sure it’s true that jurors can’t evaluate the reliability of methods underlying an expert opinion.”

The Reporter disagrees. This paragraph explains to the reader exactly why the regulation is necessary--- because jurors are not well-suited to discounting overstated opinions from an expert. The major reason for a Committee Note is to explain the motivation for the amendment. The Reporter believes that this paragraph should be retained.

⁷ Arun suggests the addition of this language, out of a concern that the amendment might be read to call for more procedures than are currently employed in the gatekeeping function. The Reporter thinks that the addition of this language is helpful not only on the merits, but also because it connects with language from the 2000 Committee Note: “The amendment makes no attempt to set forth procedural requirements for exercising the trial court’s gatekeeping function over expert testimony.”

⁸ This new paragraph is addressed to the concern expressed by Arun about “preponderance of the evidence.”

Rule 106 - April 2021 Changes to the Draft Committee Note Proposed by the DOJ

Rule 106, April 2021, Changes to the Draft Committee Note Proposed by the DOJ

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Written or Oral Statements

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

Footnotes seek to explain the DOJ’s rationale for the proposed change, and the Reporter’s view of the proposed change.

Draft Committee Note

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Second, Rule 106 has been amended to cover oral statements that have not been recorded.¹

The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.²

Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that “[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court”). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also

¹ This sentence is taken from below. If the penultimate paragraph is brought up, as is the proposal, then it helps with the flow of the note to bring this sentence up.

² This is the penultimate paragraph in the draft. DOJ would move it up to emphasize the limited scope of the amendment. I tend to think that it is out of the flow here, because the actual amendment has not yet been introduced. Limits on an amendment are often placed at the end of a Note, for emphasis, as a parting shot. See the 2014 amendment to Rule 801(d)(1)(B). But it is not a giant deal.

simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime -- when that is not what he said. In this example the prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain un rebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

~~Second, Rule 106 has been amended to cover oral statements that have not been recorded.~~ Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial --- where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule.

The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. *See United States v. Bailey*, 2017 WL 5126163, at *7 (D.Md. Nov. 16, 2017) (“A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been

summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.”). A party seeking completion with an oral statement would of course need to provide admissible evidence that the statement was made. Otherwise, there is no showing that the original statement is misleading, and the request for completion should be denied.³ ~~Fundamentally, any question about the content of an oral unrecorded statement is no different under Rule 106 than it is in any other case in which an oral unrecorded statement is proffered.~~⁴ In extreme⁵ some cases, the court may find that the difficulty in proving the completing statement substantially outweighs its probative value --- in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) (“While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly.”). Nothing in the amendment is intended to limit the court’s discretion to allow completion at a later point.

~~The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.~~

In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988), the Court in dictum referred to Rule 106 as a “partial codification” of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent --- especially when the rule is one, like the rule of completeness, that arises most often during the trial. Accordingly, the intent of the amendment is to completely displace the common law rule of completeness. This is especially appropriate because the results under this rule as amended will generally be in accord with the common-law doctrine of completeness.

³ DOJ seeks to add this sentence as a clarification. It seems obvious that if there is no evidence of the statement, completion cannot happen. Perhaps too obvious to say? But this rule is a complicated one, so maybe what seems obvious to those who have worked on the rule is not so obvious to neophytes --- for whom the rule is made.

⁴ DOJ thinks this sentence is argumentative. The counterargument is that it helps to convince the reader that the amendment makes sense. But deleting the sentence is not a large deal --- it doesn’t describe how the rule applies, or the rule’s intent.

⁵ DOJ thinks the word “extreme” puts an extra thumb on the Rule 403 scale. It seems fine to take it out.