AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

June 9, 2020 / 5:15 p.m. – 7:15 p.m.

Meeting held via WEBEX

Welcome and Approval of Minutes • *April 14, 2020*	Action	Tab 1	John Lund
Update: URE 512. Victim Communications	Action	Tab 2	Judge Bates
Update: URE 106. Remainder of or related writings or recorded statements	Discussion	Tab 3	Judge Welch
URE 404(b). Character Evidence; Crimes or Other Acts. • *Supreme Court Conference Summary*	Discussion	Tab 4	Judge Welch
Other Business: • *2021 Meeting Dates (see below)*	Discussion		John Lund

Queue:

- Rep. Ivory's Requests (Rep. Ivory resigned. Waiting for new sponsor)
  - URE 409. Payment of Medical & Similar Expenses; Expressions of Apology
  - URE 412. Admissibility of Victim's Sexual Behavior or Predisposition
- Ongoing Project: Law Student Rule Comment Review

2020 Meeting Dates:
October 13, 2020
November 10, 2020

2021 Meeting Dates:
January 12, 2021
February 9, 2021
April 13, 2021
June 8, 2021
October 12, 2021
November 9, 2021

Rule Status:
URE 512 – Subcommittee. Waiting for Rep. Snow feedback.
URE 106 – Committee. Discuss next steps due to FRE delay.
URE 404(b) – Committee. Revisions based on SC feedback.
URE 1101 – Approved. Subcommittee drafting memo for SC

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
Tuesday– April 14, 2020
5:15 p.m.-7:15 p.m.
VIA WEBEX

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Tenielle Brown	Lacey Singleton	Hon. Matthew Bates	Keisa Williams
Tony Graf	Michalyn Steele	Michael Drechsel	Nancy Merrill
Nicole Salazar-Hall			
Mathew Hansen			
Ed Havas			
Chris Hogle			
John Lund, Presiding			
John Neilsen			
Jennifer Parrish			
Dallas Young			
Deborah Bulkeley			
Hon. Linda Jones			
Hon. Teresa Welch			
Hon. David Williams			
Hon. Vernice Trease			
Adam Alba			
Hon. Richard McKelvie			

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1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting and thanked Chris Hogle for his willingness to Chair the previous two Evidence Advisory Committee meetings in his absence.
The following amendment was made to the minutes for the meeting held on February 11, 2020:

- Matt Hansen opposed URE Rule 1101

***Motion:** Judge Jones made a motion to approve the minutes from the Evidence Advisory Committee meeting held on February 11, 2020 as amended above. Chris Hogle seconded the motion. The motion carried unanimously.*

2. Legislative Rapid Response Subcommittee

Mr. Hogle provided an overview of the Legislative Rapid Response Subcommittee's work during the session. The only issue brought to the subcommittee was a bill related to body cameras. Mr.

Young and Mr. Graf worked with the bill sponsors but the remedy they were looking for didn't involve the Rules of Evidence. It turned out to be an issue for the Rules of Criminal Procedure Committee. Ms. Williams was contacted the last week of the session about a potential request. The subcommittee responded to the sponsor asking how they could be of assistance but never heard back.

Mike Drechsel: The rapid response process seemed to work pretty well. The Evidence Advisory Committee didn't get called on much during the session other than the body camera matter. That bill passed without Supreme Court action. The Court will continue to work with the sponsors to make changes as things evolve with the Criminal Procedure Committee. The other Supreme Court Advisory Committees reported successful experiences with their Rapid Response Subcommittees and I'm looking forward to continuing that process in upcoming legislative sessions. The chair of the Rules of Civil Procedure Committee went to the Capitol and met with legislators about a proposed joint resolution amending Rule 26. The resolution didn't pass, primarily as a result of that conversation. The sponsor agreed to let the court work on it.

Many legislators are encouraging their colleagues to look to the courts and the advisory committee process first before bringing legislation and it actually played out during the session. A bill passed unanimously in the House without fanfare but when it got to the Senate, Senator Weiler spoke up and encouraged the Senate to give the Court the opportunity to address it through the committee process. The Senate almost unanimously opposed the action largely because of his comments. Hopefully we will start seeing legislators come to the court earlier in the process so that we aren't having to scramble with rapid response teams.

3. URE 512 Victim Communications:

Keisa Williams: A draft of URE 512 was presented to the Supreme Court. They made a grammatical change and sent it out for public comment. The rule received one comment and is now back with the Committee for feedback and any necessary revisions.

John Lund: The public comment addressed unintentional disclosures and asked whether the rule only addresses intentional disclosures. The question for the Evidence Advisory Committee is: Are waivers treated the same in this privilege as they are in other privileges?

Judge Bates: After reading the comment, I compared the way we drafted exceptions to the rule in 512 (as far as what waived and didn't waive privilege) to the other rules of evidence. It might be more consistent with the way we've structured exceptions in other rules, to move subsections (d)(2) and (d)(3) down to subsection (e) so that those circumstances do waive the privilege. In other rules, when the holder of the privilege does something that requires somebody else to disclose the confidential communication because of a public safety threat, that disclosure functions as a waiver of the privilege.

John Lund: The right of an attorney to disclose information if he/she is concerned a crime may be committed by a client is set up as a waiver rather than an exception to a privilege.

Judge Bates: I agree. In that situation, the disclosed communication becomes admissible in court and a privilege no longer exists in regard to that communication. If a victim does something that poses a public safety threat and an advocate is required to disclose the communication, then it ought to waive the privilege as it would in other rules.

Dallas Young: Under the attorney/client privilege it's called an exception. The net result is the same, but it's called an exception as opposed to a waiver.

John Lund: In subsection (a) of URE 510 (Miscellaneous Matters), the privilege is waived if the holder of the privilege fails to take reasonable precautions against inadvertent disclosure or voluntarily discloses or consents to the disclosure. That's the broader treatment of waivers that I think would apply to the 512 privilege like all the rest.

Ed Havas: Is there a legitimate distinction between an exception and a waiver? Judge Bates noted in the attorney/client rule that there are exceptions to the privilege allowing the communication to be disclosed without waiving the privilege. That seems to be preferable language. The rest of the privilege ought not simply evaporate because of some conduct that might follow the exception.

Dallas Young: It makes more sense to carve out the communication in terms of an exception as opposed to a waiver. Criminal law in regard to waivers requires knowledge of a criminal right and an intentional relinquishment of that right. That doesn't seem to match up with what's described in (d)(2) and (d)(3).

Judge Bates: The reason the subcommittee structured the rule the way it did was because the original legislation was unclear about whether a disclosure would function as an exception or a waiver of the privilege. What I'm hearing is that maybe some of the disclosures in (d) are more appropriately couched not as disclosures that do not waive the privilege, but as disclosures that are exceptions to the privilege. If there is no known relinquishment of a right, maybe we ought to call (d)(2) and (d)(3) exceptions.

John Lund: (d)(1) should also be included. Dallas Young: Suggested changing the language in line 42 to read, "these are the exceptions to the privilege."

Ed Havas: That strikes me as consistent with the intent of the draft. If we're saying these disclosures don't waive the privilege, in essence we're saying the disclosures are excepted from the privilege but it doesn't mean the privilege is waived if you take advantage of that exception.

Chris Hogle: In the attorney/client privilege rule (URE 504), under subsection (d) the first exception to the privilege is the crime/fraud exception. I don't know that we want to borrow that phraseology for 512 because in the lawyer/client context, exceptions are things that don't apply regardless of the intent of the holder of the privilege. I like the way things are now. I don't see a need to change the phraseology of 512 because "disclosures that do not waive the privilege" means that those disclosures do not affect the applicability of the privilege.

John Lund: On balance, I'm leaning the way Chris is for substantive reasons and because "disclosures that do not waive the privilege" is phrased the way the drafters preferred. Unless we can provide the Court with an important reason not to keep that phraseology, then we ought to leave it the way it is. We need a reason to warrant another round of revisions.

Judge Bates: In my mind the Committee is discussing two issues:

1. Has the Committee correctly identified waivers and exceptions in (d) and (e)? And what is the effect of the disclosures?
2. Do (d)(1), (d)(2), and (d)(3) belong under (d) or (e)?

I agree with Chris that the language structure should stay the way it is. And I think subsections (d)(1), (d)(2), and (d)(3) should be moved to (e). Example: A victim communicates to a victim advocate that they are going to commit or have committed a crime. The advocate now has to disclose that under (d)(2) or (d)(3). If the disclosure does not result in a waiver or revocation of the privilege, it loses some of its effect. A law enforcement officer might act on it and go talk to the victim, but the disclosure still can't be used in any evidentiary proceeding in court. Part of the reason we would want to call that a waiver and stick it down under (e) is so that if the prosecutor charges the victim with a crime or a civil action is filed related to what the victim was intending to do, the statement to the victim advocate can be used as evidence. The way the rule is structured right now, the statement couldn't be used as evidence because the disclosure didn't waive the privilege.

John Lund: There may be a fundamental problem with that construct. Doctors are required to disclose a certain amount of information, evidence of sexual abuse for example, but those scenarios aren't included in the privilege rule itself. None of the other rules include specific disclosures that waive the privilege and specific disclosures that don't.

Judge Bates: Isn't subsection (d)(2) in the physician/patient rule (communications relevant to proceedings to hospitalize patients for mental illness), similar to 512? Those communications are exceptions to the privilege and no privilege exists.

Tenielle Brown: The child abuse mandatory reporter statutes specify the minimum amount of disclosure so as not to waive the privilege. Sometimes if it's not in the statute itself it will be in common law interpreting the statute. In certain circumstances, there's no waiver even if some amount was disclosed pursuant to the child abuse mandatory reporting requirements.

Deborah Bulkeley: I tend to agree with Judges Bates, but didn't the Supreme Court reject a previous draft of 512 that made some of those disclosures waivers?

Judge Bates: Rep. Snow was more worried about the stuff in (e) and (d)(4) and (5). URE 507 is similar to URE 512 in that we drafted it out of whole cloth at the request of the legislature. In 507, the exceptions under subsection (d) waive the privilege. Those exceptions are very similar to (d)(1)-(3) in 512, but the way we have 512 structured the privilege still exists under those same circumstances.

Chris Hogle: Should there be a distinction about where the privilege applies? When a victim tells an advocate they are going to commit crime, maybe that disclosure ought to be admissible in a case against the victim, but not admissible in a case against the perpetrator.

Judge Jones: From a rule construction standpoint my concern is articulating one privilege differently than the other privileges (exception vs. waiver). If we do, the question becomes whether the catchall waiver in URE 510 applies to 512? If 510 is intended to apply to all privileges across the board, then we need to use "exception" in 512 so that we aren't sending a message that waivers apply differently in that context.

John Lund: I agree. (d) = exceptions. (e) = things that waive the privilege. We could include an intro to subsection (e) that says, "in addition to a waiver that occurs under the auspices of URE 510, the following are things that waive the privilege." That would provide some coordination between the rules.

Judge Bates: Suggest getting Rep. Snow's input about (d)(1), (d)(2), and (d)(3) before the subcommittee redrafts Rule 512 to find out how strongly he feels about protecting them. In addition, I agree that we should include John's suggested intro to (e).

Chris Hogle: I think the exception language in URE 507 is a good model. When we go back to Rep. Snow we should also address whether he thought about the application of the privilege in a case against the victim rather than the perpetrator.

Mike Drechsel: Rep. Snow's version of 512 in the joint resolution structured (d)(1), (d)(2), and (d)(3) as exceptions so I think we know where he stands on that. But I do think the question of whether it applies in a case involving a different perpetrator or criminal action is interesting.

<u>Motion:</u> John Neilsen made a motion to table redrafting the rule for 30 days to get Rep. Snow's feedback. Judge Jones seconded the motion. The motion passed unanimously.

4. URE 106. Remainder of or Related Writings or Recorded Statements:

Judge Welch reviewed the handout summarizing the history of the rule draft and the subcommittee's work. The subcommittee was charged with addressing the Supreme Court's concerns in the 2018 *Sanchez* case. The Court had the following concerns:

- How does Rule 106 operate? Does it have a trumping function or is it only a timing function?
- What are the necessary and sufficient conditions for triggering Rule106? Is it a requirement that a recorded statement be admitted into evidence as a trial exhibit or is it sufficient that the pertinent statement be referred to extensively at trial?

Judge Welch: Both issues are split jurisdiction issues. In 2019, the Committee decided URE 106 has a trumping function so that it admits otherwise inadmissible hearsay if the hearsay statement is necessary to qualify, explain, or place into context the partial statement that is already introduced. In reaching that decision the Committee deferred to the Court of Appeals'

interpretation on Rule 106 in the 2016 *Sanchez* case.

The Committee also decided that to trigger Rule 106 it is not a requirement that the pertinent statement be admitted as evidence at trial. It is sufficient for the parties to refer to the statement at trial to trigger the Rule 106 issue. The Committee presented the proposed rule change to the Justices. The Justices made some edits and asked for additional information from the Committee. A subcommittee was created to respond to the following questions and issues from the Court:

- A discussion of the interplay between Rule 106 and Rule 403
- Is there a need to create a new Advisory Committee note for Rule 106?
- Information on what other scholars and states are saying about these issues

Judge Welch: The subcommittee conducted a fifty-state survey. With slight deviations, all states essentially have the same rule as Utah. URE 106 is the same as FRE 106. The Federal Advisory Committee has been meeting to discuss the same issues as this Committee. The next Federal Advisory Rules Committee meeting is on May 8th. Because URE 106 mimics the federal rule, I propose tabling work on URE 106 until after May 8th.

John Lund: Are we sure the May 8th meeting will occur considering COVID-19? Will Rule 106 be on the agenda? The Federal Rules Committee generally doesn't act in a timely manner. I'm concerned that waiting for the federal committee will significantly delay completion of the Committee's assignment from the Supreme Court.

***Motion:** Judge Welch made a motion to table the Committee's work on Rule 106 until after May 8th and then if the federal committee doesn't address it, the Committee should send a draft of URE 106 to the Supreme Court, along with answers to their questions. After discussion, but without a vote, work on URE 106 was tabled.*

5. Update: URE 404(b) Doctrine of Chances

Judge Welch provided an overview of the status of URE 404(b).

Dallas Young: I have concerns about the policy behind adoption of the rule. I don't see any relevance for propensity evidence other than to muddy up the defendant and let the jury know the defendant is an unsavory person. It's not relevant to what the defendant is on trial for right now. Doctrine of Chances (DoC) is more interesting. In a rape case, if the defendant claims consent there is some relevance to showing a history of claiming consent, although you still have the issues raised by Judge Harris. There is a very powerful prejudicial value to this evidence. If the trial is about whether the defendant committed a specific act, why do we care what he/she did 10 years ago?

Judge Welch: In the *Lane* case, Judge Harris questioned whether there should be a clear jury instruction about how to use DoC evidence. What Judge Harris brings up is what Imwinkelried says in his latest law review article. If a trial court judge is going to admit DoC evidence, then the jury should be instructed on the permitted and prohibited uses. That's what is included in the subcommittee's rule draft at 404(b)(3)(d).

John Nielsen: I read Imwinkelried's book. It's noteworthy that he traces the roots of the doctrine as far back as it goes and says DoC does have its uses and he outlines them in great detail. I can see why the Court wanted to say it's a valid theory and if we're going to have it, then we should clarify its use in the rule.

Tenielle Brown: Thinking more in terms of logic and consistency – or lack of consistency – in the use of the DoC, if we're going to have the DoC it's better to put it in the rule rather than leave it to caselaw. My concern is putting it under 404(b) because those are uses that do not require propensity reasoning. It eviscerates 404(a) to allow evidence of past acts to show that the victim wasn't lying. If the victim wasn't lying that means the victim did not consent and that goes right to actus reus and the evidence is used explicitly for propensity purposes. It's hard to use DoC evidence for any purpose other than to show propensity, so it's really an exception to 404(a). Putting it in 404(b) seems misplaced because using it to prove bias, motive, etc. are truly non-propensity uses. When you bring in past acts to show that the victim wasn't lying, the very close indirect inference is that therefore she is telling the truth, which means the defendant did it, which is propensity. If we are continuing with 404(a), we want to be careful about introducing something into 404(b) that is really an exception to 404(a).

Judge Welch: It's in 404(b) because in the *Lowther* case the Court said the fundamental, foundational requirements of the DoC – materiality, similarity, etc. – need to be shown under 404(b). Before, trial judges were doing that under 403. The Court said it should be a step-by-step process. First determine whether the requirements are met under 404(b), and then determine whether the evidence is admissible under 403. The dispute now is whether the jury should be instructed, even if it's admitted after the 403 inquiry. The best argument for keeping it under 404(b) is that it aligns with what the Court directed in *Lowther*.

Judge Jones: The *Lane* case wasn't a sexual assault case and the Court of Appeals ruled that certain evidence shouldn't have been admitted and that the judge applied an improper test. The *Murphy* case was a sexual assault case. My recollection is that if we adopt 404(d), that will take care of almost every instance in which a trial judge would otherwise be tempted to admit 404(b) evidence under the DoC. I agree with John Nielsen that there are still circumstances where DoC evidence will be admissible. One that comes to mind is the officer in Chicago accused of killing his wife and, after looking into it, he may have killed two prior wives as well. That wasn't a sexual assault case but if the DoC was available, it would have been a tool to get the evidence before a jury.

Judge Welch: My understanding from the Court is that there may be a debate about what is and isn't propensity evidence. In the *Lane* case, Harris was saying let's just call this what it is, propensity evidence, and create a rule like 413 that allows propensity evidence of prior sexual assault cases. To him, the problem was putting that evidence through a DoC lens.

As to the underlying policy question, on one hand maybe the Justices want to exercise their rule-making authority to promulgate 404(d) for the same reasons 404(c) was promulgated. On the other hand, they may decide the issue is best left to the legislature like other states did.

John Lund: I would be surprised if the Court feels the legislature should make the call about the admissibility of evidence in court. My view over last few years is that the Court has gone in the other direction.

Judge Welch: In the similarity prong of the DoC in the rule draft I included more words than what ought to be there, but I did that to show what the controversies are. There is a debate about whether the prior acts are "roughly similar" or "significantly similar." The reason for the debate is that our caselaw uses both words.

John Lund: I wouldn't use the term DoC at all. I would change the first sentence to, "The court may admit prior act evidence for a proper, non-character statistical inference if each of the following requirements is met," and delete everything else including (b)(3)(A). The hardest thing to articulate is what makes the evidence a sufficiently strong statistical inference? I understand that the language under (b)(3)(A)(1) through (4) are direct quotes from caselaw, but how something's articulated in a case doesn't necessarily cover the waterfront in a rule.

John Neilsen: The subcommittee discussed how detailed to get in the rule. Imwinkelried said some of those will differ depending on the purpose for which they are offered. Sometimes the cases will say it only needs to be roughly similar if admitted for a mens rea purpose. If it's a modus operandi purpose, it needs to be a lot more similar. That's why we were trying to make it as vanilla as possible so the details could be worked out depending upon the purpose for which the evidence was going to be admitted. I like using the term DoC in the rule because it's helpful for practitioners. Those are key search terms used in other cases nationwide.

Deborah Bulkeley: Should we carve out the notice requirement in 404(b)(3)(E) and make it a standalone section, maybe 404(b)(4), so that it's clear the notice requirement applies to all DoC evidence?

Tenielle Brown: My concern is how the 403 analysis might work. Caselaw suggests the four factors used as threshold requirements under DoC are the very things that might make it prejudicial and therefore excluded under 403. There could be some question about how the 403 analysis works if the same factors are used for both.

Judge Welch: My understanding of how it works is that 404(b) is a binary test. Is similarity there or not? Yes or no. When you get to 403 it becomes a balancing test and other factors in addition to the four in 404(b) are considered.

Tenielle Brown: I worry about the limiting principle here. We are talking about specific case types like sexual assault and sexual abuse. Why not include drug addiction? That's the reason for the character evidence ban. People who commit the crime they are currently charged with (drug possession) are more likely to commit that same crime. It's quite probative, but it's also quite prejudicial.

The Committee engaged in a lengthy discussion about the language in the rule and whether it should mirror the language in caselaw, or whether the rule should be more concise and clear. For

example, what does "bona fide dispute" mean?

John Lund: I recommend providing the Court with a report on the subcommittee's work and the 50-state survey, but not the rule itself. Let the Court know that the Committee has significant questions about the policy underlying this concept and the extent to which it should be broadly worded vs focused on sexual assault cases where it comes up most often. Judge Harris and Judge Pullan made some good points and the rule is something we need to think through carefully.

Judge Welch: I think we should include the rule draft with the report. Not for approval, but they many not want 413 provisions or the DoC in the rule at all. It would be great to get that feedback before the subcommittee wordsmiths another draft.

John Lund: Having been in conferences with the Court, if we put a rule draft in front of them they will use their brainpower to go to work on it. I don't think what we have is ready for that level of scrutiny and I don't think we should take things up and say, "How do you think we're doing so far?" We need to come up with something that we as a group have parsed through and are comfortable with. Using the eyewitness identification rule process as an example, the Court wanted us to think about how phrases from caselaw should be articulated in a rule. That's what they expect of us.

John invited Judge Welch to attend the Supreme Court conference with him to present on 404(b) and asked the Committee members to send any feedback on the rule draft to the subcommittee. The subcommittee will start working on an amended rule draft based on the Committee's discussion today.

Keisa Williams: The next Supreme Court conference is May 13th. I'm not sure if they're still having it, but I'll find out and let everyone know.

The meeting was adjourned.

Next Meeting: June 9, 2020
5:15 p.m.
Via WEBEX

Tab 2

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Rule 512

4 messages

Judge Matthew Bates <mbates@utcourts.gov> Tue, Apr 21, 2020 at 3:33 PM
To: vlsnow@le.utah.gov
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Representative Snow,

I hope this email finds you healthy and well. I'm reaching out to you for some help with our draft amendment to Rule 512. As you hopefully remember, you and I met several weeks ago to review the amendment to the Rule, and you provided some input that was very helpful to us in adhering to the legislative intent of the privilege. After that meeting, the Supreme Court reviewed the draft, made a small grammatical change, and sent it out for public comment. The proposed amendment received one public comment.

The committee discussed that comment last week and then asked me to contact you with a question about the scope of the privilege and the effect of disclosures under subsections (d)(2) and (d)(3) of our amendment. Those sections permit disclosure of the communication when the communication is evidence of the "victim being in clear and immediate danger to the victim's self or others" or when the communication is evidence that "the victim has committee a crime, plans to commit a crime, or intends to conceal a crime." But subsection (2) states that such disclosures do not waive the privilege, meaning the communications still would not be admissible in any court proceeding.

This is inconsistent with how other rules of privilege treat such disclosures. For example, the peer-support privilege, Rule 507, which was created by the legislature a few years ago, does not apply in the circumstances described in subsections (d)(2) and (d)(3) of our proposed amendment. The attorney-client privilege, Rule 504, does not apply if the services of the lawyer were sought or obtained to enable or anyone to commit or plan to commit a crime or fraud. And, the husband-wife privilege, Rule 502, does not apply to any communication made to enable or aid anyone to commit, plan, or conceal a crime or tort. Given the scope of these other privileges, the committee felt that to be consistent that subsections (d)(2) and (d)(3) should be moved to subsection (e), which would make any communications disclosed under those subsections admissible in court, just like the other privilege rules.

But because this is a privilege that was created by the legislature, it is important to us that we honor the legislative intent, and we would appreciate your input. Should the communications described in subsections (d)(2) or (d)(3) be admissible in court? I attached a copy of the draft amendment just in case you don't have one handy.

I imagine you probably did not expect to still be involved in this more than a year after your bill passed. But this is an unusual circumstance where the Supreme Court has asked us to revise a rule created by the legislature. And your input has been extremely helpful. So please know that we value your time and attention to help us get this right. I'd be happy to chat by phone or video conference if that's easier.

Matthew Bates
Judge, Utah Third District Court
801-842-69369

URE-512-Redlined-for-comment-2-20-20.pdf
56K

Keisa Williams <keisaw@utcourts.gov> Tue, May 5, 2020 at 2:36 PM
To: jcarlton@le.utah.gov, Michael Drechsel <michaelcd@utcourts.gov>

Jacqueline,

Below is an email from Judge Bates to Rep. Snow with the latest information on URE 512. Let me know if this doesn't answer the questions you sent me in that separate email or if you need more information.

Thanks,
Keisa
[Quoted text hidden]
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Keisa Williams
Associate General Counsel
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, UT 84114-0241
Work Cell: 385-227-1426
Email: keisaw@utcourts.gov

URE-512-Redlined-for-comment-2-20-20.pdf
56K

Lowry Snow <vlsnow@le.utah.gov> Tue, May 5, 2020 at 3:16 PM
To: Judge Matthew Bates <mbates@utcourts.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Judge Bates,
Thank you for your email. I apologize for not responding sooner. Somehow in the press of dealing with multiple matters, your email escaped my attention. I'm working on the issues raised in your email now with legislative counsel and will respond shortly. Thank you for your patience.
Rep Snow

Representative V. Lowry Snow
vlsnow@le.utah.gov
435-703-3688
912 West 1600 South, Suite 200
St. George, UT 84770

From: Judge Matthew Bates <mbates@utcourts.gov>
Sent: Tuesday, April 21, 2020 3:33 PM
To: Lowry Snow <vlsnow@le.utah.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>; Michael Drechsel <michaelcd@utcourts.gov>
Subject: Rule 512

[Quoted text hidden]

Mbates <mbates@utcourts.gov> Thu, May 7, 2020 at 3:06 PM
To: Lowry Snow <vlsnow@le.utah.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Representative, no need to apologize. I am certain that you and your colleagues are very busy dealing with the issues created by the current global pandemic on top of your other responsibilities that keep Utah functioning. We are grateful to have such capable and attentive leaders in our legislature. And I appreciate your attention to this rule amendment whenever you have time.

Matt
[Quoted text hidden]

Tab 3

URE 106 Subcommittee (Utah Supreme Court Advisory Committee for the Rules of Evidence): Formed December 2019.

URE 106 Subcommittee Members: Judge Teresa Welch (Chair), Judge David Williams, Tenielle Brown, John Nielsen, Karen Klucznik (Guest)[1].

Tasks: Address the Utah Supreme Court's concerns in *State v. Sanchez,* 2018 UT 31 regarding URE 106 and decide whether the rule and advisory notes should be amended to address the Court's concerns.

Recap of Events:

In *State v. Sanchez,* 2018 UT 31, the Utah Supreme Court referred two pertinent Rule 106 issues to the Evidence Advisory Committee (*see* footnote 4 in the decision). These issues/questions are:

> (1) How does Rule 106 operate—i.e., does it have a trumping function or only a timing function? Importantly, jurisdictions are split on this issue. If rule 106 has a trumping function, the rule overcomes other rules of evidence that would preclude admissibility. For example, if rule 106 has a trumping function, it would operate to admit otherwise inadmissible hearsay as long as the hearsay statement is necessary to explain or put into context a portion of a statement already introduced. The timing function of rule 106 allows a party to interrupt the proceedings to have the curative evidence introduced immediately because admitting the curative evidence later may not adequately remedy the effect of the misleading impression of the already introduced partial statement.
>
> (2) What are the necessary and sufficient conditions for triggering rule 106? For example, to trigger rule 106, is it a requirement for the recorded statement to be admitted into evidence as a trial exhibit, or is it sufficient that the pertinent statement is referred to extensively at trial (during witness testimony and/or cross-examination) but not actually admitted. This is also a split jurisdiction issue as noted by paragraph 21 of the *Sanchez* decision: "Some courts have said that reading a writing or recorded statement into the record or directly quoting it on cross examination is enough, while other courts require actual introduction of the evidence before rule 106 applies."). Importantly, pursuant to *State v. Cruz-Meza*, 2003 UT 32, oral statements (those that are not transcribed) are not treated under rule 106, but under Utah R. Evid. 611. And, for an oral statement to be admitted under Rule 611, the party seeking to admit the statement must prove the trustworthiness of the statement. (Note: Trustworthiness is a consideration that is absent from the plain language of Rule 106).

In 2019, the Evidence Advisory Committee met, discussed, and decided these two issues. The Committee decided:

(1) Utah's rule 106 has a trumping function so that it admits otherwise inadmissible hearsay if the hearsay statement is necessary to qualify, explain, or place into context the partial statement already introduced. In reaching this decision, the Committee relied on and deferred

[1] Ms. Klucznik is not a member of the Utah Supreme Court Advisory Committee for the Rules of Evidence (Committee) but she was invited to participate in the Subcommittee's research and discussions of URE 106 as she was counsel for the State on appeal in *State v. Sanchez*, 2018 UT 31. TWelch, who is currently a member of the Committee, was counsel for Mr. Sanchez (the appellant) on appeal.

to the court of appeals decision in *State v. Sanchez*, 2016 UT App 189, wherein the COAs outlined various reasons for why Utah's rule 106 should operate as having a trumping function.

(2) For Rule 106 to trigger, it is not a requirement that the pertinent written statement be admitted as evidence at trial. It is therefore sufficient for the parties to refer to the statement at trial to trigger rule 106 issues. The Committee then drafted a proposed rule 106 to reflect these decisions.

John Lund and Keisa Williams then met with the Utah Supreme Court Justices to discuss the proposed changes to URE 106. In short, the Justices made some edits to the proposed rule, and they requested additional info from the Committee, including (1) a discussion/explanation of the interplay between the proposed URE 106 and URE 403, (2) an answer to whether there is a need to create a new Committee Advisory Note to the rule since the proposed Utah rule would deviate from the Federal Rule, and (3) a request to hear what other scholars and states are saying about Rule 106 issues.

**The most recent revised/edited proposed URE 106 is as follows:

"If a party introduces all or part of a writing or recorded statement, or testimony of the contents thereof, an adverse party may require the introduction, at that time, of any part—or any other writing or recorded statement, even if the remainder is otherwise inadmissible under these rules, unless the court for good cause otherwise orders."

Note: the Committee purposefully took out the "fairness" language that is currently found in the rule since Utah Case law defines "fairness" in the rule 106 context as being what is "necessary to qualify, explain, or place into context the portion already introduced.

Update and developments regarding proposed Amendments to FRE 106:

The Advisory Committee for the United States Supreme Court is currently proposing an amendment to FRE 106. In short, it appears that there has been extensive discussion and review regarding the proposed revisions for FRE 106, and this info will be helpful when discussing any proposed revisions for URE 106.

A discussion of the proposed changes to FRE 106 is in a Drexel blog at the link below. The Drexel blog (dated August 14, 2019) discusses the various circuit split issues regarding rule 106 issues and notes, "As amended, Rule 106 would apply not only to testimony that is tantamount of a writing but to oral statements as well. It would not matter whether that statement was hearsay if the statement was necessary for context. The amendment would resolve many circuit splits discussed."

https://drexel.edu/law/lawreview/blog/overview/2019/August/federal-rule-106

The new amendment for FRE Rule 106 would state:

> **"If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of another part—or any other statement—that in fairness ought to be considered at the same time.**
>
> **A) A statement admissible under this rule should not be excluded under the rule against hearsay.**
>
> **B) In a criminal case, if evidence admissible under this rule, and offered by the defendant, is excluded under any other rule, the entire statement must be excluded."**

The link below will take you to the April 2018 Advisory Committee Meeting Notes (for the United States Supreme Court) which also provides detailed FRE 106 info. (See pgs 2, 373-428).

https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf

The link below will take you to the May 3, 2019 Committee Meeting Notes for when the Advisory Committee (for the U. S. Supreme Court) met to discuss proposed revisions for FRE 106. (See pgs 5,187-275).

https://www.uscourts.gov/sites/default/files/2019-05-evidence-agenda-book.pdf

The link below will take you to the October 25, 2019 Meeting Notes for when the Advisory Committee (for the U. S. Supreme Court) where FRE 106 was discussed. (See pgs 2, 5-13).

https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_final_draft_agenda_book.pdf

It appears that the 5/3/2019 and 10/25/2019 meetings were the last two meetings where the Committee met and discussed FRE106. It is not clear when the Committee will next meet, but from looking at their website, it appears that they will likely meet again in Spring of 2020.

Pertinent Cases regarding URE 106:

1. *State v. Sanchez*, 2018 UT 31.
2. *State v. Cruz-Meza*, 2003 UT 32.
3. *State v. Jones*, 2015 UT 19.

Law Review Articles:

1. Andrea N. Kochert, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 Ind. L. Rev. 499.
2. Michael A. Hardin, *The Space Intentionally Left Blank: What to do When Hearsay and Rule 106 Completeness Collide*, 82 Fordham L. Rev. 1283.

3. Emily Nuvan, *The Incomplete Understanding of Rule 106: A Guide for Utah Courts to Take a Stand on the Rule of Completeness* (unpublished 2019 article).

Questions:

1. What issues are being discussed regarding proposed changes to FRE 106 and what is the current timeline/stage of this proposed rule change?

2. What impact does the proposed amendments to FRE 106 have on URE 106?

Proposed course of action for URE 106 Subcommittee:

1. Review all of the pertinent URE 106 materials, cases, and articles.
2. Compile a 50 State Survey to see how other states have drafted their rule 106.
3. Review the materials regarding the proposed changes to FRE 106.
4. Propose a course of action to the entire Committee regarding the pending proposed amendments to FRE106 and how this impacts URE 106.

4/6/2020 Update: The next meeting for the Advisory Committee on (Federal) Evidence Rules will take place on May 8, 2020. See https://www.federalregister.gov/documents/2020/03/10/2020-04893/advisory-committee-on-evidence-rules-meeting-of-the-judicial-conference

6/2/20 Update: The May 8, 2020 meeting was cancelled for the Advisory Committee for the Federal Evidence Rules. The meeting has been rescheduled for November. (This info is found at the link below). I do not know what this development/delay means for our work with URE 106. Perhaps the Committee should vote again on what course of action we should take given the delay that is occurring for any proposed changes to FRE 106? See https://www.uscourts.gov/rules-policies/about-rulemaking-process/open-meetings-and-hearings-rules-committee

Document: Rule 106 Fifty-State Summary.

Completed by: Rule 106 Subcommittee Members/Utah Supreme Court Advisory Committee for the Rules of Evidence–Judge Teresa Welch (Chair), Judge David Williams, John Nielsen, Teneille Brown, Karen Klucznik (Guest).

Summary of Document: This document lists the language and Advisory Committee Notes for Federal Rule of Evidence Rule 106. Thereafter, the document lists the language of Rule 106 and any Advisory Committee Notes for each of the fifty-states (as of January 2020).

> **FRE 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."
>
> ADVISORY COMMITTEE NOTES. 1972 Proposed Rules: The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement. The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick § 56; California Evidence Code § 356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case. For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.
>
> 1987 Amendments: The amendments are technical. No substantive change is intended.
>
> 2011 Amendments: The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106 Fifty (50) State Survey (as of January 2020):

1) **Alabama:** Ala. Rule 106. Remainder of Writings or Recorded Statements. "When a party introduces part of either a writing or recorded statement, an adverse party may require the introduction at that time of any other part of the writing or statement that ought in fairness to be considered contemporaneously with it."

   ADVISORY COMMITTEE'S NOTES. This rule constitutes a specialized application of the common law completeness doctrine. *See* 7 J. Wigmore, *Wigmore on Evidence* § 2113 (Chadbourn rev. 1978). When one party introduces a portion of a writing or a recorded statement, it is deemed only fair that the adverse party be allowed to have admitted any other part of the writing or recorded statement that in fairness ought to be considered. Rule 106constitutes a rejection of that portion of the corresponding federal rule that expands the historic doctrine of completeness to include the admission of any additional writing or recorded statement that ought in fairness to be considered contemporaneously with an already admitted writing or recorded statement. See Fed. R. Evid. 106.

The doctrine of completeness has traditionally been recognized in Alabama law. *Coleman v. Sparkman*, 370 So.2d 977 (Ala.1979); C. Gamble, *McElroy's Alabama Evidence* § 316.01 (4th ed. 1991). With regard to completeness of depositions, Rule 106 is virtually a restatement of Ala. R. Civ. P. 32(a)(4), which provides that if only part of a deposition is offered in evidence by a party, then an adverse party may require the party introducing it to introduce all of it that ought in fairness to be considered with the part introduced.

Both this Rule 106 and Ala. R. Civ. P. 32(a)(4) vest in the trial judge considerable discretion to determine what "in fairness" ought to be considered with the part introduced. See *Hargress v. City of Montgomery*, 479 So.2d 1137 (Ala.1985).

Rule 106 applies only to writings and recorded statements or parts thereof. This rule is not intended to affect preexisting Alabama applications of the completeness doctrine that lie outside the confines of Rule 106. The rule, for example, has no impact upon instances when the completeness doctrine is applied to unrecorded conversations. A prominent example of such an application, having continuing existence after adoption of Rule 106, is the rule that if one party proves any part of an unrecorded oral conversation or oral statement, the other party has the right to prove the relevant remainder of it. *Abram v. State*, 574 So.2d 986 (Ala.Crim.App.1990); *Stockard v. State*, 391 So.2d 1049 (Ala.Crim.App.1979), rev'd, 391 So.2d 1060 (Ala.1980). Another completeness principle lying outside of Rule 106 is that under which a party, whose admission has been admitted against him or her, may prove all that was said at the same time as the admission and on the same subject. *Bank of Loretto v. Bobo*, 37 Ala.App. 139, 67 So.2d 77, cert. denied, 259 Ala. 374, 67 So.2d 90 (1953); C. Gamble, *McElroy's Alabama Evidence* § 180.01(8) (4th ed. 1991). In addition to specifying evidence that should be admitted as part of the doctrine of completeness, Rule 106 contains a provision regarding timeliness. The adverse party may require that the evidence needed to provide fairness be admitted at the time the initial evidence is admitted. Compare Ala. R. Civ. P. 32(a)(4). This allowance is afforded in the belief that delay in providing completeness evidence will render it less effective. This rule of contemporaneous admission in no way limits the right of the adverse party to go into the same matter on cross-examination of the witness or to offer evidence on the same matter as part of the adverse party's own case. See Fed. R. Evid. 106 advisory committee's note.

2) **Alaska:** AK Rule 106. Remainder of, or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or related statement which ought in fairness to be considered contemporaneously with it."

3) **Arizona:** AZ 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."

COMMENT TO 2012 AMENDMENT. The language of Rule 106 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

4) **Arkansas:** ARE Rule 106. Remainder of or Related Writings or Recorded Statements. "Whenever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it."

   HISTORICAL NOTES. This rule is similar to Rule 106 of the Uniform Rules of Evidence (1974).

5) **California:** Evidence Code §356. Entire act, declaration, conversation, or writing to elucidate part offered. "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

   COMMENT--ASSEMBLY COMMITTEE ON JUDICIARY. Section 356 restates the substance of and supersedes Section 1854 of the Code of Civil Procedure. The rule stated in Section 356, like the superseded statement of the rule in the Code of Civil Procedure, only makes admissible such parts of an act, declaration, conversation, or writing as are relevant to the part thereof previously given in evidence. See, *e.g.*, Witt v. Jackson, 57 Cal.2d 57, 67, 17 Cal.Rptr. 369, 374, 366 P.2d 641, 646 (1961) (the rule "is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced"). See also Evidence Code § 350.

6) **Colorado**: CRE Rule 106. Remainder of or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

   HISTORICAL NOTES. This rule is similar to Fed.Rules Evid. Rule 106, 28 U.S.C.A.

7) **Connecticut:** Code of Evidence, Sec 1-5. Remainder of Statements. "(a) Contemporaneous Introduction by Proponent. When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it. (b) Introduction by Another Party. When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it."

   COMMENTARY. (a) Contemporaneous introduction by proponent. Subsection (a) recognizes the principle of completeness. Sometimes, one part of a statement may be so related to another that, in fairness, both should be considered contemporaneously. Subsection (a) details the circumstances under which a court may or shall require a proponent of one part of a statement to contemporaneously introduce the other part. See *Clark* v. *Smith*, 10 Conn. 1, 5 (1833); *Ives* v. *Bartholomew*, 9 Conn. 309, 312-13 (1832); see also Practice Book § 13-31 (a) (5) (depositions); cf. *Walter* v. *Sperry*, 86 Conn. 474, 480, 85 A. 739 (1912). The basis for the rule is that matters taken out of context can create misleading impressions or inaccuracies and that

waiting until later in the trial to clear them up can be ineffectual. See, e.g., *State* v. *Arthur S.*, 109 Conn. App. 135, 140-41, 950 A.2d 615, cert. denied, 289 Conn. 925, 958 A.2d 153 (2008). "Statement," as used in this subsection, includes written, recorded and oral statements. Because the other part of the statement is introduced for the purpose of placing the first part into context, the other part need not be independently admissible. See *State* v. *Tropiano*, 158 Conn. 412, 420, 262 A.2d 147 (1969), cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288 (1970).

(b) Introduction by another party. Unlike subsection (a), subsection (b) does not involve the contemporaneous introduction of evidence. Rather, it recognizes the right of a party to subsequently introduce another part or the remainder of a statement previously introduced in part by the opposing party under the conditions prescribed in the rule. See *State* v. *Paulino*, 223 Conn. 461, 468-69, 613 A.2d 720 (1992); *State* v. *Castonguay*, 218 Conn. 486, 496-97, 590 A.2d 901 (1991); *Rokus* v. *Bridgeport*, 191 Conn. 62, 69, 463 A.2d 252 (1983); see also Practice Book § 13-31(a)(5) (depositions). Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)'s use of the word "statement" includes oral, written and recorded statements. In addition, because the other part of the statement is introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. See *State* v. *Paulino*, supra, 223 Conn. 468-69; *State* v. *Castonguay*, supra, 218 Conn. 496; cf. *Starzec* v. *Kida*, 183 Conn. 41, 47 n.6, 438 A.2d 1157 (1981).

8) **Delaware**: DRE 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."

COMMENT. This rule tracks F.R.E. 106. It is similar to Federal Rule of Civil Procedure 32(a)(6) and Delaware Court of Chancery Rule 32(a)(4)and Delaware Superior Court Civil Rule 32(a)(4). The Committee rejected the substitution of a "relevance" test for a "fairness" test for what must also be introduced if part of a writing or statement is introduced. For prior Delaware case illustrating the law covered by this rule, see Lowber v. State, Del. Supr., 100 A. 322 (1917). D.R.E. 106 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. The pre-2017 "Comment" to D.R.E. 106 was revised only as necessary to reflect the 2017 amendments and the current language of the Federal Rules of Civil Procedure. There is no intent to change any result in ruling on evidence admissibility.

9) **Florida:** Evidence Code §90.108. Introduction of Related Writings or Recorded Statements. "(1) When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section. (2) The report of a court reporter, when certified to by the court reporter as being a correct transcript of the testimony and proceedings in the case, is prima facie a correct statement of such testimony and proceedings."

LAW REVISION COUNCIL NOTE—1976. Generally, when a party introduces only a part of a writing or document, the adverse party may prove the contents of the remainder of the instrument or require his adversary to do so. See Crawford v. United States, 212 U.S. 183, 29 S.Ct. 260, 53 L.Ed. 465 (1909). The remainder of the document or writing can only be admitted in so far as it relates to the same subject matter and tends to explain and shed light on the meaning of the part already received. McCormick, *Evidence* § 56 (2nd ed. 1970).This section allows an adverse party to have his opponent introduce the remainder of a writing at the same time that a portion of it is introduced, and also have contemporaneously introduced any other writing or recorded statement which in fairness ought to be considered contemporaneously. The reasoning of this section is twofold. First, it avoids the danger of mistaken first impressions when matters are taken out of context. Second, it avoids the inadequate remedy of requiring the adverse party to wait until a later point in the trial to repair his case. This section is in addition to Fla.Rules of Civ.Pro. 1.330(b) [see, now, Rule 1.330(a)(4)] and 1.340(b) which provide that when portions of depositions and interrogatories are not offered by a party, an adverse party may require the introduction of any other part that in fairness ought to be considered with the part introduced, and any party may introduce any other parts. This section does not apply to conversations but is limited to writings and recorded statements because of the practical problem involved in determining the contents of a conversation and whether the remainder of it is on the same subject matter. These questions are often not readily answered without undue consumption of time. Therefore, remaining portions of conversations are best left to be developed on cross-examination or as a part of a party's own case. This treatment of conversations is in accord with Morey v. State, 72 Fla. 45, 72 So. 490 (1916), where in a criminal prosecution, when the state offered evidence of inculpatory statements made by the defendant, the court found that the defendant had the right to have placed before the jury, by means of cross-examination, the entire conversation or all statements made by the defendant at the same time and relating to the same subject matter, whether such other statements or the remainder of the conversation are exculpatory in nature.See Fed.Rule Evid. 106, Calif.Evid.Code § 356 allows the admission of remaining portions of acts, declarations, writings, and conversations that have been received in part.Commentary on 1978 Amendment: This amendment added a final sentence to Section 90.108 to make clear that a party, who is required to introduce writings or recorded statements under the section, will not be bound by the evidence so introduced.

10) **Georgia:** GA. Code Ann. §24-1-106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement."

11) **Hawaii:** HRS §626-1, Rule 106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

RULE 106 COMMENTARY. This rule is identical with Fed. R. Evid. 106. The rule incorporates the common law doctrine of completeness, see McCormick § 56. As the Hawaii Supreme Court said in Holstein v. Young, 10 H. 216, 220 (1896), a party cannot "utilize so much of this evidence as will serve his turn and reject the remainder." Cf. HRCP 32(a)(4), which provides: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced." The

Advisory Committee's Note to Fed. R. Evid. 106 points out: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."

12) **Idaho:** IRE 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."

13) **Illinois**: Evid. Rule 106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

14) **Indiana:** IN 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."

15) **Iowa:** ICA Rule 5.106. Remainder of related acts, declarations, conversations, writings or recorded statements. "a. If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any other part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time. b. Upon an adverse party's request, the court may require the offering party to introduce at the same time with all or part of the act, declaration, conversation, writing, or recorded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106(a). Rule 5.106(b), however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a)."

16) **Kansas:** Appears to have no evidence rule. "The rule of completeness is a common law rule that has had limited application in Kansas." *State v. White*, 262 P.3d 698 (Kan. Ct. App. 2011).

17) **Kentucky:** KRE Rule 106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

18) **Louisiana:** LSa-R.S. 15:450. Use of confession, admission or declaration in entirety. "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

19) **Maine:** ME Rule 106. Remainder of or related writings or recorded statements. "If a party utilizes in court 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 time."

MAINE RESTYLING NOTE--NOVEMBER 2014. Maine Rule 106 is a little broader than its federal counterpart, in that it authorizes the introduction in evidence of a writing or other parts of a writing that is "utilized" in court, not just admitted. This is to allow a party to attempt to counteract potentially incomplete or misleading handling or reference to writings in court even if they are not formally offered in evidence. *See* Maine Advisers' Note to Rule 106. This policy choice has been carried over in the restyled Rule.

FEDERAL ADVISORY COMMITTEE NOTE. The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISERS' NOTE TO FORMER M.R. EVID. 106--FEBRUARY 2, 1976
This rule codifies the familiar principle of "completeness", which is already embodied in M.R.C.P. 32(a)(4) as to depositions. Its purpose is to enable the court to correct the misleading impression created by taking matters out of context. It applies to writings and recorded statements but not to conversations. When part of a writing or recording is introduced, an adverse party has the right to inspect it and move that any other part be put in evidence immediately after the incomplete portion has been introduced, so that its impact will not be lessened by the delay. The court obviously has a large measure of discretion in determining what in fairness should thus be contemporaneously considered. The words "utilized in court" are designed to permit the same procedure when a writing is silent on a point as when it is contrary to the testimony of a witness on the stand. A concession drawn from a witness that his written statement does not include a certain thing may be just as misleading as introduction of a part of a statement contrary to his testimony. The Federal Rule uses "introduced" instead of "utilized in court" and thus does not protect against the misleading effect which may result from the use of a statement without its introduction in evidence.

20) **Maryland:** MD Rule 5-106. Remainder of or related writings or recorded statements. "When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Committee note: The change that this Rule effects in the common law is one of timing, rather than of admissibility. The Rule does not provide for the admission of otherwise inadmissible evidence, except to the extent that it is necessary, in fairness, to explain what the opposing party has elicited. In that event, a limiting instruction that the evidence was admitted not as substantive proof but as explanatory of the other evidence would be appropriate.
See *Richardson v. State,* 324 Md. 611 (1991). The Rule thus provides for the alternative of an earlier admission of evidence with regard to writings or recorded statements than does the common law rule of completeness. The timing under the common law remains applicable to oral statements and also remains as an alternative with regard to writings and recorded statements.

21) **Massachusetts:** R. Evid. 106. "(a) Remainder of writings or recorded statements. If a party introduces all or part of a writing or recorded statement, the court may permit an adverse party to introduce any other part of the writing or statement that is (1) on the same subject, (2) part of the same writing or conversation, and (3) necessary to an understanding of the admitted writing or statement. (b) Curative admissibility. When the erroneous admission of evidence causes a party to

suffer significant prejudice, the court may permit incompetent evidence to be introduced to cure or minimize the prejudice."

NOTES: Subsection (a). This subsection is derived from Commonwealth v. Aviles , 461 Mass. 60, 74 (2011). See Mass. R. Civ. P. 32(a)(4) . "When a party introduces a portion of a statement or writing in evidence the doctrine of verbal completeness allows admission of other relevant portions of the same statement or writing which serve to 'clarify the context' of the admitted portion." Commonwealth v. Carmona , 428 Mass. 268, 272 (1998), quoting Commonwealth v. Robles , 423 Mass. 62, 69 (1996). "The purpose of the doctrine is to prevent one party from presenting a fragmented and misleading version of events by requiring the admission of other relevant portions of the same statement or writing which serve to clarify the context of the admitted portion" (citations and quotations omitted). Commonwealth v. Eugene , 438 Mass. 343, 351 (2003). "The portion of the statement sought to be introduced must qualify or explain the segment previously introduced" (citations and quotations omitted). Commonwealth v. Richardson , 59 Mass. App. Ct. 94, 99 (2003). See, e.g., Commonwealth v. Aviles, 461 Mass. at 74 (where defendant offered portion of victim's testimony describing touching of her buttocks, Commonwealth was properly permitted to offer testimony about touching of vaginal area, as both answers pertained to issue of where defendant had touched victim and were made during the same line of questioning).

The decision as to when the remainder of the writing or statement is admitted is left to the discretion of the judge, but the "better practice is to require an objection and contemporaneous introduction of the complete statements when the original statement is offered." McAllister v. Boston Hous. Auth. , 429 Mass. 300, 303 (1999). See Section 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court. Compare Commonwealth v. Thompson , 431 Mass. 108, 115, cert. denied, 531 U.S. 864 (2000) (doctrine is not applicable to defendant's effort to admit alibi portion of his or her statement that has nothing to do with statement offered by Commonwealth), with Commonwealth v. Crayton , 470 Mass. 228, 230 (2014) (in prosecution for possession of child pornography, it was error to admit defendant's statement to police that he had been using a particular computer at library while excluding his contemporaneous denial that he had viewed child pornography on that computer).

Subsection (b). This subsection is derived from Commonwealth v. Ruffen , 399 Mass. 811, 813-814 (1987) ("The curative admissibility doctrine allows a party harmed by incompetent evidence to rebut that evidence only if the original evidence created significant prejudice."). See also Commonwealth v. Reed , 444 Mass. 803, 810–811 (2005) (court required to admit evidence); Burke v. Memorial Hosp. , 29 Mass. App. Ct. 948, 950 (1990), citing Commonwealth v. Wakelin , 230 Mass. 567, 576 (1918).

22) **Michigan**: R. Evid., Rule 106. Remainder of or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

COMMENTS. Staff Comment to 1978 Adoption: MRE 106 is identical with Rule 106 of the Federal Rules of Evidence.

23) **Minnesota:** R. Evid. 106. Remainder of or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

COMMITTEE COMMENT 1977. The rule extends the present rule with regard to depositions to other writings and recordings. Minn.R.Civ.P. 32.01(4). The rule is not intended to apply to conversations.

24) **Mississippi:** R. Evid. 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."

ADVISORY COMMITTEE HISTORICAL NOTE. Effective July 1, 2016, the Rule was amended as part of the general restyling of the Evidence Rules. Effective June 16, 2016, the "Comment" was retitled "Advisory Committee Note."

ADVISORY COMMITTEE NOTE. The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is a codification of the common law doctrine of completeness. The rule is already codified with regard to depositions in M.R.C.P. 32(a)(4). However, Rule 106 is somewhat narrower than Mississippi common law. The rule only applies the doctrine of completeness to written or recorded statements of a specific document. Under Mississippi case law the rule of completeness is extended to other writings and even to oral statements. See *Davis v. State*, 230 Miss. 183, 92 So. 2d 359 (1957); *Sanders v. State*, 237 Miss. 772, 115 So. 2d 145 (1969). Such a rule attempts to prevent misleading the jury by taking evidence out of context.

25) **Missouri:** Appears to have no evidence rule, just the common law rule of completeness, *See, e.g., State v. Ellis*, 512 S.W.3d 816 (Mo. Ct. App. 2016).

26) **Montana:** R. Evid. Rule 106. Remainder of or related acts, writings, or statements. "(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party: (1) an adverse party may require the introduction at that time of any other part of such item or series thereof which ought in fairness to be considered at that time; or (2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof. (b) This rule does not limit the right of any party to cross-examine or further develop as part of the case matters covered by this rule."

COMMISSION COMMENTS: Subdivision (a). This subdivision incorporates Federal Rule 106 with Section 93-401-11, R.C.M. 1947 [superseded], and case law developed under it. The Commission intends that this combination will preserve Montana's completeness rule; adopt the Federal Rule allowing the whole of a writing or recorded statement to be admitted, if fairness requires it, when part of the writing or recorded statement is introduced; and, result in a rule of completeness that codifies all of Montana case law so that scattered fragments of the rule of completeness do not have to be searched for when the rule is to be applied. Therefore the Commission believes that this incorporation of the Federal Rule and Montana law is a more accurate statement of the rule of completeness.

The subdivision is identical to Federal and Uniform Rules (1974) Rule 106 with these exceptions: "When part of an act, declaration, conversation, writing or recorded statement or series thereof" is substituted for "When a writing or recorded statement or part thereof" in the first clause; "(1)" is added and "of such item or series thereof" is substituted for "any other writing or recorded statement" and "at that time" is substituted for "contemporaneously with it" in paragraph (1); and paragraph (2) is added.

The subdivision begins with an expanded list of matters to be covered by the rule. Section 93-401-11, R.C.M. 1947 [superseded], covers acts, declarations, conversations, and writings; Federal Rule 106 covers only writings and recorded statements. Therefore the rule adds the items from Montana law to the Federal Rule and the rule adds recorded statements to Montana law. This addition is consistent with the policy of Section 93-401-11, R.C.M. 1947 [superseded], whose title reads: "When part of the transaction proved, the whole is admissible", and with the items listed in that section; the addition is intended to be a modernization of that section. The list includes not only part of such items, but also a series of such items which is a codification of the Montana practice. Northwestern Electric Equipment Co. v. Leighton, 66 Mont. 529, 536, 213 P 1094 (1923).

Paragraph (1) is a statement of the operational part of Federal Rule 106 which allows the adverse party the right to require the immediate introduction of all items of evidence which ought to be considered with part of the item of evidence being offered by the proponent of such evidence. The reason for this rule is that a mistaken impression gained by out of context evidence is hard to correct when the whole of the matter is not presented until later. Advisory Committee Note to Federal Rule 106, 46 F.R.D. 161, 194. A similar provision has already been adopted in Montana in [former] Rules 26(d)(4), M.R.Civ.P. [now superseded], allowing immediate introduction of all relevant parts of a deposition when a part is introduced; the same provision applies to interrogatories under [former] Rule 33, M.R.Civ.P. [now superseded] and use of depositions in criminal trials under Section 95-1802(c), R.C.M. 1947 [46-15-202].

Paragraph (2) is a statement of the operation of Montana law under Section 93-401-11, R.C.M. 1947 [superseded], and case law construing it which allows the adverse party the right to inquire into other evidence necessary to make the proponent's evidence understood at any time. The evidence needed to make the part introduced understood is not normally admitted until the adverse party presents his case. McGonigle v. Prudential Life Ins. Co., 100 Mont. 203, 223, 46 P2d 687 (1935) and Rasmussen v. Lee, 104 Mont. 278, 282, 66 P2d 119 (1937). The Montana completeness rule allows evidence which would ordinarily be inadmissible on its own to be admitted. McConnell v. Combination M & M Co., 30 Mont. 239, 263, 76 P 14 (1904) and Hulse v. N. Pac. Ry., 47 Mont. 59, 63, 130 P 415 (1913).

The two paragraphs follow the normal sequence of trial in that paragraph (1) allows the adverse party to immediately require that the remainder of evidence be admitted at the same time that the proponent's evidence is admitted when fairness requires. Paragraph (2) allows an inquiry by the adverse party at any time, but also gives him the right to introduce such evidence as part of his own case if paragraph (1) was not used. Failure to demand introduction under paragraph (1) would not waive the right to introduce this evidence later. Therefore, this proposed rule expresses existing Montana law as well as expanding the completeness rule to include recorded statements and allows immediate introduction of the remainder of evidence to gain a complete impression, which is an expansion of [former]Rules 26(d)(4) and 33, M.R.Civ.P. [now superseded] and Section 95-1802(c), R.C.M. 1947 [46-15-202].

It should be noted that the trial court makes the final determination of how much evidence is needed to make a fair impression under this rule and to prevent abuses of the rule. The authority of the court to make such rulings is Rule 403, allowing exclusion of relevant evidence on the grounds of prejudice, confusion of issues, or misleading the jury and waste of time or undue delay; and Rule 611 allowing the court the authority to conduct trial.

Subdivision (b). This subdivision is original and therefore entirely different than Federal and Uniform Rules (1974) Rule 106. The Advisory Committee Note to Federal Rule 106, 46 F.R.D. 161, 194 states the same principle as this subdivision. The commission feels that the guarantee of the right of any party to cross-examine or further develop as part of his case matters covered by this rule is important enough to be stated in the rule. [Former] Rule 26(d)(4) and Rule 33 (by reference) M.R.Civ.P. [now superseded] and Section 95-1802(c), R.C.M. 1947 [46-15-202], state the same principle contained in Federal Rule 106 and proposed rule 106(a)(1) as applied to depositions and interrogatories and then conclude by giving any party the right to introduce any other part. There is no other Montana law specifically on this point, and therefore this would be new Montana law.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT: The revision establishes gender neutral format only. No substantive change.

27) **Nebraska:** Revised Statute §27-106. Rule 106. Remainder of or related writings or recorded statements; action of judge. "(1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence. (2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time."

28) **Nevada:** Revised Statutes 47.120. Remainder of writings or recorded statements. "1. When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts. 2. This section does not limit cross-examination."

SUBCOMMITTEE'S COMMENT. Adapted from Draft Federal Rule 1-07, but reduced to present language of N.R.C.P. 26 concerning depositions. Subsection 2 clarifies that the adverse party may introduce related but different writings upon cross-examination as well as in his own case.

29) **New Hampshire:** R. Evid. 106. Remainder of or Related Writings or Recorded Statements. "(a) If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at the time, of any other part-- or any other writing or recorded statement-- that in fairness ought to be considered at the same time. (b) A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced so far as it relates: (1) to the same subject matter; and (2) tends to explain or shed light on the meaning of the part already received."

REPORTER'S NOTES. This Rule is derived from the language of F.R.Civ.P. 32(a)(4) which provides that when part of a deposition is introduced, the proponent may be required "to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." It is comparable to the law in New Hampshire with

respect to depositions, writings and treatises. See, Graves v. Boston & Maine R.R., 84 N.H. 225, 149 A. 70 (1930) (regarding use of depositions). The Reporter's Notes of the Vermont Rules of Evidence explain that: The rule permits the adverse party to require immediate introduction of remaining parts or related documents in the case of a writing in order to prevent the misleading impression given by an out-of-context presentation from taking root. Conversations are not accorded similar treatment, because of the cumbersomeness of presenting testimonial evidence of related parts in the middle of proponent's case. The adverse party may, however, present related parts of conversations by way of cross-examination or as part of his own case. He may, of course, also present the remainder of a writing in the same fashion if he wishes. See generally, Federal Advisory Committee's Note to Rule 106; McCormick, Evidence 130-131 (2d Ed.1972).

The Rule does not purport to limit in any manner the right to cross-examine as to portions of the matter introduced, or to incorporate them into the case of the proponent's adversary.

2016 NHRE UPDATE COMMITTEE NOTE. The amendment made by supreme court order dated April 20, 2017, effective July 1, 2017, made stylistic and substantive changes to the rule. The amendment designated the first paragraph (a) and added subdivision (b). The changes to (a) are stylistic and mirror the federal rule. The addition of (b), not included in Federal Rule of Evidence 106, codifies New Hampshire case law as set forth in State v. Lopez, 156 N.H. 416, 421 (2007). State court rules are current with amendments received through December 15, 2019.

30) **New Jersey**: R. Evid. 106. Remainder of or related writings or recorded statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously."

Note: the following New Jersey Rule 106 was amended on September 16, 2019 and is to be effective July 1, 2020. "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."

COMMENT. This rule follows Fed.R.Evid. 106 almost verbatim. While there is no 1967 New Jersey analogue to this rule, the Rules of Court have similar provisions governing the use at trial of depositions and interrogatories. See R. 4:16-1(d); R. 4:17-8(a). The federal rule is adopted because it incorporates the prevailing practice in this state.

31) **New Mexico:** N.M. R. Evid. 11.106. 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 quire the introduction, at that time, of any other party—or any other writing or recorded statement—that in fairness ought to be considered at the same time."

COMMITTEE COMMENTARY
The language of Rule 11-106 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

32) **New York:** New York does not have a rule of evidence similar to Federal Rule of Evidence 106.

33) **North Carolina:** N.C. R. Evid. 106. Remainder of or Related Writing or Recorded Statements.
"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part of any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

NORTH CAROLINA COMMENTARY
This rule is identical to Fed.R.Evid. 106. The Advisory Committee's Note states:
"The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement."

"The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial… the rule does not in any awy circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case."

"For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations."

N.C.Civ.Pro.Rule 32(a)(5), which applies to depositions, is similar to Rule 106.

34) **North Dakota:** N.D.R.Ev. 106. Remainder of or Related Writings or Recorded Statements.
"If a party introduces all or part of a writing or recorded statement, an opposing 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."

EXPLANATORY NOTE
Rule 106 is not a rule of admissibility, but rather one dealing with order of proof and, as such, may be considered to be but a specific application of the general dictates of Rule 611.

The standard of fairness gives the trial court wide discretion under this rule, which accords with the powers of a trial court to regulate the mode and order or proof, generally, granted by Rule 611. Thus, the court need not admit all evidence that may be related to the evidence sought to be introduced. Rules of relevancy, and other rules of admissibility, generally, should guide the trial court's decision.

Rule 106 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change ny result in any ruling on evidence admissibility.

35) **Ohio:** Ohio Evid. R. 106. Remainder of or Related Writings or Recorded Statements.
"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part of any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it."

STAFF NOTES
1980:

Rule 106, like Federal Evidence Rule 106, states that when a party introduces a writing or recording, or a part of either, into evidence, the adverse party may require him "At that time" to introduce any other recording or writing, or remainder of the part introduced into evidence, which in fairness places the writing or recorded introduced into proper context. The rule is a rule of timing which avoids the need for the adverse party to wait until later to place the writing or recording introduced into proper perspective through cross-examination or rebuttal evidence. The rule merely codifies the better common law tradition. See McCormick § 56 (2d ed. 1972).

The rule is limited to writings and recordings; it does not apply to conversations. Rule 106 is similar to Civ. R. 32(a)(4), which provides that when a party of a deposition is introduced into evidence, "An adverse party may require him to introduce all of it which is relevant to the part introduced."

In contrast to the Federal Rule, Rule 106 explicitly provides that it does not make admissible a writing or a part thereof that is otherwise inadmissible.

36) **Oklahoma:** Okla. Stat. Ann. tit. 12, § 2107 (West). Remainder of record.
"When a record or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other record that should in fairness be considered contemporaneously with it."

EVIDENCE SUBCOMMITTEE'S NOTE
This section is identical to Rule 106 of the Federal Rules. A more all-inclusive rule will be found in the Evidence Code of California (c. 4, § 356, 1965) which extends the principle of the rule beyond writings and recorded statements to "acts," "declarations," "conversations," writings" or "answers to letters." The rule, unlike § 356 of the California Code is limited for "practical considerations." No Oklahoma authority was found which deals with the substance contained in this section and thus has a clarifying effect.

37) **Oregon:** Or. Rev. Stat. Ann. § 40.040 (West). When part of transaction proved, whole admissible. "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, where otherwise admissible, may at that time be inquired into by the other; when a letter is read, the answer may at that time be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may at that time also be given in evidence."

EDITORS' NOTES
1981 CONFERENCE COMMITTEE COMMENTARY
Oregon Rule of Evidence 106 states the rule on admissibility of the whole where part of a transaction is proved. It replaces ORS 41.880, which is repealed, with language intended to reflect the actual case-law interpretation of that statute. The text of ORS 41.880 is amended (1) to allow contemporaneous as well as later introduction of the remainder of a writing or event, (2) but only, in either event, if the remaining evidence is otherwise admissible. See *Black v. Nelson*, 246 Or. 161, 424 P.2d 251 (1967) (remainder excluded as irrelevant), and *Myers v. Cessna Aircraft Corp.*, et al., 275 Or. 501, 553 P.2d 355 (1976) (remainder excluded as hearsay).

38) **Pennsylvania:** Pa.R.E.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 party—or any other writing or recorded statement—that in fairness ought to be considered at the same time."

Comment: This rule is identical to F.R.E. 106. A similar principle is expressed in Pa.R.C.P. No. 4020(a)(4), which states: "if only part of a deposition is offered in evidence by a party, any other party may require the offering party to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

The purpose of Pa.R.E. 106 is to give the adverse party an opportunity to correct a misleading impression that may be created by the use of a part of a writing or recorded statement that may be taken out of context. This rule gives the adverse party the opportunity to correct the misleading impression at the time that the evidence is introduced. The trial court has discretion to decide whether other parts, or other writings or recorded statements, ought in fairness to be considered contemporaneously with the proffered part.

39) **Rhode Island:** R.I.R. Evid. 106. Remainder of or Related Writings or Recorded Statements
"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

40) **South Carolina:** S.C.R.E. 106. Remainder of or Related Writings or Statements
"When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

41) **South Dakota:** SD ST§ 19-19-106. Remainder of 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"

42) **Tennesee:** Tenn. R. Evid. 106. Writings or Recorded Statements – Completeness. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Advisory Commission Comment**:** The Rule restates settled law. Notable Annotations: *State v. Vaughn*, 144 S.W.3d 391 (Ct. Crim. App. 2003) in which the Court allowed a police report containing hearsay and hearsay within hearsay pursuant to Rule 106. Court noted that Tennessee had adopted the Federal Rule and that and indicated that Rule 106 was a "rule of timing rather than admissibility."

43) **Texas:** TX R. Evid. 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 introduce, at that time, any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions."

Notable Annotations:
Generally, self-serving statements are not admissible in evidence to prove the matter asserted; exceptions to this rule apply where the excluded evidence is part of a statement or conversation previously introduced by state and is necessary to explain part of statement previously admitted, or the excluded evidence in fairness should be considered contemporaneously with the statement. Lawson v. State (App. 3 Dist. 1993) 854 S.W.2d 234, rehearing overruled, petition for discretionary review refused.

Under the doctrine of optional completeness, letter written by defendant alleging compliance with law in response to letter from police chief providing notice that defendant was operating gambling devices in her place of business should not have been excluded on ground of hearsay; letter completed the communication between defendant and police chief, and exclusion of letter gave rise to strong possibility that jury could form false impression regarding defendant's intent. Elmore v. State (App. 2 Dist. 2003) 116 S.W.3d 801, petition for discretionary review refused.

Witness' entire written statement to police was admissible in capital murder prosecution after defense counsel read portion of witness' statement to place statement into proper context so as to alleviate possibility of misapprehension by jury. Livingston v. State (Cr.App. 1987) 739 S.W.2d 311,

44) **Utah:** Utah R. Evid. 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."

ADVISORY COMMITTEE NOTES: This rule is the federal rule, verbatim. Utah Rules of Evidence (1971) was not as specific, but Rule 106 is otherwise in accord with Utah practice.

2011 Advisory Committee Notes: The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

45) **Vermont:** VT R. Evid. 106. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it"

Reporter's Notes: This rule is identical to Federal Rule 106 and virtually identical to the Uniform Rule. Its language is derived from Federal Civil Rule 32(a)(4), which is identical to V.R.C.P. 32(a)(4), providing that, when part of a deposition is introduced, the proponent may be required "to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." See also V.R.Cr.P. 15(e) (proponent may be required to introduce "all parts ... relevant to the part offered, and any party may offer other parts"); Rule 410 (statements in plea discussions).

For writings other than depositions, the Vermont cases have recognized the right of the adverse party to offer other parts that are related to the issue for which the part first in evidence was offered, but no case has been found that required the original proponent of part of a document to introduce the remainder at the time of his own offer. See Hendrickson v. International Harvester Co., 100 Vt. 161, 167-68, 135 A. 702, 704-05 (1927) (successive paragraphs of letter); Enos v. Owens Slate Co., 104 Vt. 329, 336-37, 160 A. 185, 188-89 (1932) (where defendant put dates of bills of lading in evidence, plaintiff not thereby entitled to put in bills in their entirety); State v. Williams, 94 Vt. 423, 436, 111 A. 701, 708 (1920) (only that part of banking commissioner's report relevant to audit in controversy need be admitted). Vermont law has also taken a similar position regarding conversations. Hutchinson v. Knowles, 108 Vt. 195, 200-02, 184 A. 705, 707-08 (1936)(recognizing rule, but excluding testimony that person who took statement was insurance company representative as irrelevant to statement); Perry v. Moore, 66 Vt. 519, 520-21, 29 A. 806, 806-07 (1894) (where conversations of testatrix tending to show undue influence were admitted, contemporaneous conversations tending to show lack thereof were admissible).
The rule permits the adverse party to require immediate introduction of remaining parts or related documents in the case of a writing in order to prevent the misleading impression given by an out-of-context presentation from taking root. Conversations are not accorded similar treatment, because of the cumbersomeness of presenting testimonial evidence of related parts in the middle of proponent's case. The adverse party may, however, present related parts of conversations by way of cross-examination or as part of his own case. He may, of course, also present the remainder of a writing in the same fashion if he wishes. See generally Federal Advisory Committee's Note to Rule 106; McCormick, supra § 56 at 130-31.
Under the broad “fairness” standard of the rule, the adverse party should be permitted to require introduction of other parts of the writing or related writings that help to explain the original writing even when they are incompetent as hearsay or otherwise. “Fairness,” however, should be understood as giving the court discretion, consistent with Rule 403, to exclude all or part of such remainder or related writings when the degree of incompetence is such that the jury would be misled, or when the prejudicial effect would outweigh the probative value.Although the rule is silent as to this point, the necessary implication of the right to require introduction of such incompetent evidence during the proponent's case is that the adverse party may introduce such evidence, subject to Rule 403, as part of his own case. See generally McCormick, supra § 56 at 131.

46) **Virginia**: VA R. S Ct Rule 2:106. Remainder of a Writing or Recorded Statement (Rule 2:106(b) derived from Code §8.01-417.1).
   - Related Portions of a Writing in Civil and Criminal Cases. When part of a writing or recorded statement is introduced by a party, upon motion by another party the court may require the offering party to introduce any other part of the writing or recorded statement which ought in fairness to be considered contemporaneously with it, unless such additional portions are inadmissible under the Rules of Evidence.
   - Lengthy Documents in Civil Cases. To expedite trials in civil cases, upon timely motion, the court may permit the reading to the jury, or the introduction into evidence, of relevant portions of lengthy and complex documents without the necessity of having the jury hear or receive the entire document. The court, in its discretion, may permit the entire document to be received by the jury, or may order the parties to edit from any such document admitted into evidence information that is irrelevant to the proceedings.

47) **Washington:** WA R. Evid (ER) 106. Remainder of or Related Writings or Recorded Statements. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it."

48) **West Virginia:** WVRE 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 request 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."

COMMENT ON RULE 106
Rule 106 is taken verbatim from its federal counterpart, except for the use of the term "request" instead of "require" in the first sentence. The trial court should limit the introduction, by an adverse party, of any other part of a writing or recorded statement to information that is relevant or assists the jury in placing the writing or recorded statement in context. The adverse party does not have the absolute right to place the entire writing or recorded statement in evidence.

Notable Annotations: Defendant was not entitled to offer his grand jury testimony during his criminal trial relating to investment fraud scheme on basis of rule of completeness, although government offered parts of his grand jury testimony, parts that government offered were admissions by defendant and parts that defendant sought to offer were hearsay. Fed.Rules Evid.Rules 106, 801(c), (d)(2), 28 U.S.C.A. U.S. v. Bollin, 2001, 264 F.3d 391, certiorari denied 122 S.Ct. 303, 534 U.S. 935, 151 L.Ed.2d 225, certiorari denied 122 S.Ct. 1544, 535 U.S. 989, 152 L.Ed.2d 469, post-conviction relief denied 2006 WL 1455690, post-conviction relief denied 2006 WL 5811898.

Defendant who had police sergeant read a portion of his notes regarding drug transaction into the record was not prejudiced by admission of the remainder of notes into evidence, even assuming that notes were inadmissible hearsay, in light of other evidence of transaction at issue and the defendant's involvement therein, in prosecution for delivery of a controlled substance. Rules of Evid., Rule 106. State v. Gray, 1998, 511 S.E.2d 873, 204 W.Va. 248.

Evidence rule providing that, when a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously, did not require admission of driver's statement to police officer about driver's argument with passenger in action brought by estate of passenger, who died after she jumped from driver's vehicle while arguing with him; driver's statement did not lack clarity and there was no danger that the statement would be taken out of context. Beachum v. White, 2013, 2013 WL 3185152, Unreported.

49) **Wisconsin**: Wash. St. Ann. 901.07. "When any part of a writing or statement, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion."

JUDICIAL COUNCIL NOTE: This amendment is consistent with State v. Eugenio, 219 Wis. 2d 391, 410, 579 N.W.2d 642, 651 (1998), which acknowledged that the rule of completeness is applicable to oral testimony, and with State v. Anderson, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct.

App. 1999), review denied, 230 Wis. 2d 275, 604 N.W.2d 573 (1999), which provided guidance on how, and when, to apply the rule of completeness.

"The rule of completeness, however, should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence. Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide context and prevent distortion. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule ... '[A]n out-of-court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously."' Eugenio, 219 Wis. 2d at 412 (citations omitted).

JUDICIAL COUNCIL COMMITTEE'S NOTE—1974: This section is consistent with Merlino v. Mutual Service Cas. Ins. Co., 23 Wis.2d 571, 127 N.W.2d 741 (1964), dealing with writings and expands its ruled to "recorded statements."

Notable Annotations:

Rule of completeness may allow admission of testimony even if testimony is hearsay and would not be admissible as prior consistent statement on grounds that it did not precede alleged recent fabrication. State v. Sharp (App. 1993) 511 N.W.2d 316, 180 Wis.2d 640, review denied 515 N.W.2d 714.

50) **Wyoming**: Wy R. Evid. 106. "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

EvidenceProf Blog: Recent 2nd Circuit decision re: Oral Statements and Rule 106

Teresa Welch (8/8/19): The Evidence Advisory Committee recently discussed a proposed new Rule 106 to respond to the Utah Supreme Court's directive/questions in the *State v. Sanchez* case. A while ago, I sent some Rule 106 materials to facilitate our discussion of the pertinent Rule 106 issues. I am reaching out now because a third year law student, Emily Nuvan, contacted me today and forwarded me a law review article that she has written about Rule 106, Utah cases addressing Rule 106, etc. Emily will soon be submitting her article for publication. Emily's article is attached, and she has given permission to forward this to anyone who is interested in reading it. I am forwarding the article on to the two of you because it may be helpful for any future Rule 106 discussions that the Evidence Advisory Committee may have. (The article appears to be well-researched, comprehensive, etc.). In addition, Emily forwarded me the link below that discusses a recent 2nd Circuit decision re: oral statements and Rule 106.

https://lawprofessors.typepad.com/evidenceprof/2019/07/federal-rule-of-evidence-106-the-rule-of-completeness-provides-that-if-a-party-introduces-all-or-part-of-a-writing-or-re.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+typepad%2Fiuae+%28EvidenceProf+Blog%29

Second Circuit Opinion Fleshes Out Common Law Rule of Completeness

By Evidence ProfBlogger Share

Federal Rule of Evidence 106, the rule of completeness, provides that

> 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.

So, imagine that Defendant is on trial for murdering Victim. During its case-in-chief, the prosecution wants to introduce part of of a letter Defendant sent Victim, which stated, "I'm going to kill you." Assume, however, that (1) another part of the letter says, "Just kidding about that whole killing thing;" (2) Defendant sent Victim a second letter the next day that said, "Just kidding about that whole killing thing;" or (3) Defendant left a voicemail on Victim's cell phone the next day, saying, "Just kidding about that whole killing thing." Under any of these three scenarios, the rule of completeness would say that fairness requires that the defense could introduce the exculpatory statement at the same time as the inculpatory statement rather than having to wait to introduce it (during cross-examination or the defense case).

But now, assume a fourth scenario, in which Defendant tells Victim the next day in front of Friend, "Just kidding about the whole killing thing." What does the rule of completeness tell us about this scenario.

As the recent opinion of the Second Circuit in *United States v. Williams*, 2019 WL 2932436 (2nd Cir. 2019), makes clear, the answer is "nothing." As that court noted, "Rule 106 does not cover oral statements-as the advisory committee note states, "[f]or practical reasons, [Rule 106] is limited to writings and recorded statements and does not apply to conversations." That said, the court then observed that

> the common law rule of completeness is substantially broader than Rule 106, covering "not only writings taken out of context, but also...the truncated use of acts, declarations, and conversations."...And as the Supreme Court made clear in *Beech Aircraft Corp. v. Rainey*, the common law doctrine persists in the wake of Rule 106's adoption.

And, for the Second Circuit, this common law rule of completeness is covered by Federal Rule of Evidence 611(a), which states:

(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.

According to the court,

> in this Circuit, the completeness principle applies to oral statements through Rule 611(a), so 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" so as to require completion, whether contemporaneous or on cross-examination, in instances in which testimony regarding oral statements is elicited in fragments that fail to present "'the tenor of the utterance as a whole.'"

In the end, though, none of this helped the defendant in *Williams*, who wanted to introduce the fact that he *denied* knowledge or ownership of a firearm found in the center console of a car after the State introduced evidence that he later *admitted* ownership. Instead, the court held that

> Williams has failed to show that the district court *abused* its discretion in deciding to exclude them. To require completion under the doctrine of completeness, Williams had to demonstrate that admission of his initial statements denying ownership of the gun was "necessary to explain" his later statements that the gun was his, "to place [these statements] in context, to avoid misleading the jury, or to ensure fair and impartial understanding" of these later statements....Williams did not make such a showing. 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. But the rule of completeness does not require the

admission of self-serving exculpatory statements in all circumstances,...and the 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."

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Note
Andrea N. Kochert[a1]

THE ADMISSION OF HEARSAY THROUGH RULE 106: AND NOW YOU KNOW THE REST OF THE STORY

Introduction

At trial, both parties have been crafting a story: a story of what happened and who is responsible. And a bombshell just dropped. After admission of the defendant's self-incriminating statement under Federal Rule of Evidence[1] 801(d)(2),[2] the government likely has enough evidence to persuade the jury of the defendant's guilt. The story seems clear. The facts line up almost perfectly. Then, defense counsel moves to admit another part of that statement under Rule 106, arguing that the additional, exculpatory portion of the statement is necessary to correct the misleading impression created by taking the defendant's statement out of context.[3] The jury must know the rest of the story.

Under Federal Rule of Evidence 106, "[i]f 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."[4] Generally, in order for ***500** evidence to be admitted under Rule 106, such evidence must be relevant to or explanatory of the allegedly misleading passages offered by the opponent.[5] However, whether Rule 106 operates as an independent rule of admissibility, admitting otherwise inadmissible evidence such as hearsay, is unclear.

The split among the circuit courts and authorities revolves around the perceived function of Rule 106: whether the Rule serves only a timing function or also a trumping one.[6] As written, Rule 106 does not restrict admission to otherwise admissible evidence; rather, the scope of Rule 106 extends to "any other writing or recorded statement . . . that in fairness ought to be considered."[7] Further, Rule 106 expresses the doctrine of completeness, which at common law could "trump[]," i.e. override, exclusionary rules of evidence.[8] In 1991, this issue was called "the by far most intriguing" problem to transpire under Rule 106.[9] Over twenty years later, little has changed.

Although Rule 106 should operate as an independent rule of admissibility, some circuits fail to recognize its trumping function. Part I of this Note reviews the common law origins of Rule 106, the most recent Supreme Court decision in Beech Aircraft Corp. v. Rainey,[10] and each circuit's stance on the issue. Part II examines five arguments for a trumping function under Rule 106: a textual, functional, and legislative analysis, as well as a focus on the exclusion of confusing or misleading evidence under Rule 403 and on the admission of evidence against a criminal defendant under Rule 801(d)(2). Part III addresses the decision of the Advisory Committee on Evidence Rules not to amend Rule 106 in 2003.[11] Finally, Part IV explores the possibility of amending Rule 106 to exclude misleading evidence when the necessary completing evidence is inadmissible because of privilege.

I. History of Rule 106

The history of Rule 106 consists of two parts: the common law doctrine of completeness and the interpretation of Rule 106 subsequent to its promulgation. ***501** When proposing Rule 106 in 1972, the Advisory Committee on Evidence noted that "[Rule 106] is an expression of the rule of completeness."[12] At common law, the doctrine of completeness possessed a trumping function.[13] However, in Rainey, the Supreme Court failed to address whether Rule 106 incorporated this trumping function.[14] Lacking guidance, the circuit courts remain split.[15]

A. Common Law Origins

Rule 106 traces back to the common law doctrine of completeness.[16] As exemplified by the seventeenth-century trial of Algernon Sidney, the remainder of a defendant's out-of-court statement was admissible if necessary to provide context for previously-admitted evidence.[17] In his formulation of the common law doctrine, Professor Wigmore recognized a trumping function.[18] However, because Rule 106 expressed, rather than completely codified, the doctrine of completeness,[19] the issue arose as to whether the Rule had in fact incorporated the trumping function of the common law doctrine.

1. Trial of Algernon Sidney.-The doctrine of completeness traces as far back as the famous seventeenth-century English trial of Algernon Sidney, where the defendant Sidney successfully argued against the piecemeal admission of his allegedly "certain false, seditious, and traitorous Libel."[20] Sidney, an English politician and political theorist, had been accused of conspiring in the death of the king and indicted for high treason.[21] In the manuscript evidence at issue, ***502** Discourses Concerning Government, Sidney laid out a justification for rebellion against absolute monarchy.[22] At trial, the clerk read the following excerpt from Discourses:

> [T]he King hath three Superiors, to wit, Deum, Legem, & Parliament[], that is, the Power, originally in the People of England, is delegated unto the Parliament. He is subject unto the Law of God as he is a Man, to the People that makes him a King, in as much as he is a King: The Law sets a Measure unto that Subjection . . . . If he doth not like this Condition, he may renounce the Crown.[23]

Sidney objected that his indictment was based on "200 and odd Sheets . . . scraps of Paper found in his House" showing "neither Beginning nor Ending."[24] Sidney further argued: "My Lord, if you will take Scripture by pieces, you will make all the Penmen of the Scripture blasphemous; you may accuse David of saying, There is no God; and accuse the Evangelists of saying, Christ was a Blasphemer and a Seducer; and the Apostles, That they were drunk."[25] The court accepted Sidney's argument: "Mr. Sidney, if there be any Part of it that explains the Sense of it, you shall have it read; indeed we are trifled with a little."[26] Sidney replied, "If they will produce the whole, my Lord, then I can see whether one Part contradicts another."[27]

Although Sidney's Discourses would conceptually qualify as hearsay, it would likely be admissible (barring a Rule 403 analysis[28]) under Rule 801(d)(2)[29] as statements of a party-opponent. Under the doctrine of completeness, as exemplified in the trial of Algernon Sidney, any part of these statements that provided context would also be admissible. Thus, as Rule 106 expresses the doctrine of completeness, any evidence needed to provide further context would arguably also be admissible under Rule 106-even if classified as hearsay.

2. Wigmore on Evidence.-Well-regarded by jurists, authors of treatises, and scholars for his formulation of the common law doctrine of completeness,[30] ***503** Professor Wigmore stressed the concept of wholeness:

> [T]he thought as a whole, and as it actually existed, cannot be ascertained without taking the utterance as a whole . . . . To look at a part alone would be to obtain a false notion of the thought. The total-that is to say, the real-meaning can be got at only by going on to the end of the utterance. One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation.[31]

Wigmore went on to distinguish two forms of incompleteness: (1) the "lack of verbal precision" and (2) "the lack of entirety of parts."[32] The lack of verbal precision relates to how the presence or absence of a single word within an utterance may "substantially alter the true meaning of even the shortest sentence" while the lack of entirety of parts expresses how the correct understanding of an utterance depends upon other parts of the utterance.[33] Wigmore explained:

> A word is interpretable in the light of the use of the same word in another part; a clause is modified by a prior or subsequent clause; one sentence qualifies another; and one paragraph may form only part of a whole exposition. We must compare the whole [utterance], not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and effect of the first part.[34]

The doctrine of completeness encompasses Wigmore's "[e]ntirety of parts" theory.[35]

***504** Under Wigmore's formulation, the doctrine of completeness dealt with the substantive admission of evidence and not merely timing.[36] In his treatise, Wigmore "distinguish[ed] the completeness doctrine from rules governing the timing of evidence presentation."[37] He

explained, "That the stage of reexamination or cross-examination is the proper time for putting in explanatory utterances is one of the rules for the order of evidence and does not involve the tenor or limits of the utterance."[38]

3. Codification.-The Federal Rules of Evidence were enacted on January 2, 1975 and became effective on July 1, 1975.[39] It is generally accepted that Rule 106 expresses or reflects-rather than completely codifies-the common law doctrine of completeness.[40] For example, whereas the common law doctrine of completeness allowed oral statements, Rule 106 excludes such statements.[41]

B. The Supreme Court: Beech Aircraft Corp. v. Rainey

In Beech Aircraft Corp. v. Rainey,[42] the Supreme Court skirted the question of whether Rule 106 operates as an independent rule of admissibility for otherwise inadmissible evidence. In Rainey, a Navy flight instructor and her student were killed when their aircraft banked sharply to avoid another plane, lost altitude, and crashed.[43] At issue was whether pilot error or equipment malfunction had caused the crash.[44] Plaintiff John Rainey, husband of the deceased pilot and himself a Navy flight instructor, wrote a "detailed letter" (the contested evidence in Rainey), taking issue with an investigative report that had concluded the accident was due to pilot error and outlining his theory that ***505** equipment malfunction was "[t]he most probable primary cause" of the accident.[45] The trial court permitted defense counsel to question Rainey (presumably under 801(d)(2)(A)) regarding a statement in his report that tended to suggest pilot error.[46] However, the court sustained an objection to plaintiff counsel's questioning of Rainey as to whether he had said the primary cause of the accident was equipment malfunction.[47]

Although the jury returned a verdict for the defendants (the manufacturer and the company that serviced the plane), "[a] panel of the Eleventh Circuit reversed and remanded [the case] for a new trial."[48] On rehearing en banc, the Eleventh Circuit Court of Appeals unanimously reaffirmed the panel's decision that Rule 106 (or alternatively Rule 801(d)(1)(B)) "require[ed] the court to let Rainey testify as to the whole letter."[49] Upon review, the Supreme Court affirmed under "the general rules of relevancy" (Rules 401 and 402) but declined to address whether Rule 106 or Rule 801(d)(1)(B) applied.[50]

The Court's decision in Rainey is puzzling in that, although the Court recognized that "[c]learly the concerns underlying Rule 106 are relevant here," it reverted to the argument that where "misunderstanding or distortion can be averted only through presentation of another portion [of a document], the material required for completeness is ipso facto relevant and therefore admissible under Rules 401 and 402."[51] At least one authority has described Rainey as implicitly upholding the common law doctrine of completeness as "a supplement to Rule 106."[52] However, the Court presented the rule of completeness as merely an alternative to Rule 106,[53] rendering the latter superfluous.

The Court's reasoning suggests that the rule of completeness renders the additional evidence relevant and thus admissible under Rule 402.[54] After citing Wigmore's doctrine of

completeness,[55] the Court described the Advisory Committee note to Rule 106 as "a reaffirmation of the obvious: that when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible under Rules 401 and 402."[56] The Court added:

> ***506** While much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.[57]

The primary difficulty with the Court's avoidance of Rule 106 derives from the hearsay nature of Rainey's letter. Although all relevant evidence may be admissible under Rule 402, that admissibility is conditioned upon the "as otherwise provided" clause of the rules of evidence.[58] And under Rule 802, hearsay is inadmissible unless a federal statute, the rules of evidence, or the Supreme Court provides otherwise.[59] While Rainey may be construed as a roundabout route to admit otherwise inadmissible evidence required for completeness, the Court's language is not so clear-the Court focuses on relevance rather than a hearsay exception. Furthermore, the Court's reliance upon a common law approach thwarts legislative intent by ignoring Rules 106 and 802-rules specifically codified to handle evidence required for completeness and out-of-court statements respectively.[60]

C. The Circuit Split

Lacking guidance from the Supreme Court, the circuit courts split on whether Rule 106 operates as an independent rule of admissibility.[61] The circuits that find ***507** no trumping function often state that Rule 106 serves a timing or order-of-proof function.[62] In contrast, circuits recognizing a trumping function base their reasoning on statutory rules of construction,[63] arguing principally that, in order for Rule 106 to fulfill its purpose, the admission of otherwise inadmissible evidence must be permitted.[64]

1. Trumping Function.[65]-The First,[66] Second,[67] Seventh,[68] Tenth,[69] Eleventh,[70] and D.C.[71] Circuits recognize the trumping function of Rule 106. The Second Circuit recently adopted this position, stressing the importance of satisfying the common law requirements of Rule 106, namely, that the additional evidence is necessary to explain the admitted portion, to provide context, to avoid misleading the jury, or to ensure a fair and impartial understanding of the admitted portion.[72] The Seventh Circuit, in often-cited dicta, has gone beyond ***508** recognizing Rule 106 as a rule for the admission of hearsay to also exploring the possibility of excluding the original misleading evidence.[73] And the D.C. Circuit is a well-cited jurisdiction for its reasoning that "Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously."[74]

2. No Trumping Function.[75]-In contrast, the Fourth,[76] Sixth,[77] Eighth,[78] and Ninth[79] Circuits do not recognize a trumping function under Rule 106. Pre-Rainey, the Fourth Circuit admitted hearsay under Rule 106;[80] however, now it asserts that the Rule does "not render admissible the evidence which is otherwise inadmissible."[81] The Sixth Circuit stresses the timing function of Rule 106,[82] while the Eighth Circuit demands that the hearsay evidence falls within a defined ***509** hearsay exception.[83] The Ninth Circuit is entrenched in its position with no explanation other than citing the authority of the Second Circuit.[84]

3. Issue Remains Unaddressed.-The issue whether Rule 106 possesses a trumping function remains a noted, yet unaddressed, quandary in the Third[85] and Fifth[86] Circuits. The Third Circuit considered the admission under Rule 106 of an entire tape of statements made to an undercover government operation-portions of which were already admitted under Rule 801(d)(2)-but declined because the tape was not necessary to explain or place in context other evidence (another tape recording), avoid misleading the jury, or insure a fair and impartial understanding.[87] Similarly, based on the facts presented before the court, the Fifth Circuit has also found it unnecessary to resolve the issue.[88]

II. The Admission of Otherwise Inadmissible Evidence

An analysis of Rule 106 strongly suggests that the Rule operates as an independent rule of admissibility. First, the text of Rule 106 does not ban a trumping function.[89] Second, Rule 106 depends upon the ability to trump other evidentiary rules to fulfill its function of providing context.[90] Third, an examination of the legislative history of Rule 106 makes clear that Congress refused banning the admission of otherwise inadmissible evidence and, in fact, recently considered amending Rule 106 to explicitly include a trumping function.[91] Fourth, a broader treatment of Rule 106 to include all additional evidence-whether otherwise admissible or not-would advantageously address the purpose of Rule 403 with less complexity. Finally, in the case of hearsay evidence admitted against a criminal defendant under Rule 801(d)(2), much may ***510** depend upon the admission of the remainder of that evidence under Rule 106.

A. Text

Interpretation of a statute begins with its text.[92] Under Rule 106, "[i]f 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."[93] On its face, Rule 106 neither limits admission to otherwise admissible evidence[94] nor overrides the rules of hearsay.[95] The title for Rule 106-"Remainder of or Related Writings or Recorded Statements"[96]-provides little further guidance. Thus, the recognition of a trumping function under Rule 106 would not be inconsistent with its text.

Furthermore, a timing function under Rule 106 would be consistent with the rule's lack of an "except as otherwise provided by the rules"[97] qualifier. Authorities recognize that Rule 106, unlike other major rules of admissibility, lacks this qualifier.[98] Under the rules of statutory

construction, the drafters of Rule 106 presumably knew of the option to qualify Rule 106 with an "except as otherwise provided" provision but nevertheless chose otherwise.[99]

There are two main avenues to interpret this decision. First, the courts may interpret Rule 106 to be free from exclusionary rules such as Rule 802.[100] However, as the late Professor Charles A. Wright and Professor Kenneth W. Graham point out, "another of the meta-rules-Rule 104(a)-contains an explicit clause that frees the trial judge from the other exclusionary Rules."[101] This ***511** analogy is faulty. Rule 104(a) differs from Rule 106 in that Rule 104 handles how a judge may decide questions of admission. It does not address the admission of evidence under a rule.

Second, as Professors Wright and Graham also note, "with respect to the exclusionary [r]ules that do contain such a clause, Rule 106 could be said to be a [r]ule that 'otherwise provides.'"[102] For example, under Rule 802, "[h]earsay is not admissible unless [the rules] provide[[] otherwise."[103] A situation may arise where a party introduces all or part of a writing under a hearsay exception and Rule 106 could operate to admit "any other part-or any other writing or recorded statement-that in fairness ought to be considered at the same time,"[104] regardless of the hearsay rules. This interpretation also best aligns with the recognition of a trumping function under Rule 106. Although Rule 106's lack of an "except as otherwise provided by the rules" qualifier may be seen as a deliberate omission by Congress, which clearly is not opposed to circuits treating Rule 106 as an independent rule of admissibility. And Congress's inaction since 1975 may be seen as an affirmation of a trumping function.

B. The Purpose of Rule 106: Timing and Trumping Functions

The split among the circuit courts and authorities revolves around the perceived function of Rule 106: whether the Rule serves only a timing function or also a trumping one. The placement of Rule 106 provides little guidance. However, an analysis of Rule 102[105]-which provides the purpose for the Federal Rules of Evidence-suggests the inclusion of a trumping function under Rule 106. Such an interpretation, consistent with the rules of statutory construction, would also avoid rendering Rule 611-which governs "the mode and order of examining witnesses and presenting evidence"-superfluous.[106]

1. Placement.-Rule 106's placement in the Federal Rules of Evidence under Article "I: General Provisions" and not under Articles "IV: Relevance and Its Limits" or "VIII: Hearsay" sets it apart.[107] This placement is consistent with both a timing-only position and a trumping position. Under a timing-only interpretation, this placement would be logical because there would be no need to determine admissibility. On the other hand, under a trumping interpretation, this placement also would make sense because Rule 106-incorporating the common law doctrine of completeness-serves a "responsive role."[108] Unlike rules of admission under Article IV or VIII, Rule 106 requires that an adverse party first introduce all or part of a writing. Furthermore, as the D.C. Circuit ***512** Court pointed out in United States v. Sutton,[109] "Article I . . . contains rules that generally restrict the manner of applying the exclusionary rules."[110] By allowing the admission of otherwise inadmissible evidence, a trumping function under Rule 106 would

restrict the manner of applying exclusionary rules such as Rule 802-the rule against hearsay.

2. Guidance from Rule 102.-Rule 102,[111] which provides the purpose for the Federal Rules of Evidence, should be used to interpret Rule 106.[112] Under Rule 102, the rules of evidence "should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[113] The advisory committee notes for Rule 106 parallel Rule 102: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."[114]

A trumping function under Rule 106 would more fully serve the purpose of the Federal Rules of Evidence. Rule 106 is not only about timing; it is substantive and supports the paramount purpose of our judicial system: to determine the truth. Professors Wright and Graham confirm the importance of a trumping function under 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."[115] A trumping function would also promote efficiency by avoiding jury confusion.[116]

The alternative theory for Rule 106, a timing-only purpose, may satisfy the letter but fails to satisfy the spirit of Rule 102. Should a party invoke Rule 106 immediately, a timing-only purpose would help eliminate the expense and delay of fixing a misleading impression later at trial. However, the committee notes for Rule 106 preserve a party's right to invoke Rule 106 upon cross-examination, which would lessen this benefit should the party wait until cross to invoke the rule.[117] Further, inadmissible evidence would not come in, and some misleading ***513** impressions would remain.

3. Impact on Rule 611.-A timing-only purpose for Rule 106 would render Rule 611(a)[118] meaningless because Rule 611(a) governs the mode and order of examining witnesses and presenting evidence.[119] Rule 611(a) provides, "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; [and] (2) avoid wasting time . . . ."[120] Thus, a timing-only reading of Rule 106 would oppose one of the most basic interpretative canons-"[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[121] As Judge Weinstein noted, "Rule 106 might well have been omitted or covered by a more general provision acknowledging the court's broad power to insure that any evidence is presented in a way that avoids misleading, unfairness, and undue consumption of time."[122] However, Congress chose otherwise. And a similar reading of Rule 106 would render Rule 611 superfluous, contrary to the rules of statutory construction.

C. Legislative History

The legislative history of Rule 106 reveals that Congress did not intend to limit the application

of Rule 106 to only otherwise admissible evidence. During the drafting of Rule 106 and despite a contrary request from the Department of Justice,[123] Congress refused to explicitly bar the admission of otherwise inadmissible evidence. Furthermore, Congress modeled the Federal Rules of Evidence using the California Evidence Code-which consistently has included a trumping function under its codification of the doctrine of completeness.[124] Under the original text, additional evidence introduced under Rule 106 could be construed as nonhearsay.[125] This legislative history culminated in 2002 when the Advisory Committee on Evidence Rules considered amending Rule 106 to ***514** explicitly include a trumping function.[126]

1. Committee Hearings.-During hearings on the Federal Rules of Evidence, although Assistant Attorney General W. Vincent Rakestraw and the Department of Justice specifically requested that the Senate Judiciary Committee amend Rule 106 to only permit the introduction of "any other part or any other writing or recorded statement which is otherwise admissible,"[127] no such proviso was added. Some scholars suggest that the advisory committee was "satisfied with the [Committee] Reporter's mischievous explanation that the 'fairness' standard [in Rule 106] implicitly required that completing evidence be admissible."[128] In other words, in order to determine whether the additional evidence "ought in fairness to be considered with" the original evidence under Rule 106, a judge would have "to know what the offered evidence purport[ed] to be"[129] and presumably reject any hearsay. However, a rule of statutory construction stresses that Congress intends what is written. Courts "ordinarily resist reading words or elements into a statute that do not appear on its face."[130] Here, Congress chose not to exclude a trumping function from Rule 106.

2. The California Evidence Code.-The Federal Rules of Evidence were modeled after the California Evidence Code.[131] A member of the Advisory Committee, Herman Selvin, had been the Chair of the California Law Revision Commission-the group that drafted California's codification of the common law.[132] And when updating the California Code, the drafters noted that "[t]o the extent that this section [Section 1854, California's doctrine of completeness] makes hearsay admissible, we may regard the section as a special exception to the hearsay rule."[133] Then section 1854 provided:

> When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.[134]

***515** Like Rule 106, § 1854 did not explicitly mention a trumping function although it possessed one. Even after the enactment of Rule 106, California courts continued to admit otherwise inadmissible evidence under the completeness doctrine.[135]

3. Hearsay? The Original Language.-As originally enacted, additional evidence introduced under Rule 106 could be construed as nonhearsay because the original party offering the evidence would introduce the remainder.[136] Subsequent amendments to the rule were not intended to cause any changes in substance.[137] Originally, Rule 106 stated: "When a writing or

recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[138] In 1987, the rule was amended to emphasize gender neutrality-"no substantive change was intended."[139] The amended rule provided that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[140] In 2011, Rule 106 again underwent stylistic, but not substantive, changes when the Federal Rules of Evidence were restyled in their entirety.[141]

Under the originally-enacted Rule 106, it was possible to interpret that the original party was offering the evidence and therefore that evidence met a hearsay exception.[142] As the amendments were not intended to substantively change Rule 106, thisfiction is still possible under the current Rule.

4. The Almost-Amendment to Rule 106 in 2003.-From 2002 to 2003, the Advisory Committee on Evidence Rules considered an amendment to explicitly add that Rule 106 "operat[ed] as an independent rule of admissibility."[143] At its April 2002 meeting, the Committee requested that its reporter, Professor Daniel J. Capra, prepare a report on a number of rules that required amendment.[144] At ***516** the October 2002 meeting, Professor Capra submitted his memorandum on Rule 106, indicating that the courts and commentators were in dispute over whether the rule operated as an independent rule of admissibility.[145] The Committee "noted that while the courts appeared to be in dispute over the existence of a trumping function, this dispute [did] not seem to make a real difference in the cases."[146] In light of this discussion, Professor Capra prepared a memorandum on Rule 106, analyzing the split in authority and concluding "that few if any of the cases [[with respect to their holdings] would be affected by the addition or rejection of a trumping function in Rule 106."[147] Relying upon this analysis, at its April 2003 meeting, the Committee decided not to amend Rule 106 to include a trumping function because "the costs of amending Rule 106 to include a trumping function were far outweighed by the risks that a change in language would be misinterpreted, and concluded that any problems under the current rule were being well-handled by the courts."[148]

While the Committee did not explicitly state that Rule 106 possessed a trumping function, it considered the costs and benefits of amending Rule 106 to include a trumping function.[149] This effort would have been misplaced had the Committee thought otherwise-that a trumping function did not exist under Rule 106.

D. A Focus on Rule 403

A broader treatment of Rule 106 to include all evidence-whether otherwise admissible or not-would address the purpose of Rule 403[150] with less complexity. When addressing Rule 403 in a Rule 106 context, some authorities focus on the problems of the additional evidence rather than the original evidence.[151] However, this overlooks the prejudicial impact of the original misleading statement. As Professor Dale Nance stresses in A Theory of Verbal Completeness:

"Indeed, the risks of misleading inaccuracies usually associated with a party's presentation of her own out-of-court statements for the truth ***517** thereof, even when that party does not testify, are overwhelmed by the likelihood of distortion accompanying the proponent's selective presentation of portions of the opponent's statement."[152] The admission of additional evidence under Rule 106 would serve as an alternative to the exclusion of the original misleading evidence under Rule 403.

Rule 106 and Rule 403 share many similarities. Both address the idea of fairness as well as the dangers of misleading evidence and undue delay. Under Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[153] Similarly, Rule 106 only admits evidence "that in fairness ought to be considered at the same time" as the original statement.[154] The advisory committee notes for Rule 106 also parallel: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."[155]

A Rule 403 analysis does not suit well the narrow context where the original evidence unfairly creates a misleading impression by taking a statement out of context. The difficulty with Rule 403 derives from (1) its complicated two-step analysis-evaluation of probative value and dangers followed by their comparison-and (2) its substantial tilt toward the admission of the contested evidence.[156] The admission of otherwise inadmissible evidence under Rule 106 would more fairly address the misleading context in two respects.

First, a Rule 106 analysis would focus on the admission of additional explanatory evidence rather than exclusion of the original misleading evidence.[157] Within the misleading impression context, the exclusion of the original evidence under Rule 403 would not necessarily erase its prejudicial impact upon the jury-despite any instructions to the contrary. The addition of context would better rectify the situation by giving the jury the rest of the story.

Second, a Rule 106 analysis would be simpler and more neutral than one under Rule 403. The focus would be to evaluate the fairness of admitting additional explanatory evidence (a one-step analysis) rather than to evaluate the probative value of either the original or the additional evidence and then determine whether the dangers of unfair prejudice substantially outweighed such probative value[158] (a two-step analysis). Otherwise inadmissible evidence would come in freely under Rule 106 for the sole purpose of correcting a misleading ***518** impression.

E. A Focus on the Criminal Defendant and Rule 801(d)(2)

During a criminal trial, the prosecutor routinely admits the defendant's self-incriminating statements under Rule 801(d)(2).[159] With his life, liberty, and future livelihood at stake, the defendant's arsenal should include an equally powerful exception to the rule against hearsay for the limited purpose of correcting a misleading impression. Without Rule 106,[160] the jury would never know the rest of the story.[161] A court may invoke Rule 106 without harm; in fact, the rule

lessens the hearsay dangers presented both by the original misleading evidence and by the additional evidence. Further, the admission of otherwise inadmissible evidence through Rule 106 counters any burden that a court may place upon a criminal defendant's Fifth Amendment right not to testify.[162]

1. Lessening the Hearsay Dangers of the Original Misleading Evidence.-As a responsive-as opposed to a proactive-rule,[163] Rule 106 lessens the hearsay dangers presented by the original misleading evidence. Although the rationale behind the Rule 801(d)(2) hearsay exception is based on an adversarial concept-that it is fair to hold a party opponent to her previous statements-rather than reliability, the reliability of any evidence admitted under Rule 801(d)(2) has already been called into question by virtue of its hearsay origins.[164] A Rule 106 motion makes that portion appear even less reliable.[165] ***519** Therefore, in order to restore confidence in the original misleading evidence, a court must admit otherwise inadmissible evidence[166] under Rule 106 to provide context and clarification.

2. Lessening the Hearsay Dangers of the Additional Explanatory Evidence.-Similarly, as a responsive-as opposed to a proactive-rule, Rule 106 lessens the hearsay dangers of the additional evidence. The lack of cross-examination, and thus reliability, is a common problem with the admission of hearsay statements.[167] Within the context of 801(d)(2) also lurks the danger of lack of candor. Most likely, a defendant will always wish to admit his self-serving statements. However, as Professor Nance correctly points out, "[T]hat the proponent has already chosen to inject the statement into the trial of the issue assures the tribunal that the proponent has the wherewithal to challenge the opponent's version of the complete statement, an important check upon total fabrication of self-serving hearsay."[168] After all, when the proponent cleverly admits a portion of an otherwise inadmissible hearsay statement for the truth of the matter asserted-yet also consciously creates a misleading impression in favor of his case-fairness demands that a court admit the remainder under Rule 106 for the purpose of providing context and clarification and avoiding jury confusion.

3. The Fifth Amendment Right Not to Testify.-Both commentators and courts recognize that special considerations accompany motions made by criminal defendants.[169] These authorities voice concern that a bar on the admission of otherwise inadmissible evidence under Rule 106 would unduly burden a defendant's Fifth Amendment right not to testify-that a defendant would be coerced into "testify[ing] in order to get what he feels is a full explanation admitted into the record as substantive evidence."[170] In United States v. Walker,[171] the Seventh Circuit explained:

> 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 ***520** 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."[172]

The D.C. Circuit also supports this reasoning.[173]

Not all circuits are in agreement with the Seventh or D.C. Circuits. In United States v. Holden,[174] the Sixth Circuit emphasized, "The mere fact that evidence admitted under Rule 801(d)(2) motivates a defendant to take the stand does not mean that he was compelled to do so in a manner that implicates his privilege against self-incrimination."[175] However, such reasoning overlooks the effect that a ban on the admission of otherwise admissible evidence would have under Rule 106. Although such a ban may not compel a violation of the Fifth Amendment, it would burden such a right. The admission of otherwise inadmissible evidence under Rule 106 would counter this problem. Considering that much is at stake for the criminal defendant and that Rule 106 lessens hearsay dangers, a ban makes little sense.

III. A Practical Problem: United States v. Holden

A. The 2003 Decision Not to Amend Rule 106

At the October 2002 meeting of the Advisory Committee on Evidence Rules, the Reporter, Professor Capra, submitted his memorandum on Rule 106, indicating that the courts and commentators were in dispute over whether the rule operated as an independent rule of admissibility.[176] At the April meeting, the Committee "noted that while the courts appeared to be in dispute over the existence of a trumping function, this dispute [did] not seem to make a real difference in the cases."[177] In his memorandum, Professor Capra concluded:

> [F]ew if any of the cases would be affected by the addition or rejection of a trumping function in Rule 106. The cases rejecting a trumping function would come out the same because the proffered evidence would ***521** still have been excluded under the circumstances, most commonly because the proffered statements were not needed to correct any misimpression. And the cases adopting a trumping function could all have been decided on other grounds, most commonly because the proponent "opened the door" to completing evidence, or because the "fairness" language of Rule 106 mandated the result.[178]

Professor Capra correctly asserts that the holdings of most cases would be unaltered should a court admit otherwise impermissible evidence under Rule 106. However, a court rarely bases its opinion upon one facet of law. Rather, a well-written legal argument often supports a court's conclusion with alternative assumptions and chains of reasoning. In Capra's memorandum, the jurisdictions that did not recognize a trumping function also happened to reject the contested additional evidence for other reasons.[179]

Professor Capra also recognized that his view could be incongruent with the holding in United States v. Ortega[180]-where the court did not specify whether the portions of a confession presented by the prosecution were misleading.[181] Further, the Committee's rejection of an amendment

because of the lack of a "real effect on the results of the cases"[182] left open the possibility that a federal court could base its decision solely on its belief that Rule 106 did not possess a trumping function. Time has played out the consequences. In at least one case since 2003, the court's holding hinged upon its unexplained assertion that ***522** hearsay could not be admitted through Rule 106.[183]

For those jurisdictions recognizing a trumping function within Rule 106, Professor Capra noted that a court could decide these "minority of cases" under either an "opening the door" principle or nonhearsay purpose.[184] Or such language in these minority cases constituted dictum.[185] Although a court might reason such cases under a common law principle, this does not alter the reality that these circuit courts based their reasoning upon the admission of otherwise inadmissible evidence through Rule 106.

B. United States v. Holden

Although Professor Capra's memorandum characterized the "apparent conflict in the cases" as "more [of] an academic problem than a practical one" because "the Rule [had] not been used to reach an unfair result,"[186] the recent case of United States v. Holden[187] unfairly hinged on the Sixth Circuit's exclusion of hearsay under Rule 106.

In Holden, Mike Holden, the operator of a water treatment plant, was convicted of two counts: first, "knowingly falsifying and concealing material facts in a matter within the jurisdiction of the Environmental Protection Agency" and, second, "falsifying documents with the intent to impede an investigation."[188] The district court held that certain admissions Holden made to an agent of the Tennessee Bureau of Investigation were admissible under Rule 801(d)(2).[189] However, when Holden sought to bring in other statements from the same conversation during cross-examination, the court sustained the government's hearsay objections.[190] The court held that Holden had waived his rights under the rule of completeness by failing to invoke the rule at the time the purportedly misleading evidence was introduced.[191] Holden appealed his conviction.[192]

The Sixth Circuit found the trial court erred because Rule 106 "does not circumscribe the right of the adversary to [introduce completing evidence] on cross-examination or as part of his own case."[193] However, "this error was harmless . . . [b]ecause the statements Holden s[ought] to introduce [were] ***523** inadmissible hearsay" and properly excluded.[194] Further, "Rule 106 [was] . . . not designed to make something admissible that should be excluded."[195] Contrary to the findings Professor Capra presented to the Committee,[196] how a court interprets Rule 106 does have a real impact on cases.

C. Need for Simplicity & Uniformity

An amendment to Rule 106, namely clarification that the rule contains a trumping function, would create simplicity and uniformity in how courts apply the rule. In his memorandum, while

reserving to the Committee the decision "whether the process-oriented gains of an explicit trumping function [would] justify the costs of an amendment," Professor Capra quoted Professors Wright and Graham in espousing the benefits:

> No self-respecting judge would permit a party to manipulate the rules of evidence to put on a case that looked like an advertisement for a bad movie-bits and pieces taken out of critical context to create a misleading impression of what was really said. If this cannot be done in a forthright manner under Rule 106, the judge must find some other way to see that justice is done. He can accomplish this in a number of ways; a fictional waiver of the right to object can be based on the introduction of the part of a writing, hearsay objections can be surmounted by ruling that evidence is not offered for the truth of the matter but only to aid in interpretation, other rules can be strained or deliberately misinterpreted, and if all else fails, the part of the evidence introduced by the proponent can be stricken under Rule 403. In short, there will be few cases in which the judge cannot reach the result that sound policy compels; to say that he cannot do this under Rule 106 is to prefer the costly, roundabout, fictional method over the direct and honest approach.[197]

In addition to simplicity, it would be more fair and just-especially within the 801(d)(2) context-if evidence law were applied uniformly across the federal courts.[198]

IV. The Exclusion of Misleading Evidence: United States v. LeFevour

An interesting question arises when the necessary completing evidence is ***524** inadmissible because of privilege-an unlikely but plausible situation.[199] For example, suppose a party successfully admits incriminating selections of a letter written by the party opponent into evidence-a letter that tells a story but also contains privileged attorney-client information. In United States v. LeFevour,[200] the Seventh Circuit proposed the exclusion of the original misleading evidence.[201] Exclusion would offer an escape valve for the rare situation when Rule 106 demands the introduction of additional, but privileged, evidence.[202] However, authorities do not universally endorse this position.[203] Accordingly, an amendment will most likely be necessary. Such an amendment would offer courts the option of excluding evidence that a party has strategically selected to create a factually true, although misleading, impression.

A. United States v. LeFevour

In LeFevour, Judge Posner agreed with the admission of otherwise inadmissible evidence under Rule 106:

> If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too. The party against whom that evidence is offered can hardly care which route is taken, provided he honestly wanted the otherwise inadmissible evidence admitted

> only for the purpose of pulling the sting from evidence his opponent wanted to use against him. Rule 106 was not intended to override every privilege and other exclusionary rule of evidence in the legal armamentarium, so there must be cases where if an excerpt is misleading the only cure is to exclude it rather than to put in other excerpts.[204]

In LeFevour, the additional evidence proffered by the defendant-a portion of a tape recording-was inadmissible under Rule 106, not because of its hearsay nature, but rather because the original evidence was not misleading.[205] In that case, the defendant LeFevour, a former state court judge, was convicted of violating the RICO Act, committing mail fraud, and filing false income tax returns during a fourteen-year career of taking bribes.[206] At trial, the government played a portion of a taped conversation between LeFevour and a police ***525** officer.[207] LeFevour moved to admit an excluded portion of the recording wherein the officer told the FBI agents who had wired him that "he had 'put on his best scare act' with LeFevour."[208] However, the trial judge ruled the additional evidence "inadmissible because it would confuse the jury and was not relevant to impeaching [the officer's] testimony."[209]

The Seventh Circuit affirmed.[210] Although both conversations were on the same tape, there was no misleading impression created by the admitted conversation because the government's purpose admitting the tape recording into evidence was to show that LeFevour knew the identity of a witness's lawyer; such a statement was "complete in itself."[211] This portion of Judge Posner's opinion may safely be characterized as dicta, as the evidence in that case was unnecessary to correct a misleading impression.[212] However, Judge Posner offers a novel solution to the dilemma when the additional evidence permitted under Rule 106 is otherwise barred by privilege. LeFevour retains support in the Seventh Circuit.[213]

B. Exclusion as an Escape Valve

Exclusion under Rule 106 can serve as an escape valve when additional evidence that would otherwise correct a misleading impression is inadmissible due to privilege. To leave the original misleading evidence would be unjust, creating an opportunity for opposing parties to carefully select evidence with the knowledge that any opposing additional evidence most likely would be inadmissible. In essence, exclusion under Rule 106 serves as an alternative to exclusion under Rule 403.[214] In addition, exclusion under Rule 106 would remove the undue emphasis on admissibility in this unique situation where the danger of the original evidence is principally that it lacks the rest of the story. And exclusion under Rule 106 would offer a simpler analysis, speeding ***526** efficiency in the decision of evidentiary issues.

C. Rule 106 as Written

Most likely, Rule 106 must be amended to enact an exclusionary function. Under Rule 106, "[i]f 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."[215] As written, Rule 106 appears to be an inclusionary-rather than an exclusionary-rule.[216] Professor Nance notes that Dean McCormick grouped the rule of completeness (§ 56: "The Effect of the Introduction of Part of a Writing or Conversation) with two other inclusionary rules of general applicability: Waiver of Objection (§ 55) and Curative Admissibility (§ 57: "Fighting Fire with Fire: Inadmissible Evidence as Opening the Door").[217] Although McCormick also located these rules under "Chapter 6. The Procedure of Admitting and Excluding Evidence,"[218] it is difficult to stray far from the text of Rule 106, which expressly condones the introduction of additional evidence but does not mention the exclusion of the original misleading evidence.

D. Practical Effect

An exclusionary amendment to Rule 106 would have the largest impact before the admission of excerpts of a statement. After a jury hears the evidence, exclusion by a strike is unlikely to correct a misleading impression.[219] However, motions in limine or objections upon the offer of excerpts could effectively invoke the exclusionary (or, in the alternative, trumping) function of Rule 106. Such invocations have worked. In Brewer v. Jeep Corp.,[220] the Eighth Circuit upheld the trial court's refusal to admit a film dealing with jeep rollovers unless the filmmakers' companion report was also offered into evidence.[221] The film had been commissioned by the defendant, and the parties agreed to admit it as an admission of a party opponent.[222]

*527 Conclusion

As written, Rule 106 extends to the admission of otherwise inadmissible evidence. The rule expresses the common law doctrine of completeness, which served a trumping function in cases such as the trial of Algernon Sidney. Under a textual, functional, and legislative analysis, as well as a focus on Rule 403 and Rule 801(d)(2), Rule 106's trumping function-or at least the need for its recognition-could not be more apparent. The express recognition of such a trumping function through an amendment would advantageously serve the purposes of the Rules of Evidence with minimal setbacks. Further, an amendment to exclude misleading evidence when the necessary completing evidence is inadmissible because of privilege would offer the trial judge a simple and effective alternative to Rule 403. Under both amendments, following Judge Posner's formulation in LeFevour,[223] Rule 106 would read as follows:

> 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-whether otherwise admissible or not-that in fairness ought to be considered at the same time. In the alternative, if the additional part or any other writing or recorded statement is inadmissible because of privilege, the original misleading evidence must be excluded too.

At trial, both parties have been crafting a story-a story of what happened and who is responsible. Rather than permit the cherry-picked admission of evidence, an amended Rule 106 would foster

an atmosphere of fairness with the twin goals of "ascertaining the truth and securing a just determination"-much in line with the purpose of the Rules of Evidence.[224] And the jury would know the rest of the story.

Footnotes

a1 J.D. Candidate, 2013, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana; B.B.A., 2010, University of Notre Dame, Notre Dame, Indiana. I would like to thank Jeffrey O. Cooper, Associate Professor of Law at Indiana University Robert H. McKinney School of Law; J.P. Hanlon, Partner at Faegre Baker Daniels; Molly Briles, Executive Notes Editor, Indiana Law Review, Volume 45; and Alex Whitted, Note Development Editor, Indiana Law Review, Volume 45, for their invaluable guidance and advice throughout the writing of this Note. Additionally, I would like to thank my family and friends for their encouragement and support.

1 The restyled Federal Rules of Evidence went into effect on December 1, 2011. The restyled Rules are written in the active voice with no substantive change intended. Unless otherwise noted, this Note references the restyled Rules.

2 Fed. R. Evid. 801(d)(2) ("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.").

3 Fed. R. Evid. 106.

4 Id.

5 United States v. Lewis, 641 F.3d 773, 785 (7th Cir. 2011) (quoting United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)). The Seventh Circuit requires "a complete statement . . . to be read or heard when 'it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding.'" Id. (quoting United States v. Sweiss, 814 F.2d 1208, 1211-12 (7th Cir. 1987)).

6 See discussion infra Part I.C.

7 Fed. R. Evid. 106 (emphasis added).

8 Dale A. Nance, Verbal Completeness and Exclusionary Rules under the Federal Rules of Evidence, 75 Tex. L. Rev. 51, 54 (1996) [hereinafter Nance, Verbal Completeness].

9 Trial Evidence Comm., A.B.A., Emerging Problems under the Federal Rules of Evidence, 21 (David A. Schlueter et al. eds., 2d ed. 1991) [[hereinafter Emerging Problems].

10 488 U.S. 153, 172 (1988).

11 Minutes of the Advisory Committee on Evidence Rules Meeting of April 25, 2003, at 8-9 [hereinafter Advisory Committee Minutes Apr. 25, 2003], available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/403EVMin.pdf.

12 Fed. R. Evid. 106 advisory committee's note.

13 See infra Part I.A.

14 Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170-72 (1988).

15 Compare United States v. Crosgrove, 637 F.3d 646, 661 (6th Cir. 2011) (finding no trumping function), with United States v. Lopez-Medina, 596 F.3d 716, 735-36 (10th Cir. 2010) (finding a trumping function).

16 Nance, Verbal Completeness, supra note 8.

17 See infra Part I.A.1.

18 See infra Part I.A.2; see also 7 John Henry Wigmore, Evidence in Trials at Common Law § 2094, at 597-601 (James H. Chadbourn rev. 1978) (stressing wholeness, as illustrated by Algernon Sidney's Trial, where the remainder of a text-an out-of-court statement-was admitted).

19 See Fed. R. Evid. 106 advisory committee's note; accord 21A Charles Alan Wright et al., Federal Practice & Procedure: Federal Rules of Evidence § 5072.1 (2d ed. 2012) (noting the Advisory Committee described Rule 106 as "an expression of the rule of completeness" (quoting Fed. R. Evid. 106 advisory committee's note)).

20 Trial of Algernon Sidney, 9 How. St. Tr. 818, 868 (K.B. 1683), reprinted in 3 A Complete Collection of State-Trials, and Proceedings upon High-Treason and other Crimes and Misdemeanours, from the Reign of King Richard III to the End of the Reign of King George II, 710 (2d. ed. 1730); see also 7 Wigmore, supra note 18, at 601; Dale A. Nance, A Theory of Verbal Completeness, 80 Iowa L. Rev. 825, 829 & n.12 (1995) [hereinafter Nance, A Theory]; James P. Gillespie, Note, Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness, 62 Notre Dame L. Rev. 382, 383 (1987).

21 Trial of Algernon Sidney, supra note 20, at 710-711, 721.

22 Jonathan Scott, Algernon Sidney and the Restoration Crisis, 1677-1683, at 260-64 (1991).

23 Trial of Algernon Sidney, supra note 20, at 719.

24 Id. at 724.

25 Id.

26 Id.

27 Id.

28 Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

29 Fed. R. Evid. 801(d)(2).

30 See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171 (1988) ("[T]he rule of completeness was stated succinctly by Wigmore . . . ." (quoting 7 Wigmore, supra note 18, § 2113, at 653), quoted in 2 Clifford S. Fishman & Anne T. McKenna, Jones on Evidence § 11:35 n.80 (7th ed. 2012))); 1 Kenneth S. Broun et al., McCormick on Evidence § 56, at 283-84 (6th ed. 2006) (citing 7 Wigmore, supra note 18, § 2094 for "[t]he oft-repeated classic illustration" of misquoting the Bible and presenting a "half-truth because it divorces the quotation from its context"); 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 106[02], at 106-14 (Joseph P. McLaughlin ed., 2d ed. 1996) [hereinafter 1 Weinstein's Evidence] ("For this reason Wigmore-dignifying common sense by impressive terminology-speaks of the principle codified in Rule 106 . . . ."); 21A Wright et al., supra note 19, § 5072 ("Wigmore codified what he called the principle of 'Verbal Completeness' . . . ." (quoting John Henry Wigmore, Wigmore's Code of the Rules of Evidence in Trials at Law 371 (3d ed. 1942))); see also Nance, Verbal Completeness, supra note 8, at 129 n.16 ("Wigmore . . . did more than any other evidence scholar to render the doctrine comprehensible . . . ."); Nance, A Theory, supra note 20 at 829 ("Wigmore's synthesis of the common-law rule provides an excellent starting point . . . ."); Gillespie, supra note 20 ("Many scholars and judges credit Professor Wigmore with recognizing and synthesizing the common law on the subject into a unified doctrine.").

31 7 Wigmore, supra note 18, at 597 (emphases omitted); see Nance, A Theory, supra note 20, at 826 (questioning "whether the mandate to tell 'the whole truth,' as distinct from the mandate not to lie, has any practical significance").

32 7 Wigmore, supra note 18, at 597, 601; see also Nance, A Theory, supra note 20, at 829 n.13.

33 7 Wigmore, supra note 18, at 601.

34 Id.

35 1 Weinstein's Evidence, supra note 30, at 106-15; accord Nance, A Theory, supra note 20, at 830.

36 See Nance, A Theory, supra note 20, at 835-47 (citing 7 Wigmore, supra note 18, § 2095, at 607) (arguing that Wigmore described two distinct completeness rules: (1) a rebuttal rule, which included a "timing" function (removing the limit on the scope of cross-examination to the subject matter of the direct examination) and a trumping function; and (2) an interruption rule, which allowed the proponent of the completing evidence to "interrupt" the other party's case immediately)).

37 Nance, A Theory, supra note 20, at 837 & n.37 (citing 7 Wigmore, supra note 18, § 2114, at 661-62) (internal citations omitted).

38 7 Wigmore, supra note 18, § 2114, at 661-62.

39 The Federal Rules of Evidence were enacted pursuant to Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975) (codified at 28 U.S.C. app. (2006 & Supp. V 2011)). See Gillespie, supra note 20, at 382 n.1.

40 See Fed. R. Evid. 106 advisory committee's note; accord 21A Wright et al., supra note 19 (noting the Advisory Committee described Rule 106 as "an expression of the rule of completeness") (quoting Fed. R. Evid. 106 advisory committee's note); Nance, Verbal Completeness, supra note 8, at 53.

41 Gillespie, supra note 20; see 21A Wright et al., supra note 19 (discussing the differences between Rule 106 and the common law).

42 488 U.S. 153 (1988).

43 Id. at 156.

44 Id. at 157.

45 Id. at 159 (alteration in original).

46 Id. at 159-60.

47 Id. at 160.

48 Id.

49 Rainey v. Beech Aircraft Corp., 827 F.2d 1498, 1500 (11th Cir. 1987), aff'd in part, rev'd in part, 488 U.S. 153 (1988).

50 Rainey, 488 U.S. at 172.

51 Id. at 172.

52 21A Wright et al., supra note 19 (attributing the ability to offer evidence on cross-examination to the common law doctrine rather than Rule 106).

53 See Fed. R. Evid. 106 & advisory committee's note.

54 Fed. R. Evid. 402.

55 See Rainey, 488 U.S. at 171 (citing 7 Wigmore, supra note 18, § 2113, at 653).

56 Id. at 172 (citing 1 Weinstein's Evidence, supra note 30, at 106-20).

57 Id.

58 In 1975, Congress passed an Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (amended 2011).

59 Fed. R. Evid. 802.

60 The Court's decision in Rainey could be seen as an implicit "judicial codification" of a trumping function for Rule 106. Rainey, 488 U.S. at 171-72. After all, in an evidentiary situation where Rule 106 could apply, the Court invoked the trumping function of the common law doctrine of completeness. However, the Court did not address the use of Rule 106: "While much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106." Id. at 172 (emphasis added). The Court's stance toward a trumping function for Rule 106 is thus unclear. It is interesting to note that the Fourth Circuit changed its position after Rainey was decided in December 1988. Compare United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988) (pre-Rainey; recognizing a trumping function), with United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) (post-Rainey; not recognizing a trumping function).

61 Compare United States v. Lopez-Medina, 596 F.3d 716, 735 (10th Cir. 2010), United States v. Kopp, 562 F.3d 141, 144 (2d Cir. 2009), United States v. Bucci, 525 F.3d 116, 133 (1st Cir. 2008), United States v. Baker, 432 F.3d 1189, 1222-23 (11th Cir. 2005), United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986), and United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986), with United States v. Collicott, 92 F.3d 973, 982-83 (9th Cir. 1996), Wilkerson, 84 F.3d at 696, United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987), and United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982).

62 Costner, 684 F.2d at 373 (citing 1 Weinstein's Evidence, supra note 30, ¶ 106[01], at 106-13), cited by United States v. Crosgrove, 637 F.3d 646, 661 (6th Cir. 2011); see also Donald F. Paine, The Rule of Completeness, 38 Tenn. B.J. 31, 31 (2002). But see 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 106.03[1], at 106-13 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2011) [hereinafter 1 Weinstein Federal Evidence] (recognizing a conflict among the circuit courts).

63 See infra Part II.

64 See, e.g., Sutton, 801 F.2d at 1368, cited in Lopez-Medina, 596 F.3d at 735-36; Bucci, 525 F.3d at 133; United States v. Glover, 101 F.3d 1183, 1190-92 (7th Cir. 1996); Gravely, 840 F.2d at 1163.

65 Authorities who agree with this position include: Broun et al., supra note 30, at 286 (stating that "as a categorical rule," the statement that the additional material must be otherwise admissible "is unsound"); 2 Fishman & McKenna, supra note 30, § 11:39 (describing this position as "[t]he better view"); 2 Michael H. Graham, Handbook of Federal Evidence § 106.1 (7th ed. 2012) (discussing "waiver of objection through 'door opening"' (citing United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948))); 1 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual 89 (6th ed. 1994) (citing the "open door principle"); see also Adam H. Kurland, Prosecuting Ol' Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant, 51 U. Pitt. L. Rev. 841, 894 (1990) (stating "the better view seems to be that Rule 106 provides for a limited independent source of admissibility that overrides hearsay objections").

66 See Bucci, 525 F.3d at 133 (rejecting the government's argument that Rule 106 is limited to the order of proof).

67 See United States v. Kopp, 562 F.3d 141, 144 (2d Cir. 2009).

68 See United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986); accord United States v. Lewis, 641 F.3d 773, 785 (7th Cir. 2011).

69 Lopez-Medina, 596 F.3d at 735 (citing 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 1.43 (3d ed. 2007); Bucci, 525 F.3d at 133; and Sutton, 801 F.2d at 1368).

70 United States v. Baker, 432 F.3d 1189, 1222-29 (11th Cir. 2005).

71 Sutton, 801 F.2d at 1368.

72 Kopp, 562 F.3d at 144 (quoting United States v. Johnson, 507 F.3d 793, 796 (2d Cir. 2007)) (rejecting admission of statement because defendant's intent to kill was irrelevant). Contra U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1375-76 (2d Cir. 1988) (rejecting the letter on the bases of hearsay under Rule 805 and "unduly prejudicial" content under Rule 403).

73 United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986) ("If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too."). However, the Seventh Circuit found "no danger of a misleading impression" in LeFevour. Id.

74 Sutton, 801 F.2d at 1368, quoted in Lopez-Medina, 596 F.3d at 735-36. The Sutton court also provided reasoning for the admission of hearsay under Rule 106 and added that "Rule 106 [would] be invoked rarely and for a limited purpose." Id. at 1367-69. See also United States v. Glover, 101 F.3d 1183, 1192 (7th Cir. 1996) (citing Sutton's finding that excluded portions of a recorded conversation should be admitted to protect a defendant's constitutional right to not take the stand and testify); United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988) (citing Sutton to support the proposition "that parties should not be able to lift selected portions out of context").

75 Authorities who agree with this position include: 1 Mueller & Kirkpatrick, supra note 69; John C. O'Brien & Roger L. Goldman, Federal Criminal Trial Evidence 98-99 (1989).

76 United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996).

77 United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982).

78 United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987).

79 United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996).

80 United States v. Gravely, 840 F.2d 1156, 1163-64 (4th Cir. 1988) (pointing out that the defendant had selectively omitted fourteen intervening and undesirable lines in a thirty-page memorandum: "The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. . . . The rule simply speaks the obvious notion that parties should not be able to lift selected portions out of context." (citing United States v. Sutton, 801 F.2d 1346, 1366-69 (D.C. Cir. 1986))).

81 Wilkerson, 84 F.3d at 696 (holding the judge did not abuse discretion in omitting exculpatory portions of defendant's confession, despite admitting the inculpatory portions under Rule 801(d)(2), in part, because hearsay may not come in under Rule 106).

82 Costner, 684 F.2d at 373 (citing 1 Weinstein's Evidence, supra note 30, ¶ 106[01], at 106-13), see also United States v. Crosgrove, 637 F.3d 646, 661 (6th Cir. 2011); Paine, supra note 62.

83 Woolbright, 831 F.2d at 1395 ("We conclude, however, that neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611 . . . 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.", cited in United States v. Ramos-Caraballo, 375 F.3d 797, 802-03 (8th Cir. 2004)). But see infra Part IV; Brewer v. Jeep Corp., 724 F.2d 653, 657 (8th Cir. 1983) (admitting "the complete report . . . [both] the mundane as well as the sensational").

84 Collicott, 92 F.3d at 983 (citing U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1375-76 (2d Cir. 1988)) (identifying the impermissibility of the admission of hearsay under Rule 106 as one of three reasons for error in the admission of defendant's statements).

85 See United States v. Hoffecker, 530 F.3d 137, 192-93 (3d Cir. 2008).

86 See United States v. Branch, 91 F.3d 699, 727-28 (5th Cir. 1996).

87 Hoffecker, 530 F.3d at 192.

88 Branch, 91 F.3d at 728 (declining to reach the issue because the defendant failed to show how additional evidence would "qualify, explain, or place into context" the portion already introduced).

89 21A Wright et al., supra note 19, § 5078.1.

90 See infra Part II.B (discussing the purpose of Rule 106).

91 Minutes of the Advisory Committee on Evidence Rules Meeting of October 18, 2002, at 3-4 [hereinafter Advisory Committee Minutes Oct. 18, 2002], available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/1002EVMin.pdf.

92 Dean v. United States, 556 U.S. 568, 572 (2009).

93 Fed. R. Evid. 106 (emphasis added).

94 21A Wright et al., supra note 19, § 5078.1.

95 1 Saltzburg et al., supra note 65.

96 Fed. R. Evid. 106.

97 "[E]xcept as otherwise provided by the rules" is a commonly-known phrase from the pre-December 1, 2011 version of the Federal Rules of Evidence. The restyled Rules are written in the active voice and thus lack this phrasing. "There is no intent to change any result in any ruling on evidence admissibility." See id.; Fed. R. Evid. 106 advisory committee's note.

98 See, e.g., United States v. Sutton, 801 F.2d 1346, 1368 & n.17 (D.C. Cir. 1986) (citing 21A Wright et al., supra note 19, § 5078); 21A Wright et al., supra note 19, § 5078.1 n.6 (citing Rules 402, 501, 602, 613(b), 704, 802, 806, 901(10), and 1002 as examples); Gillespie, supra note 20, at 390-91 & 391 n.82. Cf. Fed. R. Evid. 402 (admissibility of relevant evidence); Fed. R. Evid. 802 (inadmissibility of hearsay).

99 21A Wright et al., supra note 19, § 5078.1 n.7.

100 Fed. R. Evid. 802 ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.").

101 21A Wright et al., supra note 19, § 5078.1 n.6; see Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

102 21A Wright et al., supra note 19, § 5078.1.

103 Fed. R. Evid. 802.

104 Fed. R. Evid. 106.

105 Fed. R. Evid. 102.

106 Fed. R. Evid. 611(a) & advisory committee's note to subdiv. a; see Gillespie, supra note 20, at 391 n.84.

107 Fed. R. Evid. art. I, art. IV, art. VIII.

108 Nance, A Theory, supra note 20, at 835.

109 801 F.2d 1346 (D.C. Cir. 1986).

110 Id. at 1368 (emphasis added) (citing 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5078, at 377 (1977 & 1985 Supp.)) [hereinafter 21 Wright & Graham].

111 Fed. R. Evid. 102.

112 See Sutton, 801 F.2d at 1369-70.

113 Fed. R. Evid. 102.

114 Fed. R. Evid. 106 advisory committee's note (referring to remedial measures undertaken later in trial to correct the misleading impression); see Fed. R. Evid. 102.

115 21A Wright et al., supra note 19, § 5078.1.

116 Id.

117 Fed. R. Evid. 106 advisory committee's note ("The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case."). But see Gillespie, supra note 20, at 392 (claiming a party will have no opportunity to introduce this evidence at a later time).

118 Fed. R. Evid. 611(a).

119 Gillespie, supra note 20, at 391 n.84.

120 Fed. R. Evid. 611(a) (emphasis added).

121 Corley v. United States, 556 U.S. 303, 314 (2009) (alterations in original) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)) (internal quotation marks omitted).

122 1 Weinstein's Evidence, supra note 30.

123 Letter from W. Vincent Rakestraw, Asst. Attorney Gen., Legislative Affairs, to Hon. James O. Eastland, Chairman, Senate Judiciary Comm. (June 14, 1974), Federal Rules of Evidence: Hearings on H.R. 5463, Before the S. Comm. on the Judiciary, 93d Cong. 121-23 (1974) [hereinafter Rakestraw Letter]; accord Gillespie, supra note 20, at 387.

124 See Cal. Law Revision Comm'n, Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence: Article VIII Hearsay Evidence 599 (1962) (discussing Section 1854); 1 Weinstein's Evidence, supra note 30, at 106-20 (discussing Section 356); 21A Wright et al., supra note 19, § 5078.1 nn.17-18.

125 See Nance, Verbal Completeness, supra note 8, at 59-60.

126 Advisory Committee Minutes Oct. 18, 2002, supra note 91; Advisory Committee Minutes Apr. 25, 2003, supra note 11, at 8.

127 Rakestraw Letter, supra note 123, at 122; accord Gillespie, supra note 20, at 387.

128 21A Wright et al., supra note 19, § 5078.1. The reasoning behind the word choice "mischievous" is interesting but unknown.

129 1 Saltzburg et al., supra note 65.

130 Dean v. United States, 556 U.S. 568, 572 (2009) (quoting Bates v. United States, 522 U.S. 23, 29 (1997)).

131 Cal. Civ. Proc. Code § 1854 (West 1872) (recodified at Cal Evid. Code § 356 (West 1965)).

132 21A Wright et al., supra note 19, § 5078.1 n.21.

133 Cal. Law Revision Comm'n, supra note 124, at 599, quoted in 1 Weinstein's Evidence, supra note 30, at 106-20; 21A Wright et al., supra note 19, § 5078.1.

134 Cal. Law Revision Comm'n, supra note 124, at 599.

135 Cal. Evid. Code § 356 (West 1965) (California's equivalent of Rule 106); 21A Wright et al., supra note 19, § 5078.1.

136 See Nance, Verbal Completeness, supra note 8, at 59-60.

137 Fed. R. Evid. 106 advisory committee's note.

138 Fed. R. Evid. 106 (emphasis added) (original enactment by Congress, effective July 1, 1975), quoted in Nance, Verbal Completeness, supra note 8, at 59 & n.27; see also 1 Mueller & Kirkpatrick, supra note 69 (describing Rule 106 as a "force the proponent rule").

139 Nance, Verbal Completeness, supra note 8, at 59 n.28; 1 Weinstein Federal Evidence, supra note 62, § 106App.02.

140 Fed. R. Evid. 106 (emphasis added) (amended 1987); see 1 Weinstein Federal Evidence, supra note 62, § 106App.02.

141 The restyled Rules went into effect December 1, 2011.

142 Nance, A Theory, supra note 20, at 845-46.

143 Advisory Committee Minutes Oct. 18, 2002, supra note 91, at 3; Advisory Committee Minutes Apr. 25, 2003, supra note 11, at 8.

144 See Advisory Committee Minutes Oct. 18, 2002, supra note 91, at 2.

145 Id. at 3-4.

146 Advisory Committee Minutes Apr. 25, 2003, supra note 11, at 8-9.

147 Id. at 9 (emphasis added).

148 Id.

149 Advisory Committee Minutes Oct. 18, 2002, supra note 91.

150 Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

151 See 21A Wright et al., supra note 19, § 5078.2; 2 Graham, supra, note 65; 1 Saltzburg et al., supra note 65, at 97 (citing United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986)); Memorandum from Daniel J. Capra, Professor, Fordham Univ. Sch. of Law, to the Advisory Comm. on Evidence Rules (Apr. 1, 2003) [hereinafter Capra Memo], available at http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda% 20Books/Evidence/EV2003-04.pdf (pdf pages 107-26).

152 Nance, A Theory, supra note 20, at 846.

153 Fed. R. Evid. 403.

154 Fed. R. Evid. 106.

155 Fed. R. Evid. 106 advisory committee's note (referring to remedial measures undertaken later in trial to correct the misleading impression).

156 See Fed. R. Evid. 403.

157 But see discussion infra Part IV.

158 Fed. R. Evid. 403; see, e.g., United States v. LeFevour, 798 F.2d 977, 983-84 (7th Cir. 1986).

159 Fed. R. Evid. 801(d)(2).

160 Fed. R. Evid. 106.

161 See John D. Cline, It Is Time to Fix the Federal Criminal System, 35-SEP Champion 34, 36 (2011) (presuming a defendant's self-incriminating statements under Rule 801(d)(2)(A) would be admissible under Rule 106 and further arguing, nevertheless, that "[t]his imbalance permits the government to select inculpatory snippets from a defendant's wiretapped conversations, FBI interview, or civil deposition testimony while barring the defendant from introducing the exculpatory portions except to the limited extent [Rule 106] requires. The defendant's apparently inculpatory statements are thus wrenched out of context, and the jury is left with the distorted impression that the defendant spoke and thought about nothing but criminal conduct." (footnote omitted)).

162 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend V (emphasis added).

163 A court may invoke Rule 106 only in response to the introduction of another statement. Fed. R. Evid. 106 ("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."); see Nance, A Theory, supra note 20, at 835.

164 Interview with Jeffrey O. Cooper, Assoc. Professor of Law, Ind. Univ. Robert H. McKinney Sch. of Law in Indianapolis, Ind. (Oct. 26, 2011).

165 Id.

166 In the 801(d)(2) context, such evidence could be a portion of the same statement as the original evidence; see Fed. Rule Evid. 801(d)(2).

167 Gillespie, supra note 20, at 392 & n.91 (claiming also that exceptions to the rule against hearsay must have "circumstantial guarantee[s] of trustworthiness (citing Fed. R. Evid. 801 advisory committee's note)).

168 Nance, A Theory, supra note 20, at 846.

169 See Gillespie, supra note 20, at 385 & n.27 (stating that courts tend to "show[] more sensitivity" (citing United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986)); United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981))); see also Kurland, supra note 65, at 898-99; O'Brien & Goldman, supra note 75.

170 Kurland, supra note 65, at 899 (noting that the original evidence must be misleading and that merely desiring a fuller explanation would be insufficient); see also Gillespie, supra note 20, at 389-92.

171 652 F.2d at 708.

172 Id. at 713 (alterations in original) (emphasis added) (quoting 1 Weinstein's Evidence, supra note 30, ¶ 106[01] at 106-9).

173 United States v. Sutton, 801 F.2d 1346, 1370 (D.C. Cir. 1986) ("Since this was a criminal case Sucher had a constitutional right not to testify, and it was thus necessary for Sucher to rebut the government's inference with the excluded portions of these recordings." (citing United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981))).

174 557 F.3d 698 (6th Cir. 2009).

175 Id. at 706.

176 Advisory Committee Minutes Oct. 18, 2002, supra note 91, at 3.

177 Advisory Committee Minutes Apr. 25, 2003, supra note 11, at 8.

178 Id. at 9 (emphases added).

179 See Capra Memo, supra note 151, at 5-8; see, e.g., United States v. Ortega, 203 F.3d 675, 682-83 (9th Cir. 2000) (finding Rule 106 does not extend to oral statements), holding modified by United States v. Larson, 495 F.3d 1094 (9th Cir. 2007); United States v. Edwards, 159 F.3d 1117, 1126-27 (8th Cir. 1998) (explaining that the initially proffered portions of the various confessions were not misleading); United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996) (finding the omitted statements unnecessary for completeness); United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) (stating that Rule 106 does not cover oral statements and that omitted portion was unnecessary to correct a misimpression); Phoenix Assoc. III v. Stone, 60 F.3d 95, 103 (2d Cir. 1995) (finding working papers independently admissible as working papers); U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1375-76 (2d Cir. 1988) (finding letter was also excluded under Rule 403); United States v. Woolbright, 831 F.2d 1390, 1395-96 (8th Cir. 1987) (holding honeymoon statement properly admitted as residual hearsay); United States v. Terry, 702 F.2d 299, 314 (2d Cir. 1983) (finding Rule 106 inapplicable to oral statements but determining that defendants' completing statements should have been admitted under the state-of-mind exception to the hearsay rule); United States v. Costner, 684 F.2d 370, 373-74 (6th Cir. 1982) (portion offered by the government did not correct any misimpression); United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir. 1981) (finding the additional excluded portion was irrelevant).

180 203 F.3d 675 (9th Cir. 2000), holding modified by United States v. Larson, 495 F.3d 1094 (9th Cir. 2007).

181 Id. at 682-83.

182 Capra Memo, supra note 151, at 9.

183 United States v. Holden, 557 F.3d 698, 706 (6th Cir. 2009); see infra Part III.B.

184 Capra Memo, supra note 151, at 8; see, e.g., United States v. Gravely, 840 F.2d 1156, 1163-64 (4th Cir. 1988); United States v. Sutton, 801 F.2d 1346, 1368-69 (D.C. Cir. 1986); United States v. Rubin, 609 F.2d 51, 70 (2d Cir. 1979).

185 See, e.g., United States v. LeFevour, 798 F.2d 977, 981-82 (7th Cir. 1986).

186 Capra Memo, supra note 151, at 1, 4.

187 557 F.3d 698 (6th Cir. 2009).

188 Id. at 700.

189 Id. at 705.

190 Id. at 705-06.

191 Id.

192 Id. at 702.

193 Id. at 706.

194 Id. at 705-06.

195 Id. at 706 (quoting United States v. Costner, 684 F.2d 370, 373 (6th Cir.1982)).

196 See Capra Memo, supra note 151, at 1.

197 Id. at 9 (emphases added) (quoting 21 Wright & Graham, supra note 110; see also United States v. Sutton, 801 F.2d 1346, 1369 n.18 (D.C. Cir. 1986)).

198 It is important to note that the Federal Rules of Evidence are mirrored at the state level. Compare Fed. R. Evid. 106, with Ind. R. Evid. 106 (mirroring the pre-2011 version of Rule 106) and Miss. R. Evid. 106 (mirroring the pre-1987 version of Rule 106). But see Ohio R. Evid. 106 (adding that the additional evidence must be otherwise admissible). Accordingly, an amendment to Rule 106 would have far reaching effects.

199 Interview with Jeffrey O. Cooper, supra note 164.

200 798 F.2d 977 (7th Cir. 1986).

201 Id. at 981; see 21A Wright et al., supra note 19, § 5078.3 (describing this situation as "The Rule 403 blackjack").

202 See discussion infra Part IV.B.

203 Gillespie, supra note 20.

204 United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986) (emphasis added); see Emerging Problems, supra note 9, at 22.

205 LeFevour, 798 F.2d at 981.

206 Id. at 979.

207 Id. at 980.

208 Id.

209 Id.

210 Id. at 985.

211 Id. at 981-82.

212 Id. at 981 ("But this is not a matter we need pursue further here, as we do not think there was any danger of a misleading impression."); see United States v. Pendas-Martinez, 845 F.2d 938, 944 n.10 (11th Cir. 1988) (characterizing as dictum); United States v. Benton, 54 M.J. 717, 723 n.7 (A. Ct. Crim. App. 2001) (describing as a "comment"). But see Liftee v. Boyer, 117 P.3d 821, 833-34 (Haw. Ct. App. 2005, as amended) (referring to LeFevour's ruling and describing "fairness" as the basis for admittance in these "minority" cases).

213 See United States v. Glover, 101 F.3d 1183, 1188 (7th Cir. 1996) (finding that neither the trial court nor the Seventh Circuit questioned defense counsel's statement of the law that "Federal Rule of Evidence 106 required that nearly all of his prior testimony be entered as evidence in the second trial, or, alternatively, that the entire testimony be excluded.") (emphases added); 1 Weinstein Federal Evidence, supra note 62, at 106-17.

214 See discussion supra Part II.D (focusing on Rule 403).

215 Fed. R. Evid. 106 (emphasis added).

216 Nance, Verbal Completeness, supra note 8, at 52 ("[Rule 106's] peculiarity lies in the fact that, unlike almost all other admissibility rules, it is inclusionary rather than exclusionary."); see also Gillespie, supra note 20, at 385 n.34 ("Judge Posner's analysis while appealing, especially when the remainder is considered privileged, cannot withstand close scutiny [[sic]. . . . Rule 106 is a rule of inclusion, not exclusion; thus, a court acting within its sound discretion cannot exclude evidence pursuant to Rule 106.").

217 Edward W. Cleary et al., McCormick on Evidence §§ 55-57, at 141-49 (3d ed. 1984).

218 Id. ch.6, at 122 (emphasis added).

219 Id. § 52, at 126-27.

220 724 F.2d 653 (8th Cir. 1983).

221 Id. at 657.

222 Id.

223 United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986).

224 Fed. R. Evid. 102.

46 INLR 499

39 Am. J. Trial Advoc. 683

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Student Note
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*683 THE WHOLE TRUTH OR ANYTHING BUT ...: HOW FAIRNESS, RELIABILITY, AND THE RULE OF COMPLETENESS AFFECT THE JURY'S TRUTH-SEEKING FUNCTION

> "Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light."

--Judge Benjamin Cardozo[1]

Introduction

Judge Cardozo's words are both masterfully written and inarguably insightful. It is the search for truth--the "light" that Judge Cardozo speaks of--that, to a great extent, drives the legal profession. This search is carried out in a variety of approaches, but is embodied most completely by the true hallmark of the American legal system: the jury trial.

This Note begins by exploring the importance of a jury's truth-seeking function from both a philosophical standpoint and a practical standpoint. Further, this Note addresses how facts leading to the truth are compiled prior to trial and how they are presented to a jury during trial. Finally, this Note considers how the search for the truth in the context of a jury trial relates to the law of evidence, and specifically how the rule of completeness--both the common law version and its codified counterpart--is a determinate in how facts are presented to a fact finder in an attempt to discover the truth in any given case. As is shown below, the common law rule,

and to a great extent Federal Rule of Evidence 106, both rely heavily on the concept of fairness to a litigant. This principle is contrasted with the theme that underlies the Federal Rules of Evidence, namely that evidence should be reliable in order to be considered in court. In addressing the dichotomy that exists between focusing on fairness versus focusing on reliability, this Note considers how various circuits apply the rule of completeness, and cumulates in an analysis of how the ***684** circuits *should* apply the rule of completeness in the interest of finding the truth.

I. The Importance of Truth

"The truth is the one thing most needful."[2] This statement, while able to be broadly applied, is especially poignant in litigation and the legal profession as a whole. As Justice Blackmun said quite plainly in *Oregon v. Hass*, "[w]e are ... always engaged in a search for truth ... so long as the search is surrounded with the safeguards provided by our Constitution."[3] Although made in the context of a criminal trial, Justice Blackmun's words can serve as a maxim to be applied to all law, so that the purpose of every legal proceeding is to ascertain the truth and serve justice.[4] The truth of a case is delivered by the jury in the form of a verdict, the very meaning of which is "true-speaking."[5] Hence, when a jury has deliberated and reached a verdict, they have, in fact, found the truth. This truth will be, in any given case, an absolute one, as is evidenced both by common law and, more broadly, philosophical principles. To illustrate this fact, we will go forward considering the oft-cited personal injury hypothetical: plaintiff's and defendant's cars collide in an intersection; plaintiff says the light was red; defendant says the light was green--only one of them is right.[6]

*685 A. Truth as an Absolute--Based on Philosophical Principle

"The truth does not become truth when it is verified."[7] Rather, the "[t]ruth is immutable and its existence cannot depend on ... formalit [ies]."[8] Nor should it. As a matter of principle, the truth is absolute and objective, and its existence is unwavering.[9] This fact is supported throughout history and finds its origins in the dialogues of such political philosophers as Plato's Socrates.[10]

Objective truth was discussed in one of its earliest forms in Plato's *Republic* and the well-known allegory of the cave.[11] The allegory of the cave tells us that what mankind perceives to be true is merely a shadow of the truth.[12] Socrates posits that mankind is chained in a cave staring at a wall upon which shadows are cast.[13] According to Socrates,

> [t]hey are in it from childhood with their legs and necks in bonds so that they are fixed, seeing only in front of them, unable because of the bond to turn their heads all the way around. Their light is from a fire burning far above and behind them. Between the fire and the prisoners there is a road above, along which see a wall, built like the partitions puppet-handlers set in front of the human beings and over which they show the puppets .... Then most ***686** certainly ... such men would hold that the truth is nothing other than the shadows of artificial things [shown on the shadows on the wall].[14]

Analyzing this story more closely, the puppeteers cast the shadows that humanity sees, and these shadows become "truth"--subjective and false, rather than objective and true. It is clear that this "truth" that humanity sees in the shadows is, in reality, anything but the actual truth. Rather, the shadows are merely a reflection of what the puppeteers want humanity to *believe* is truth. These shadows mislead and result in false or incorrect beliefs and notions of "artificial things," as described by Socrates.[15]

This actual, objective truth, as well as the allegory of the cave itself, can easily be analogized to the modern day jury trial. The men chained in the cave are representative of an empaneled jury, and the lawyers and judges embody the puppeteers. However, jurors are expressly forbidden from stepping away from their seat in the cave to search for the truth themselves and must instead rely on the advocates and evidence to determine the truth.[16] This is the very nature of the adversarial process. The shadows that jurors see are what the judges and lawyers allow them to see based on an application of the rules of evidence. Motions in limine are filed and objections are made, keeping evidence out as a matter of law that the jury will never be able to consider in determining liability,[17] ***687** and theories of a case will highlight an skew facts one way or the other.[18]

Going back to our personal injury hypothetical, the defense lawyer will try to paint the evidence in a light that makes it more likely that the traffic light was actually green and his client is right, while the plaintiff lawyer will do just the opposite. However, as in the allegory of the cave, no matter what shadows the jurors may see throughout a trial, the true, objective, unchanging truth will always be the same.[19] Despite what the advocates and the court will allow the jury to see, the light was either green, or it was not.

B. Truth as an Absolute--Based on the Compilation and Presentation of Facts

The search for truth of which Justice Blackmun speaks begins from the outset of any proceeding, whether civil or criminal, and is geared towards fact-finding.[20] The process can be thought of as a means to an end, with the means being the process of reaching the truth, and the end being ascertaining the truth. The process of reaching the truth comes by way of evidence. "[W]hen one offers 'evidence,' ... he offers, otherwise than by reference to what is already known, to prove a matter of fact which is to be used as a basis of inference to another matter of fact."[21]

***688** Evidence is obtained throughout the litigation process, and its discovery is greatly governed, on the civil side, by the Federal Rules of Civil Procedure.[22] The "truth" of a case begins to be unveiled by the averments in a complaint and responses in an answer, though at this stage the truth is anything but obvious or objective, given the almost assuredly opposing contentions of the parties.[23] The combination of these contentions sets the stage for the very beginning of the means to the end: finding the truth of what actually happened. Obviously, one

party's contention does not establish what the truth actually is, hence the necessity for liberal discovery and the required disclosure of information.[24] The plaintiff will adamantly aver that the light was red, and the defendant will in all probability deny it, or at the very least claim that he lacks knowledge, leaving the bare bones pleadings as an inconclusive measure of what the truth is.

Beyond the pleading phase, initial disclosures are the next avenue by which the parties, and ultimately the fact finders, discover the truth.[25] Every federal civil suit requires all parties to make initial disclosures, but these disclosures need not be meticulously detailed.[26] Rather, each party must disclose simple basic information, such as the name of relevant individuals, documents relevant to the matter, alleged damages, and insurance information--just enough to narrow the scope of the matter so that the truth may more easily be found.[27] The "meat" of the truth, ***689** however, comes from formal discovery[28] through interrogatories,[29] requests for production,[30] requests for admission,[31] and depositions.[32] During this phase, the plaintiff's lawyer may engage in a scrutinizing interrogation of the defendant, inquiring how certain he was that the light was green, or propound interrogatories requesting specific details about the defendant's recollection of the accident. These avenues of discovery serve "to facilitate trial preparation, to obtain facts, to narrow issues, and to reduce the chance of surprise"--all of which either lead to the truth or is directly related to facilitating the discovery of the truth.[33]

C. Trial--The Importance of What the Jury Is Allowed to Know

Once the discovery phase is complete, the parties prepare for trial, which is where the true "fact finding" and ultimate determination of the truth begins and a verdict is reached. Historically, this role falls within the province of the jury.[34] However, where no jury trial is demanded, or ***690** where no jury trial is required as a matter of right, the fact finding role falls within the scope of the trial court's duties.[35] From a practical standpoint, this shows that the truth finding function in a trial is left up to ordinary people--people who are malleable, impressionable, and who come into court with preconceived values, beliefs, and prejudices.[36] Although the evidence that these ordinary individuals see, and in turn consider, is based on what is presented at trial, jurors will most certainly take this evidence and interpret it as they see fit.[37] This is where the importance of the role of the advocates and judge comes into play, as it is their job to control what is presented at trial.[38] Advocates must present evidence in a succinct and discernable manner that can later be argued in closing, and the judge must preside over the proceedings in a way that ensures that justice is sought and the truth is found.[39]

II. Truth in Evidence--The Rule of Completeness

"In the law of evidence, truth matters."[40] The truth-seeking function of a jury trial is reflected in Federal Rule of Evidence 102, which provides the purpose of the rules of evidence. Rule 102 states: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development ***691** of evidence law, *to the end of ascertaining the truth and securing a just determination*."[41] As discussed below, one of the

most important avenues "of ascertaining the truth" is the rule of completeness.[42] However, as will be shown, the circuit courts are vastly split on the rule's practical application, with some focusing on a "fair" application of the rule of completeness,[43] and others focusing on a "reliable" application of the role of completeness.[44]

A. The Common Law Rule Based on Fairness

In the search for Socratic--that is, objective--truth in a legal proceeding, fairness is seen throughout the law as a strong theme.[45] In the law of torts, fairness is embodied in doctrines such as comparative negligence and assumption of the risk.[46] In criminal law, fairness is shown in the right to a trial by an impartial jury.[47] Even in civil procedure, fairness is embodied by the doctrine of forum non conveniens.[48] The importance of fairness is constantly emphasized by, and is a key focus of, both the common law and the application of the law by the ***692** modern judiciary, as was recently emphasized in the preamble of the September 2015 Strategic Plan for the Federal Judiciary, presented at the Judicial Conference of the United States.[49]

From the standpoint of the law of evidence, fairness is embodied strongly by the rule of completeness.[50] The common law rule of completeness is best described in the works of John Henry Wigmore,[51] and can be succinctly stated as follows: "the opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance."[52] As Wigmore notes with regard to verbal completeness:

> A simple life, reduced to its lowest terms, could be lived in a dwelling of one room; but a fin-de-siécle existence, with all its appurtenant needs, conveniences, luxuries, and follies, demanded a complex mansion with scores of apartments, countless petty fittings, and a huge estate of many departments .... So with any utterance of any thought the complexity of the latter produces elaboration in the former. It follows that the thought as a whole, and as it actually existed, cannot be ascertained without *taking the utterance as a whole* and comparing the successive elements and their mutual relations. To look at a part alone would be to obtain a false notion of the thought. The total--that is to say, the real--meaning can be got at only by going on to the end of the utterance. One part cannot be separated and taken by itself without doing injustice, by producting [sic] misrepresentation.[53]

Noting the ability to offer the remainder of a piece of evidence was in fact a "right" at common law, Wigmore identified "three general ***693** corollaries of the principle on which the right rests."[54] First, the remainder of a piece of evidence, whether oral or written, cannot be taken into evidence unless it is relevant "to the issue."[55] This requirement is steeped in common sense, as an attempt to offer an immaterial or irrelevant piece of evidence under the guise of the completeness doctrine would violate the basic rule that only relevant evidence is admissible.[56] Second, "[n]o more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable" in evidence.[57] This second requirement has, on its

face, both a scope requirement and a temporal requirement: "The simple rule [is] ... that 'the whole of what was said at the same time on the same subject' may be put in ...."[58] The second corollary logically leads to the third: "[t]he remainder ... is not in itself testimony."[59] In other words, the remainder can only be offered to "aid [] in the construction of the utterance as a whole," and is therefore not itself evidence.[60] As noted by Wigmore, "[t]he remainder of the utterance ... is merely a hearsay statement,"[61] and therefore, cannot be offered for the truth of the matter asserted.[62]

The common law rule embodies the fact that it is only fair to consider the entirety of a piece of evidence, and contemplates whether the "[e]ntirety of parts is ... essential to the correct understanding of an utterance."[63] Both fairness and practical experience show that the remainder may be necessary to understand the original: "A word is interpretable in the light of the use of the same word in another part; a clause is modified by a prior or subsequent clause; one sentence qualifies ***694** another; and one paragraph may form only a part of the whole exposition."[64] In Wigmore's view, even where one writing merely references another, the latter should be offered into evidence in order to give "full understanding of the effect of the former."[65] As long as the remainder is relevant to the matter and is not itself a separate piece of evidence, anything that may be necessary to fairly interpret an original piece of evidence is admissible at common law.

Other commentators echoed this liberal interpretation of the common law rule of completeness.[66] One scholar identified several instances where the remainder of a piece of evidence should be considered, and even said that "sometimes the rule should apply even if no portion of the underlying document has been formally introduced, where refusal would mislead the jury as to its contents."[67] Even Professor Charles McCormick, who often tends to focus more on the importance of utilizing reliable evidence rather than fair evidence, opines that "[t]he common law version of the rule of completeness permits the proponent to prove such part as he desires,"[68] stating the common law rule affords an advocate "the *right* to introduce the remainder of the writing, recording, statement, correspondence, former testimony, or conversation relating to the same subject matter [as the original]."[69]

B. The Enactment of Federal Rules of Evidence 106

Then, in 1973, the rule was partially codified.[70] Specifically, Federal Rule of Evidence 106 provides: "If a party introduces all or a part of a writing or recorded statement, an adverse party may require the introduction, ***695** 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."[71] As is shown by the text of the rule, Congress intended Rule 106 to continue to support the common law rule of completeness's focus on fairness, going so far as to make reference to the concept in the rule itself.[72] The importance of fairness in relation to the rule of completeness is further supported by the legislative intent behind the rule.[73] The advisory committee's notes to the 1972 proposed version stated:

> The [codified] rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of

> repair work when delayed to a point later in the trial .... The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.[74]

Although the legislative history does not *explicitly* give credence to the importance of fairness, it is clear that "misleading impression" and "inadequacy of repair work" point to the conclusion that Congress was of the opinion that the remainder of evidence should come in in the interest of fairness, given that "fairness" was included in the text of the rule.[75]

The United States Supreme Court analyzed the codification of the rule of completeness in relation to its common law counterpart. In *Beech Aircraft Corp. v. Rainey*,[76] a Navy flight instructor was killed when her aircraft crashed during a training exercise.[77] The deceased's spouse brought a products liability suit against the manufacturer of the aircraft, ***696** alleging the crash was the result of equipment malfunction.[78] The Navy conducted an internal investigation and made a report of its findings, which were offered at trial.[79] Also offered into evidence was a letter written by the respondent detailing objections in the form of opinions to the Navy's reported findings.[80] The trial court allowed questions into the contents of the letter during direct-examination, but sustained an objection concerning the remainder of the letter during cross-examination on the grounds that it was improper opinion evidence.[81] On appeal, it was determined that it was reversible error to exclude evidence concerning the remainder of the writing pursuant to Rule 106.[82]

Despite the fact that Rule 106 was clearly invoked by the appellate court, the United States Supreme Court decided that, "[w]hile much of the controversy in this suit ... centered on whether Rule 106 applies, we find it unnecessary to address that issue."[83] However, the United States Supreme Court gave specific deference to the codified rule's common law counterpart, coming to the conclusion "that when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402."[84] By so holding, the United States Supreme Court's analysis of Federal Rule of Evidence 106 and its relation to the common law rule supports the general idea that codification does not do away with the common law, but rather helps to determine how to properly interpret it.[85]

*697 C. A Comparison of the Common Law Rule and the Codified Rule

There are certain aspects of the common law rule that are not reflected in the codified rule. As noted by the United States Supreme Court, Federal Rule of Evidence 106 only *"partially* codified the doctrine of completeness."[86] At common law, the rule of completeness applied broadly to all types of evidence, whether documentary or oral testimony.[87] Furthermore, as noted above, although the common law rule required that the remainder be relevant, within the scope of the first part, and not itself be evidence, these three corollaries led to a liberal application of

the rule.[88] Federal Rule of Evidence 106, on the other hand, greatly narrows the application of the rule of completeness.[89] Whereas the common law rule allowed either the proponent or opponent of a statement to offer the remainder, Rule 106 limits the rule to the rights of an "adverse party."[90] Moreover, the federal rule plainly applies when "a party introduces all or a part of a *writing* or *recorded statement*," thereby arguably excluding the admissibility of oral statements.[91]

McCormick contrasted the codified rule with the common law rule by saying "the common law right applies so long as the other passage is logically relevant to the same topic as the part the proponent offers."[92] Federal Rule of Evidence 106, on the other hand, is "[t]he more drastic doctrine," in that it "does not come into play unless the other passage is so closely related to the part the proponent offers that presenting only that part to the jury would be a half-truth which might mislead the jury."[93] ***698** However, even with Rule 106's more conservative application, it is still clear that fairness was a key focus of both the common law and modern versions of the rule of completeness.

III. Importance of Reliability

Seeking the absolute Socratic truth is not, however, always best served by means that tend to focus on fairness. For example, though it may be *fair* to allow an out of court statement into evidence and claim that it is not being offered for the truth of the matter asserted,[94] it is entirely possible the jury will take the statement for its truth.[95] Likewise, it may be *fair* to offer otherwise improper character evidence for a supposedly acceptable purpose, such as to show knowledge on the part of the witness,[96] but an observant juror may take that evidence and read into it a bad character.[97] Instances such as these show that deference to fairness should be balanced with the requirement of reliability. Indeed, the importance of reliability cannot be ignored, and it has been given much credence throughout legal history.

As noted by Professor McCormick, "[t]he common law system of evidence is exacting in its insistence on the most reliable sources of information."[98] Moreover, the law of evidence is full of doctrines that show a "preference for ... more reliable types of evidence."[99] For example, Federal Rule of Evidence 602 requires a witness to have ***699** personal knowledge of a fact to be competent to testify about it.[100] Quoting McCormick, the Federal Rules of Evidence Advisory Committee noted "'[t]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information.'"[101] This further supports the very purpose of the Federal Rules of Evidence wherein the search for truth is of paramount importance, which not only goes hand in hand with the requirement of reliability, but also is reflected throughout the rules.[102]

A witness may not testify until an oath has been sworn to tell the truth, which emphasizes that a tribunal will receive only reliable testimony,[103] and if a witness commits perjury, harsh penalties may be ordered by the court.[104] Once a witness has sworn an oath, a witness may only testify to

matters that they have personal knowledge of,[105] a witness may not testify as to what was said by others outside of court,[106] and a witness may not offer any opinions that are beyond the qualifications of a layperson.[107] Additionally, if the witness is an expert, the witness may not offer any opinions that are not the product of reliable means.[108] Any documents received into evidence must be the original,[109] and copies are only ***700** acceptable when there is no question as to the copy's authenticity.[110] Courts may take judicial notice of facts, but only if the facts are from an unquestionably reliable source.[111] Experts may give opinions about matters a layperson cannot,[112] but only after meeting specific qualifications indicating the reliability of the testimony as an expert opinion.[113] All of these requirements point to one conclusion: while fairness is important, reliability trumps.

IV. Fairness Versus Reliability--The Circuit Split on the Application of the Rule of Completeness

Even a cursory review of the rationales behind the respective importance of reliability and fairness shows the two are in conflict with one another. On one hand, reliable evidence may be important, but in the interest of upholding the requirement of reliable evidence, fairness may be thrown out the window. On the other hand, fairness dictates that some pieces of evidence should be admitted even if they undermine the importance of reliable evidence.[114] The Rules of Evidence attempt to resolve this conflict. For example, the residual exception to the rule against hearsay allows hearsay evidence to be admitted if, among other things, "the statement has equivalent circumstantial guarantees of ***701** trustworthiness" and "admitting it will best serve the purposes of these rules and the interest of justice."[115] Similarly, relevant evidence--evidence that is reliably related to the matter at hand--is admissible only if its probative value is not outweighed by the possibility of unfairly prejudicing the jury.[116] In the case of both these rules, fairness is balanced with reliability in an attempt to determine the admissibility of evidence, which results in an interesting dichotomy.

Although fairness and reliability in terms of evidentiary theory may be at odds with one another, it also appears that one cannot truly exist without the other. Is it not accurate to say that reliability is important only because it is fair to limit evidence to trustworthy and truthful information? Similarly, can fairness truly be applied without the consideration of reliable evidence? The various circuits attempt to address this dichotomy in their respective interpretations of Federal Rule of Evidence 106, but as is well documented, the result is a litany of circuit splits.[117] Given the broad and encompassing nature of Federal Rule of Evidence 106, and moreover its relation to other rules of evidence, several issues have arisen about which the circuits disagree: whether hearsay evidence should be admissible under Rule 106;[118] whether generally inadmissible evidence should be admissible under Rule 106;[119] whether, and under what circumstances, a criminal defendant's confession ***702** is admissible under Rule 106;[120] as well as whether Rule 106 applies to oral statements.[121] These circuit splits can be combined in order to consider a broader question: in the application of Federal Rule of Evidence 106 and the rule of completeness, do circuits focus more on fairness or reliability?

A. "Fairness Is of Utmost Importance" Circuits

Circuits that focus on fairness in applying the rule of completeness tend to adhere to a liberal interpretation of Federal Rule of Evidence 106, often allowing otherwise inadmissible evidence to be received. The leading case that serves as a proponent of fairness is *United States v. Sutton*,[122] which "represents the school of thought that Rule 106 was specifically designed so that it would not be subject to any of the other rules of evidence."[123] *Sutton* specifically held:

> Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court.[124]

Stated succinctly, the *Sutton* test is as follows: given that "Rule 106 should not be limited solely to otherwise admissible evidence,"[125] the remainder of a piece of evidence may be admitted, regardless of the other ***703** rules of evidence, if it would be fair to do so.[126] In focusing on fairness, *Sutton* specifically included the liberal common law provisions of the rule of completeness, saying that, in fairness, Rule 106 "reasonably should be interpreted to incorporate the common-law requirements that the evidence be relevant, and be necessary to qualify or explain the already introduced evidence allegedly taken out of context."[127]

Citing Professors Wright and Graham, *Sutton* provided that the reason Rule 106 should be liberally applied is because "the only limitation on the common-law doctrine of completeness embodied in Rule 106 was on grounds of prejudice."[128] Therefore, under this approach, if undue prejudice is the only evidentiary consideration that need be considered in admitting the remainder on grounds of fairness, the remainder need only have a probative value that outweighs the danger of unfair prejudice.[129] Carried to its extreme, if the probative value of the remainder is simply that it is fair to include it, then the Rule 403 balancing test will almost always be satisfied because of the great importance of fairness, and the remainder will always come in.

Several other circuits implicitly follow the *Sutton* "fairness" approach. For example, the First Circuit has unabashedly said "our case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence."[130] Similarly, the Third Circuit adopted a four-part test specifically referencing and giving credence to fairness.[131] The Second Circuit also follows ***704** this approach at times, finding that "[u]nderlying Rule 106 ... is a principle of fairness requiring the introduction of an entire or related document if necessary for the 'fair and impartial understanding of the admitted portion' or document."[132]

Other circuits have extended a liberal construction of Rule 106, specifically regarding inadmissible hearsay and oral testimony in light of a trial court's inherent power to control the admission of evidence pursuant to Federal Rule of Evidence 611.[133] As stated by the Eleventh

Circuit: "Rule 106 [may be extended] 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 ...."[134] The Eleventh Circuit also applied this standard to a criminal defendant's statement, stating "[u]nder the Rule 106 fairness standard, the exculpatory portion of [a] defendant's statement should [be] admitted if it was relevant to an issue in the case and necessary to clarify or explain the portion received," leaving such determination within the sound discretion of the trial court.[135] Similarly, the Tenth Circuit succinctly stated "[e]ven if [a] fact allocution [sic] would be subject to a hearsay objection, that does not block its use when it is needed to provide context for a statement already admitted."[136] The Tenth Circuit has also held, "[w]hile Rule 106 explicitly applies only to writings and recorded statements, the rule of completeness embodied in Rule 106 is 'substantially applicable to oral testimony, as well.'"[137]

Professor McCormick agrees with these circuits, plainly noting that "[i]t is sometimes stated that the additional material may be introduced ***705** only if it is otherwise admissible. However, as a categorical rule, that statement is unsound."[138]

B. "Fairness Is a Concept--Not a Reality" Circuits

Although all circuits generally require that the remainder be, at the very least, relevant, circuits that focus on reliability in the application of Federal Rule of Evidence 106 and the rule of completeness tend to uphold and give great weight to the other rules of evidence, especially hearsay.[139] As a general rule in these circuits, Rule 106 is not to be used as an avenue to admit otherwise inadmissible evidence.[140] This viewpoint is most cogently stated in the Second Circuit case of *U.S. Football League v. National Football League*,[141] which held "[t]he doctrine of completeness, [Federal Rule] 106, does not compel admission of otherwise inadmissible hearsay evidence."[142] Similarly, the Fourth Circuit, in the often-cited case of *United States v. Bollin*,[143] held "[t]he fact that some of the omitted testimony arguably was exculpatory does not, without more, make it admissible under the rule of completeness."[144]

Circuits that rely on the relevance requirement give greater weight to that requirement than the consideration of fairness. For example, the ***706** Sixth Circuit stated although "[t]he general rule is that if one party to litigation puts in evidence part of a document, ... [the opposing party] may introduce the balance of the document," this general rule is subject to the exception "that only the other parts of the document which are relevant and throw light upon the parts already admitted become competent upon its introduction."[145] Importantly, "[t]here is no rule that either the whole document, or no part of it, is competent," and therefore relevant.[146]

These circuits also combat the notion that deference to the trial court's determinations as to admissibility of evidence should trump the rules of evidence as a whole. The Eighth Circuit has even gone so far as to expressly address its sister circuits' ruling that Federal Rule of Evidence 611 somehow broadens the trial court's ability to admit otherwise inadmissible evidence, holding "that neither Rule 106 ... nor Rule 611 ... 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."[147]

C. Posner's Middle Ground

Judge Richard Posner considered a middle ground in the context of fairness versus reliability in *United States v. LeFevour*.[148] In considering the lower court's application of Rule 106, Posner noted "[i]f otherwise inadmissible evidence is *necessary* to correct a misleading impression, then ... it is admissible for *this limited purpose*," and nothing more.[149] Posner, giving an alternative to this rule, stated: "[I]f [the remainder ***707** would be otherwise inadmissible], the misleading evidence *must* be excluded" in the first place if it creates such a confusion as to not be ascertainable without additional evidence.[150] In other words, the remainder should not be needed to prevent misleading the jury. Rather, the original piece of evidence should be clear to begin with, and it should be the goal of both the advocates and the trial court to present a coherent case to the jury. Posner's rationale is as follows: "Rule 106 was not intended to override every privilege and other exclusionary rule of evidence in the legal armamentarium, so there must be cases where if an excerpt is misleading the only cure is to exclude it rather than to put in other excerpts."[151] If the jury does become confused or misled by the evidence, then the remainder should be offered solely as a remedial measure.[152] Preferably, though, if the remainder is otherwise inadmissible evidence, the original should not be offered in the first place. Simply stated, it is better to say nothing at all than to say something that requires clarification or qualification.

In following this approach, Posner ignored the fairness versus reliability debate and focuses on what the jury needs in order to find the truth. Instead of saying a litigant *may* offer the remainder to protect interests of either fairness or reliability, Posner's suggested resolution mandated that the remainder be put into evidence to avoid confusion by the jury, saying that a litigant should offer the remainder if failure to do so would mislead the jury.[153] Even better, though, the jury should not be confused in the first place. If the jury would not be misled without the remainder, then under Posner's perspective, there is no use for the remainder at all.

*708 V. How Should the Courts Apply the Rule of Completeness?

Given the tension between the circuits with regard to the application of Rule 106, it bears the question of how *should* the courts apply Federal Rule of Evidence 106 and the rule of completeness? Should courts apply the rule by focusing on fairness? Or should courts apply the rule focusing on reliability? Is one more important than the other?

It should come as no surprise that the answer to this question, like so many questions in law, is "it depends." If the end that is sought is the most economic use of judicial sources, perhaps reliability and a strict adherence to the Rules of Evidence should trump fairness, thereby theoretically limiting the amount of evidence in a trial and shortening the duration of a proceeding.[154] If, on the other hand, the end that is sought is from a more sociological, equitable standpoint, perhaps fairness and a thorough evaluation of the ins and outs of every piece of

evidence related to a case should trump reliability.[155] The Federal Rules of Evidence focus on "ascertaining the truth and securing a just determination."[156] These two things-- truth and a just determination--are therefore the ends that should be sought in applying the rule of completeness.

A "just determination," and "justice" as a whole, however, as noted by various commentators, are inherently subjective.[157] The truth, on the ***709** other hand, is not subjective and it does not vary depending on who is interpreting it.[158] Yes, the defendant can argue until he is blue in the face that the light was green, but that does not change the fact that the light was, in reality, red, assuming it actually was. The truth, therefore, *is* and does not change.

A. Application to the Red-Light-Green-Light Scenario

The key question in our hypothetical is one that can be answered with absolute truth: what color was the traffic light?

In searching for the answer to this question, the trial court clearly should not apply the rule of completeness for the sake of absolute fairness, or, in other words, letting in every piece of evidence that the opponent desires. Such a practice inherently leads to the admissibility of unreliable evidence, which could tarnish the truth. Say that a police report to the traffic accident contains several witness statements. One statement contained in the police report is the statement of the defendant providing that the light was green, and another statement in the police report is the statement of the plaintiff's mother, who would do or say anything for her son, and just happened to be driving behind the plaintiff at the time of the accident. The plaintiff's mother's statement, of course, provided the light was red, even though in reality she never even looked at the color of the light. If the defense offers the portion of the police report that contained the defendant's statement that the light was green, would it be in the Socratic truth's best interest to also admit the statement of the clearly biased mother on the grounds that it satisfies the rule of completeness?[159] Of course not. It may be *fair* to offer the mother's statement, however, in the search for the actual truth, admitting such evidence only hinders the fact finder by providing unreliable evidence that, it turns out, should not be trusted.

On the other hand, courts should not apply the rule for the sake of absolute reliability. If otherwise inadmissible evidence is *never* admitted, even to put other evidence in context, the facts of the case would then exist as if in a vacuum. This would lead to a highly skewed view of the ***710** "truth" in a case. An everyday example is the use of the statement "There is no God," when the complete statement is actually "The fool hath said in his heart, there is no God."[160] The personal injury hypothetical can also be applied.[161] If the plaintiff offers a supplemental police report in which a friend of the defendant offered the statement "the defendant had been drinking," the jury, upon receiving this evidence, may be apt to rule in the plaintiff's favor. If the defense tries to invoke the rule of completeness by offering the remainder of the statement, that "the defendant had been drinking *but probably had a blood alcohol level of .01 because he hadn't had a drink in several hours*," and plaintiff objects on grounds that the remainder is an improper opinion, it would be patently unfair to the defendant to sustain the objection, even

though admitting the remainder would result in the jury considering clearly unreliable evidence. This also would not serve the purpose of finding the actual truth of the case.

B. The Solution--Back to Posner

Posner's middle ground in *LeFevour* is the best manner to reach Socratic truth in applying the rule of completeness.[162] If the Socratic truth can only be found if the original evidence is put in context by the remainder, the remainder should be admitted, but should be considered only to the extent that it is necessary to reach the truth and avoid misleading the jury.[163] This solution differs importantly from both the common law rule of completeness and Federal Rule of Evidence 106. Under both the common law rule and Rule 106, a party *may* introduce the remainder if it is fair to do so;[164] under Posner's solution, the question is that of necessity, i.e. what *must* be done to find the truth?[165] However, ***711** according to Posner, it would be better to not confuse the jury or offer evidence that requires explanation or qualification in the first place.[166] Better to not offer the police report at all if fairness or reliability may suffer from the admittance of the remainder into the record. This solution does away with the fairness-reliability dichotomy, both of which, therefore, take a back seat to the importance of finding Socratic truth.

Conclusion

There is no apparent end in sight to ease the tension of how the circuits apply Federal Rule of Evidence 106. The last and only time the United States Supreme Court decided to even mention the rule of completeness or Rule 106 was in 1988--almost thirty years ago.[167] Until the United States Supreme Court decides to take up the issue again, the circuits will continue to differ.

However, taking a step back, perhaps the disagreement between the circuits on whether to focus on reliability or fairness is acceptable, so long as courts continue to remember the purpose behind the rule of completeness, the other rules of evidence, and the entire American legal system as a whole--that the search for objective truth is, in reality, the most important thing. It was the purpose of this Note to attempt to prove just that. Members of the legal profession have the distinct privilege of comprising a community of individuals that are tasked by way of litigation with the responsibility of guiding jurors to the truth, and as such are held to a higher standard of conduct, governed by strict rules of professional responsibility, and subject to discipline at their infraction. In turn, this search for truth serves as the means to an even greater end: that justice--even in its amorphous and subjective state--should nonetheless prevail. After all, "[t]he future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied."[168] By no greater way can this be accomplished but by the search for truth.

Footnotes

d1 B.S. (2011), Kennesaw State University; J.D. (2016), Cumberland School of Law.

1 LLOYD PAUL STRYKER, *The Art of Advocacy, in* SELECTED WRITINGS ON THE LAW OF EVIDENCE AND TRIAL 2 (1957) (quoting Judge Benjamin Cardozo).

2 ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 179 (1987).

3 420 U.S. 714, 722 (1975) (discussing the search for truth in the context of a criminal case).

4 *See* Poole v. Georgia, 551 F.2d 683, 684 (5th Cir. 1977) ("[T]he object of all legal investigation is the discovery of the truth ...."); State v. Wood, 142 A. 728, 730 (Me. 1928) ("A trial before a jury is an investigation of matters of fact, its sole purpose being to ascertain the truth.").

5 *See* LATIN DICTIONARY, http://www.latin-dictionary.org/Latin-English-Dictionary/veredictum (last visited June 26, 2016) (providing the definition for the Latin word "veredictum").

6 This hypothetical portrays a modern-day application to the ancient art of rhetoric. *See Rhetorica, in* THE BASIC WORKS OF ARISTOTLE 1326 (Richard McKeon ed. Random House, Inc. 1326 (1941)) ("[A] litigant has clearly nothing to do but to show that the alleged fact is so or is not so, that it has or has not happened."). Applying this to the hypothetical, from a theoretical standpoint, the plaintiff's lawyer must show that what she says happened, actually happened--that the traffic light was, in fact, red.

7 Pinero v. Martinez Santiago, 4 P. R. Offic. Trans. 821, 831 (P.R. 1976) (per curiam) (Yunque, J., dissenting).

8 *Id.*

9 *See id.* (stating the truth exists whether or not is has been verified by a party and verifying some statement, document, or other evidence does not change the existence of it being true).

10 The truth throughout philosophy is often represented by light or a source of light, hence the term "enlightenment." *See* BLOOM, *supra* note 2, at 264 ("The very term Enlightenment is connected with Plato's most powerful image about the relation between thinker and society, the cave."). In Plato's allegory of the cave in the *Republic*, the objective truth is reflected by the light of the sun. *See* THE REPUBLIC OF PLATO 194 (Allan Bloom trans., 2d ed. 1968); *see also* STRYKER, *supra* note 1 (referring to the law as a "guiding star").

11 *See generally* THE REPUBLIC OF PLATO, *supra* note 10, at 193.

12 *See id.* at 194 ("Then most certainly ... such men would hold that the truth is nothing other than the shadows of artificial things .... Don't you suppose he'd be at a loss and believe that what was seen before is truer than what is now shown?").

13 *Id.* at 193.

14 *See id.* at 193-94.

15 *Id.* at 194.

16 *See* Remmer v. United States, 347 U.S. 227, 229 (1954) ("In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial ...."); United States v. Lloyd, 269 F.3d 228, 238 (3d Cir. 2001) ("A new trial is warranted if the defendant likely suffered 'substantial prejudice' as a result of the jury's exposure to the extraneous information." (citing United States v. Gilsenan, 949 F.2d 90, 95 (3d Cir. 1991))); United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979) ("[W]e hold that the appellant is entitled to a new trial if there existed a reasonable possibility that the extrinsic material could have affected the verdict.").

17 The collateral source rule and evidence of the wealth of a defendant during the liability phase of a jury trial serve as practical examples. Neither should be allowed into evidence during trial because either could sway the jury to determine liability based off the ability or inability of the defendant, or his insurance company, to pay money damages. *See, e.g.*, Crowther v. Consol. Rail Corp., 680 F.3d 95, 98-99 (1st Cir. 2012) (discussing the admissibility of evidence via the collateral source rule, and noting it "is meant to guard against two risks: that after a jury has found liability and goes on to assess damages it will deduct from the appropriate award whatever compensation a plaintiff is receiving for injuries from a source other than a liable defendant (health insurance benefits, say), and the more general risk that a jury will regard the receipt of such benefits as a reason to avoid finding liability at all in a close case").

18 *See* JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 18 (4th ed. 2006) ("The theory of the case is the basic idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a coherent, believable whole. The theory of the case is the basic idea around which everything revolves. It provides a comfortable viewpoint from which the jury can look at all the evidence ....").

19 *See* THE REPUBLIC OF PLATO, *supra* note 10, at 193-94.

20 *Accord* STRYKER, *supra* note 1, at 1 ("The law seldom decides the issue; the facts do.").

21 JAMES B. THAYER, *A Preliminary Treatise on Evidence, in* AN EVIDENCE ANTHOLOGY 1 (Edward J. Imwinkelried & Glen Weissenberger eds., 1996).

22 *See* Phillips v. Dist. Ct. in & for Second Judicial Dist., 573 P.2d 553, 555 (Colo. 1978) ("The range of discovery ... is quite broad and ... discovery rules are to be liberally interpreted in order 'to effectuate the full extent of their truth-seeking purpose."' (quoting Cameron v. Dist. Ct., Colo., 565 P.2d 925, 928 (1977))).

23 *Compare* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain ... a short and plain statement of the claim ....") *with* FED. R. CIV. P. 8(b)(1)(B) ("In responding to a pleading, a party must ... admit or deny the allegations asserted against it by the opposing party.").

24 *See* FED. R. CIV. P. 26 advisory committee's notes ("The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.").

25 *See* FED. R. CIV. P. 26(a)(1).

26 *See* FED. R. CIV. P. 26 advisory committee's note to 1993 amendment ("Broad, vague, and conclusory allegations sometimes tolerated in notice pleading ... should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents [relating to the matter].").

27 FED. R. CIV. P. 26(a)(1)(A)(i)-(iv).

28 Although the Federal Rules of Civil Procedure set forth formal ways that parties can discover facts in a case, a practitioner should never forget the means of informal discovery available to him. *See* FED. R. CIV. P. 26(f) advisory committee's note to 1993 amendment ("The parties should also discuss ... what additional information ... can be made available informally without the necessity for formal discovery requests.").

29 *See* FED. R. CIV. P. 33(b)(3) (requiring interrogatories be responded to under oath, thereby further bolstering the fact that the purpose of the discovery process is to find the truth).

30 *See* FED. R. CIV. P. 34.

31 *See* FED. R. CIV. P. 36.

32 *See* FED. R. CIV. P. 30(b)(5)(A)(iv) ("The officer [before whom the deposition is taken] must begin the deposition with an on-the-record statement that includes ... the officer's administration of the oath or affirmation to the deponent ....").

33 United States v. Article of Drug Consisting of 30 Individually Cartoned Jars, More or Less, Labeled in Part: "Ahead Hair Restorer for New Hair Growth," 43 F.R.D. 181, 188 (D. Del. 1967).

34 *See* Yapp v. Weaver, 92 Ill. App. 473, 474 (Ill. 1900) ("It was the peculiar province of the jury to decide in the conflict where the truth was ...."); Callicott v. L. Rowan & Son, 47 Ill. App. 299, 300 (1893) ("[I]t is the peculiar province of the jury where there is such conflict to weigh, consider and reconcile the testimony, and from the entire evidence ascertain the truth ...."); Russell's Heirs v. Mason, 8 Tex. 226, 228 (Tex. 1852) ("There is nothing in this case to make it an exception to the rule so often laid down by this court that it is peculiarly the province of the jury ... to weigh the evidence and find the truth of the contested fact.").

35 *See* FED. R. CIV. P. 39(b) ("Issues on which a jury trial is not properly demanded are to be tried by the court.").

36 *See* DENNIS J. DEVINE, JURY DECISION MAKING 68-69 (2012) ("Courts do not have the luxury of opening a fresh pack of jurors. Real jurors come from communities where their attitudes, beliefs, and values have been shaped extensively by many life experiences before they ever set foot in a courtroom.").

37 *See id.* at 69 (*"Nullification* is a phenomenon that is grounded in community values and occurs when jurors knowingly disregard the law in reaching a decision. ...").

38 *See* FED. R. EVID. 611 (giving the trial judge broad discretion over evidentiary matters in a trial).

39 *Id.*

40 1 CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 184 (Kenneth S. Brown 6th ed. 2000).

41 FED. R. EVID. 102 (emphasis added).

42 *See generally* 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 601 (James H. Chadbourn ed., 1978) (detailing the common law application of the rule of completeness).

43 *See* Subsection IV.A., *infra*.

44 *See* Subsection IV.B., *infra*.

45 *See, e.g.*, Murphy v. Florida, 421 U.S. 794, 799 (1975); Chang v. Baxter Healthcare Corp., 599 F.3d 728, 736 (7th Cir. 2010); Hilen v. Hays, 673 S.W. 2d 713, 718 (Ky. 1984).

46 *See Hilen*, 673 S.W. 2d at 718 ("The answer to the charge that in a comparative negligence system the claimant recovers for his own wrong is that the opposite is true. Even where comparative is applied 100% ... the claimant who is 95% negligent recovers from the defendant only for that small portion of the injury, 5%, which is fairly attributable to the defendant's fault. In theory, the system is 100% fair.").

47 *See* Murphy v. Florida, 421 U.S. 794, 799 (1975) ("The constitutional standard of fairness requires that a defendant have 'a panel of impartial, 'indifferent' jurors.'" (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961))).

48 *See Chang*, 599 F.3d at 736 ("The Supreme Court has said that 'if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all,' such dismissal is indeed improper .... The alternative forum must provide the plaintiff with 'a fair hearing to obtain some remedy for the alleged wrong.'") (citations omitted)).

49 STRATEGIC PLAN FOR THE FEDERAL JUDICIARY (2015) ("The federal judiciary is respected throughout America ... for its delivery of equal justice under the law. Through this plan, the judiciary identifies a set of strategies that will enable it to continue as a model in providing *fair* and impartial justice." (emphasis added)).

50 *See* FED. R. EVID. 106 ("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.").

51 *See generally* 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 653 (James H. Chadbourn 1978) (detailing the common law application of the rule of completeness).

52 *Id.*

53 *Id.* at 595.

54 *Id.* at 656.

55 *Id.*

56 *See* FED. R. EVID. 402 ("Relevant evidence is admissible unless ... provide[d] otherwise ... Irrelevant evidence is not admissible.").

57 WIGMORE, *supra* note 42, at 656.

58 *Id.* at 659 (quoting Richardson v. State, 186 So. 580, 581 (Ala. 1938)).

59 *Id.* at 656.

60 *Id.*

61 *Id.* at 659.

62 *See* FED. R. EVID. 802 (indicating that hearsay evidence is generally inadmissible).

63 WIGMORE, *supra* note 42, at 601.

64 *Id.*

65 *Id.* at 634.

66 *See* 2 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 11:35 (7th ed. 2004); MCCORMICK, *supra* note 40, at 137.

67 FISHMAN & MCKENNA, *supra* note 66, at § 11:35.

68 MCCORMICK, *supra* note 40, at 137.

69 *Id.* at 138 (emphasis added).

70 *See* FED. R. EVID. 106 advisory committee's notes; *see also* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988).

71 FED. R. EVID. 106.

72 *See id.* (stating "fairness ought to be considered").

73 *See* FED. R. EVID. 106 advisory committee's notes (providing there are two considerations for the codified rule wherein the rule seeks to correct evidence that would be misleading or that would be inadequate to repair at some point later in the trial).

74 FED. R. EVID. 106 advisory committee's notes.

75 *Id.*

76 488 U.S. 153 (1988).

77 *Rainey*, 488 U.S. at 156.

78 *Id.* at 156-57.

79 *Id.* at 157.

80 *Id.* at 159.

81 *Id.* at 159-60.

82 *Id.* at 160-61.

83 *Id.* at 172.

84 *Id.*

85 *See* Werner v. Upjohn Co., Inc., 628 F.2d 848, 856 (4th Cir. 1980) ("It is clear that in enacting the Federal Rules of Evidence Congress did not intend to wipe out the years of common law development in the field of evidence, indeed the contrary is true. The new rules contain many gaps and omissions and in order to answer these unresolved questions courts certainly should rely on common law precedent.").

86 *Rainey*, 488 U.S. at 172 (emphasis added).

87 *See generally* WIGMORE, *supra* note 42, at 653-54.

88 *Id.* at 656.

89 *See* MCCORMICK, *supra* note 40, at 95 (comparing the common law rule of completeness with FED. R. EVID. 106).

90 FED. R. EVID. 106.

91 *Id.* (emphasis added). Be advised that some circuits have held that Rule 106 can, in some cases, apply to oral testimony as well as documentary evidence. *See* Section IV, *infra*.

92 *See* MCCORMICK, *supra* note 40, at 96.

93 *Id.*

94 *See* FED. R. EVID. 801(d) (providing instances in which a statement is not hearsay).

95 *See, e.g.*, United States v. Reyes, 18 F.3d 65, 70 (2d Cir. 1994) ("[T]he mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice.").

96 *See* FED. R. EVID. 404(b).

97 *See* FED. R. EVID. 404(a) advisory committee's notes (quoting California Law Revision Commission) ("Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.").

98 MCCORMICK, *supra* note 40, at 27.

99 *Id.* (indicating the importance of reliable evidence "is reflected in the hearsay rule, the documentary originals doctrine, and the opinion rule").

100 *See* FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.").

101 FED. R. EVID. 602 advisory committee notes (quoting MCCORMICK, *supra* note 40, at 19.).

102 *See* FED. R. EVID 102 (indicating the purpose of the Federal Rules of Evidence is to find the truth and secure a just determination).

103 *See* FED. R. EVID. 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.").

104 *See, e.g.*, 18 U.S.C. § 1621 ("Whoever [knowingly and willingly lies under oath] ... is guilty of perjury and shall ... be fined ... or imprisoned not more than five years, or both.").

105 *See* FED. R. EVID. 602.

106 *See* FED. R. EVID. 802.

107 *See* FED. R. EVID. 701.

108 *See* FED. R. EVID. 702.

109 *See* FED. R. EVID. 1002.

110 *See* FED. R. EVID. 1003.

111 *See* Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 422 (5th Cir. 2013) ("Pursuant to Federal Rule of Evidence 201, a court is entitled to take judicial notice of adjudicative facts from reliable sources whose accuracy cannot reasonably be questioned." (quoting Sosebee v. Steadfast Ins. Co., 701 F.3d 1012, 1018 n.1 (5th Cir. 2012))).

112 *See* FED. R. EVID. 703.

113 *See* FED. R. EVID. 702; *see also* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 590 (1993) ("The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation.").

114 *Compare, e.g.*, FED. R. EVID. 802 (providing hearsay evidence is generally inadmissible) *with* FED. R. EVID. 807 (providing hearsay evidence *may* in some circumstances be admissible if it has "guarantees of trustworthiness").

115 FED. R. EVID. 807.

116 *See* FED. R. EVID. 403.

117 *See generally* Michael A. Hardin, Note, *This Space Intentionally Left Blank: What to Do When Hearsay and Rule 106 Completeness Collide*, 82 FORDHAM L. REV. 1283, 1307 (2013). The First, Second, Third, Fourth, Seventh, Tenth, and D.C. Circuits held "if a remainder passes the fairness test, no other rule of evidence should exclude it from being entered under Rule 106." *Id.* at 1308. The Second, Fourth, Sixth, Seventh, and Ninth Circuits held "a remainder must otherwise be admissible or else be excluded." *Id.* at 1311.

118 *Id.*

119 *See generally* Editors Blog, *Can the FRE 106 Rule of Completeness Be Used to Admit Otherwise Inadmissible Evidence?*, FEDERAL EVIDENCE REV. (Sept. 7, 2011), http://federalevidence.com/blog/2011/september/can-fre-106-rule-completeness-admit-otherwise-excluded-evidence. (indicating the Second, Fourth, and Ninth Circuits held "[Rule] 106 cannot admit evidence that would be otherwise not be [sic] admissible," and the First and D.C. Circuits held Rule 106 permitted "otherwise inadmissible evidence to be introduced").

120 *See generally* Andrea N. Kochert, *The Admission of Hearsay Through Rule 106: and Now You Know the Rest of the Story*, 46 IND. L. REV. 499, 520 (2013) (noting the Seventh and D.C. Circuits liken introducing the remainder of a defendant's statement to forcing him to testify).

121 *See generally* Editors Blog, *Circuit Split: Does FRE 106 Rule of Completeness Apply to Oral Statements?*, FEDERAL EVIDENCE REVIEW (July 24, 2014), http://federalevidence.com/blog/2014/july/circuit-split-scope-rule-completeness-under-fre-106 (noting the Second, Seventh, and Ninth Circuits held Rule 106 applies to oral testimony).

122 801 F.2d 1346 (D.C. Cir. 1986).

123 Hardin, *supra* note 117, at 1307.

124 *Sutton*, 801 F.2d at 1368.

125 *Id.* at 1368 n.17.

126 Hardin, *supra* note 117, at 1307.

127 *Sutton*, 801 F.2d at 1369.

128 *Id.* at 1368 n.17.

129 *See* FED. R. EVID. 403.

130 United States v. Bucci, 525 F.3d 116, 133 (1st Cir. 2008) (citing United States v. Simonelli, 237 F.3d 19, 28 (1st Cir.2001)); *see also* United States v. Awon, 135 F.3d 96, 101 (1st Cir. 1998) ("[Rule 106] holds that an otherwise inadmissible recorded statement may be introduced into evidence where one side has made a partial disclosure of the information, and full disclosure would avoid unfairness to the other party."), *abrogated by* United States v. Piper, 298 F.3d 47 (1st Cir. 2002).

131 United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984) ("Under this doctrine of completeness, a second writing may be required to be read if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding." (citing United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982))).

132 Phoenix Assocs. III v. Stone, 60 F.3d 95, 102 (2d Cir. 1995) (quoting United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)).

133 FED. R. EVID. 611(a)(1) ("The court should 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 ....").

134 United States v. Baker, 432 F.3d 1189, 1223 (11th Cir. 2005), *abrogated on other grounds by* United States v. McKinley, No. 14-15619, 2016 WL 1425917 (11th Cir. Apr. 12, 2016).

135 United States v. Range, 94 F.3d 614, 621 (11th Cir. 1996).

136 United States v. Lopez-Medina, 596 F.3d 716, 735 (10th Cir. 2010).

137 United States v. Zamudio, No. 96-2182, 1998 WL 166600, at *5 (10th Cir. 1998) (quoting United States v. Mussaleen, 35 F.3d 692, 696 (2d Cir. 1994)).

138 MCCORMICK, *supra* note 40, at 95 ("In particular, the statement is sometimes inaccurate as applied to hearsay law.").

139 *See* United States v. Branch, 91 F.3d 699, 728 (5th Cir. 1996) ("Although different circuits have elaborated Rule 106's 'fairness' standard in different ways, ... common to all is the requirement that the omitted portion be relevant and 'necessary to qualify, explain, or place into context the portion already introduced.'").

140 *See, e.g.*, United States v. Lentz, 524 F.3d 501, 526 (4th Cir. 2008) ("Rule 106 does not, however, 'render admissible the evidence which is otherwise inadmissible under the hearsay rules.'" (quoting United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996))); United States v. Collicott, 92 F.3d 973, 980-81 (9th Cir. 1996) ("[W]here other hearsay statements from the conversation or document fail to clarify or provide context ... they may be irrelevant and thus inadmissible."); United States v. Dorrell, 758 F.2d 427, 434 (9th Cir. 1985) ("[T]he judge may exclude portions of written statements offered into evidence that are irrelevant.").

141 842 F.2d 1335 (2d Cir. 1988).

142 *Nat'l Football League*, 842 F.2d at 1375-76.

143 264 F.3d 391 (4th Cir. 2001).

144 *Bollin*, 264 F.3d at 414.

145 United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982) (citing United States v. Littwin, 338 F.2d 141, 145-46 (6th Cir. 1964)).

146 *Costner*, 684 F.2d at 373 (citing *Littwin*, 338 F.2d at 145-46 ("But this rule is subject to the qualification that only the other parts of the document which are relevant and throw light upon the parts already admitted become competent upon its introduction.")).

147 United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987); *see also* United States v. Collicott, 92 F.3d 973, 982-83 (9th Cir. 1996) ("Rule 106 'does not compel admission of otherwise inadmissible hearsay evidence.'" (citing Phoenix Assocs. III v. Stone, 60 F.3d 95, 103 (2d Cir. 1995))).

148 798 F.2d 977, 981 (7th Cir. 1986).

149 *LeFevour*, 798 F.2d at 981 (emphasis added).

150 *Id.* (emphasis added).

151 *Id.*

152 *Id.* ("The purpose of the 'completeness' rule codified in Rule 106 is merely to make sure that a misleading impression created by taking matters out of context is corrected on the spot, because of 'the inadequacy of repair work when delayed to a point later in the trial.'" (quoting Advisory Committee Notes for Proposed Rule 106)).

153 *Compare* WIGMORE, *supra* note 42, at 653 ("[T]he opponent ... may in his turn compliment it by putting in the remainder ...."), *and* FED. R. EVID. 106 (stating "an adverse party may require the introduction ... of any other part") *with LeFevour*, 798 F.2d at 981 ("If otherwise inadmissible evidence is necessary to correct a misleading impression, then ... it is admissible for this limited purpose ...."). However, "[t]he qualifying words, 'ought in fairness,' show that the duty to place 'any other part' of the recorded statement or any other 'recorded statement' in evidence is not absolute." *LeFevour*, 798 F.2d at 981.

154 *See* Monterey Cty. v. Cornejo, 266 Cal. Rptr. 68, 71 (Cal. Ct. App.) (noting the relationship between judicial economy and its "beneficial effects ... on the public purse"), *superseded by* 790 P.2d 1289 (Cal. 1990).

155 *See, e.g.*, Cullum v. Diamond A Hunting, Inc., No. SA-07-CV-0076 FB (NN), 2010 WL 3655863, at *5 (W.D. Tex. Sept. 13, 2010) (noting the ability of a party to use socioeconomic status to gain an unfair advantage over his opponent in litigation), *rejected in part*, No. SA-07-CA-76-FB, 2010 WL 5817541 (W.D. Tex. Dec. 22, 2010).

156 FED. R. EVID. 102.

157 *See, e.g.*, Samuel J. Imperati et al., *If Freud, Jung, Rogers, and Beck Were Mediators, Who Would the Parties Pick and What Are the Mediator's Obligations?*, 43 IDAHO L. REV. 643, 690 (2007) ("[J]ustice is subjective and situation-specific."); Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns As an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 371 (1987) ("[T]he concept of 'justice' is subjective and ethereal ...."); John E. Young, *The Law as an Expression of Community Ideals and the Lawmaking Functions of Courts*, YALE L.J. 1, 7 (1917) ("In short, the standard of justice is subjective ....").

158 Young, *supra* note 157, at 17.

159 For purposes of this scenario, assume the police report is otherwise admissible.

160 United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986) (quoting *Psalm* 14:1 (King James)).

161 WIGMORE, *supra* note 42, at 594.

162 *LeFevour*, 798 F.2d at 981.

163 *See* United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987) (holding inadmissible evidence may be used in a "limited purpose" in order to correct any misleading impressions).

164 WIGMORE, *supra* note 42, at 653; FED. R. EVID. 106.

165 *LeFevour*, 798 F.2d at 981 ("If otherwise inadmissible evidence is *necessary* to correct a misleading impression, then ... it is admissible for this limited purpose ....") (emphasis added)).

166 *Id.*

167 *See Rainey*, 488 U.S. at 153.

168 CANONS OF PROF'L ETHICS, pmbl. (AM. BAR ASS'N 1908).

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Notes
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THIS SPACE INTENTIONALLY LEFT BLANK: WHAT TO DO WHEN HEARSAY AND RULE 106 COMPLETENESS COLLIDE

Federal Rule of Evidence 106 provides that when one party in a trial or hearing offers into evidence a portion of a statement in a misleading way, the opposing party can offer the rest, or some other portion of, that document or recorded statement at the same time if it is necessary for the factfinder to understand and contextualize the first part. Sometimes, however, the other portion, or "remainder," would be inadmissible if it were offered by itself, either because it is hearsay or for some other reason. This leaves the court in a difficult position: Should it allow the remainder to be entered into evidence in violation of some other rule that would exclude it? Or should the court exclude the remainder and allow the initial misleading portion to stand, uncorrected?

Some circuits have held that Rule 106 must trump the other rules of evidence in order to do its job. These courts admit otherwise inadmissible hearsay evidence for its truth. Other circuits have held that if no independent hearsay exception exists for the remainder, it must be excluded despite Rule 106. Finally, some opinions have suggested that Rule 106 allows the remainder of a statement to be admitted for the narrow purpose of contextualizing the initial misleading portion.

This Note argues the following: if one party offers a misleading portion of a statement into evidence, the opposing party should be able to offer the remainder, but the jury should only be allowed to use it for context. The evidentiary basis for doing so is not Rule 106, but rather the U.S. Supreme Court case Beech Aircraft Corp. v. Rainey, which holds that remainders necessary to correct misleading impressions are automatically relevant for a nonhearsay purpose. The end of this Note offers courts a step-by-step process for judges to follow when ruling on whether to admit remainders.

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*1285 Introduction

As Gerardo Lopez-Medina sat next to his attorney at the defense table, on trial for possession of methamphetamine with intent to distribute, his half-brother's ghost spoke out from the witness stand, and testified that the two of them had possessed those drugs together.[1] Lopez-Medina heard it, the jury heard it, and in closing argument, it was not lost on the prosecutor, who said that when the defendant's "own half brother finger[ed] him," it was "the final nail in the coffin."[2] In reality, Rogelio Lopez-Ahumado, the defendant's half-brother, was sitting (very much alive) in a jail cell miles away. He had already pled guilty to possessing the very same methamphetamine, stashed in the same truck, but had refused to testify for either the government or the defense in his half-brother's trial.[3] As a condition of his plea, Lopez-Ahumado had written a statement to the court admitting that the truck, where the authorities had found the drugs, belonged to Lopez-Medina, and that the drugs had belonged to both brothers.[4] The "ghost" was actually Officer Johnson, reading from the very same statement that Lopez-Ahumado had to write before he could plead guilty.[5]

However, the defendant (or rather his attorney) had a hand in summoning this ghost. The defense strategy was to ask Officer Johnson whether Lopez-Ahumado had already been arrested and had pled guilty to possessing the drugs in question.[6] When the officer affirmed Lopez-Ahumado's arrest and guilty plea, it was true, but it was not the entire story. So, the court allowed the prosecution to have Officer Johnson read Lopez-Ahumado's statement implicating

Lopez-Medina. The court permitted this reading to ensure that the jury would not mistakenly believe that Lopez-Ahumado had admitted to being the only person to whom those drugs belonged.[7] From that point forward, the prosecution was free to treat what Lopez-Ahumado wrote in that statement as though he had said the words in open court.[8]

In the Federal Rules of Evidence, when one party offers a statement that is misleading because it is incomplete, Rule 106, known as a version of the "rule of completeness," allows the other side to stop the proceedings and "complete" the statement before any other evidence is presented.[9] But what happens when another rule of evidence renders the remainder of the statement inadmissible? Does the court have the power to admit it anyway, because completeness trumps one of the carefully crafted prohibitions on what may be received in evidence? Should the court let the misleading ***1286** statement stand and allow the jury to form the wrong idea about what was said? Or can the judge fashion some kind of compromise?

The federal circuit courts continue to split on how to analyze and rule on proposed completions of misleading statements under Rule 106.[10] This Note examines Rule 106's role in the trial process, its relationship with the other rules of evidence, and the different ways the courts have solved this problem. Moreover, this Note provides courts with a step-by-step approach to Rule 106 "completeness" problems as they arise at trial.

This Note is divided into three parts. Part I serves as a primer, not only on Rule 106, but also on hearsay, the rule of evidence that Rule 106 must trump most often when it allows an out-of-court statement to be completed.[11] Part I also discusses various other rules of evidence that may interact or conflict with Rule 106, as well as a U.S. Supreme Court case that addressed a completeness issue without invoking Rule 106.[12] Part II breaks down the various analytical approaches that circuit and district courts have taken to determine whether Rule 106 trumps other evidence rules. Finally, Part III argues that while Rule 106 technically should not trump any other rules of evidence, this does not mean that the remainder of a statement cannot be admitted. Rather, if admitting the remainder of a partial statement is necessary to avoid misleading the factfinder, the remainder will almost never violate the rules of evidence in the first place: it will not be hearsay, and it will serve a relevant purpose that does not prohibit its admission.

I. The Complete Picture: Rule 106's Place Among the Federal Rules of Evidence

Part I.A covers relevant evidence rules, including jury instructions limiting the purposes for which evidence is admitted. Part I.B introduces the concept of "limited admissibility"--that is, the way evidence rules distinguish between proper and improper purposes for which juries may consider evidence. Part I.C covers the concept of hearsay, discussing hearsay exceptions and exemptions, nonhearsay purposes of statements, and some of the inherent asymmetries in who is allowed to offer statements into evidence. Part I.D discusses Rule 106's basic function and how to determine if a remainder ought to be considered contemporaneously with the portion of the statement initially offered into evidence.[13]

***1287 A. Basic Evidentiary Principles**

This section introduces a few basic rules of evidence that inform the discussion of other rules and evidentiary analysis in general.

1. Relevance and Rule 403

Rule 401 states that evidence is relevant if it tends to make any fact of consequence more or less probable than that fact would be without such evidence.[14] Rule 402 states that relevant evidence is generally admissible, except if admitting it would violate the U.S. Constitution, a federal statute, the other Federal Rules of Evidence, or other Supreme Court rules.[15] Rule 403 allows the judge to exclude relevant evidence on grounds of undue prejudice, if the probative value of that evidence is substantially outweighed by (among other things) its unfairly prejudicial effect or its ability to mislead the jury.[16] The Advisory Committee on Evidence Rules defines undue prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[17]

2. Judges' Control over Proceedings

Federal Rule of Evidence 611(a) gives the court "reasonable control over the mode and order of examining witnesses and presenting evidence."[18] This is so the court can make the examinations and presentations effective for determining the truth, avoid wasting time, and protect witnesses from being harassed or embarrassed on the witness stand.[19] Some courts have interpreted this rule to allow judges to apply Rule 106 to oral statements in addition to writings or recordings.[20]

Rule 105 mandates that judges give proper jury instructions. It reads: "If 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."[21] Many of the Federal Rules of Evidence prohibit the use of evidence for one or more particular purposes but allow it for any other purpose.[22] For this reason, judges must tell the jury how to use a piece of evidence in coming to a verdict.[23] Limiting instructions may prevent undue prejudice by cautioning the jury against using evidence the ***1288** wrong way.[24] However, sometimes a jury instruction is insufficient, because the risk of the jury misusing the evidence substantially outweighs whatever probative value the evidence has when used correctly.[25] In these instances, the evidence will be inadmissible under Rule 403.[26]

When one party introduces a piece of evidence that is inadmissible for one purpose but admissible for a different purpose, the opposing party has the duty to object and request a limiting instruction from the judge.[27] The judge has no discretion to deny this limiting instruction.[28] If the opposing party does not object, the evidence may be used for any purpose.[29]

It is unclear how effective limiting instructions are at preventing juries from using evidence for

prohibited purposes. Jurors, uneducated in the law, may struggle to understand the difference between the permitted and prohibited purpose.[30] Moreover, even if jurors understand the distinction, they still might unconsciously draw a forbidden inference.[31] On the other hand, limiting instructions do constrain the attorneys. In closing arguments, neither attorney may ask the jury to draw those forbidden inferences or make an argument using the evidence for an improper purpose.[32]

B. "Limited Admissibility" and Exclusion of Evidence: Relevant for the Right and Wrong Reasons

This section discusses the "limited admissibility" principle inherent in the Federal Rules of Evidence and gives examples of rules embodying this principle.

1. General Examples

Many Rules of Evidence are "purpose-specific"; they bar the use of a certain kind of evidence for one particular purpose, but not other purposes.[33] This general principle has been called "limited admissibility."[34]

***1289** For example, under Rule 404(b), a party cannot use evidence of a person's prior crimes, wrongs, or acts in order to prove that the person has a certain character trait and acted in accordance with that trait on a particular occasion.[35] Policy concerns underlie this rule: evidence of a person's character "subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."[36] However, this kind of evidence can be used for any other purpose besides proving that the person acted in conformity with the character trait.[37]

Another policy-driven rule is Rule 407: if A gets injured, and subsequently, B takes precautions that would have made A's injury less likely had those precautions been taken earlier, A cannot use those subsequent precautions as evidence that B was at fault for A's injury.[38] A major justification for this rule is that if our legal system admitted this evidence to prove fault, it would punish people for fixing dangerous situations.[39] Accordingly, defendants would be deterred from fixing the alleged cause of an injury for fear that the injured person would have a stronger case against them.[40] However, evidence of subsequent precautions is admissible if offered for any other purpose.[41]

Some rules, however, are exclusionary rather than inclusionary. Instead of allowing evidence for any purpose that is not improper, they bar certain types of evidence outright, or admit evidence only if it is offered for a specific, proper purpose.[42] These rules may also be based in policy considerations.[43]

***1290** 2. Rules Governing the Use of Original Documents and Recordings

Several rules restrict witness testimony concerning the contents of written documents and recordings. Rule 1001 says that a "'writing' consists of letters, words, numbers, or their equivalent set down in any form."[44] Similarly, a "'recording' consists of letters, words, numbers, or their equivalent recorded in any manner."[45] Under Rule 1002, if a party seeks to prove the content of a writing or recording, she must provide the original, unless one of several exceptions is met.[46] This does not mean that if a statement was made and a writing or recording of that statement exists, the party offering that statement must offer that writing or recording into evidence in order to prove that the statement was made.[47] Instead, it means that if a party wants to use the writing or recording itself as proof of the information it contains, the party must introduce the original[48] or a duplicate,[49] rather than have a witness or other document simply summarize or retell the information contained therein.[50] However, not all testimony about what a document or recording contains is for the purpose of proving its content. For example, the rule may permit an expert witness to explain how she relied on information contained in a document when coming to her conclusion.[51]

In addition to the exception allowing duplicates,[52] there are several other exceptions to the requirement of originals. The proponent of a document or recording can prove the content of a writing or recording without offering the original if "all the originals are lost or destroyed, and not by the proponent acting in bad faith,"[53] if "an original cannot be obtained by any available judicial process,"[54] if the opponent controlled the original but failed to produce it after notice that it "would be a subject of proof at the ***1291** trial or hearing,"[55] or if the writing or recording is "not closely related to a controlling issue."[56] Furthermore, if an opposing party testifies or writes about the contents of a document, Rule 1007 allows the proponent of the document or recording to prove its content using the opponent's testimony, deposition, or writing; the proponent does not need to have the original.[57]

C. Primer on Hearsay: A Barrier with Many Gaps

This section discusses the definition of hearsay, the various exceptions and exemptions to the rule prohibiting its admission, and ways that statements may be admitted for a different purpose than to prove the truth of the matters they assert.

1. Hearsay Defined

Hearsay is a statement, made outside of the current trial or hearing, that is offered into evidence to prove the truth of the matter asserted.[58] In other words, hearsay is offered to prove that a fact asserted in the statement is actually true. Hearsay generally is not admissible, except as provided by Supreme Court rules, federal statute, or the Federal Rules of Evidence.[59]

Notably, a statement can be admissible despite the hearsay rule in three distinct ways. First, a statement can be admitted pursuant to a hearsay exception.[60] Under Rule 803, a hearsay statement is admissible if something about the statement indicates that it is sufficiently important and reliable.[61] For example, if the "declarant" (the person who makes the statement)

makes a statement to a medical doctor for the purposes of being diagnosed or treated, this statement is excepted from hearsay because the declarant has a strong motivation to be honest.[62] A statement about a startling event made by a declarant who still feels startled is excepted because the declarant has little time to reflect and is less capable of deception.[63] Statements "describing or explaining an event or condition, made while or immediately after the declarant perceived it" are considered reliable for the same reason.[64] Rule 803(3) excepts statements about the declarant's own state of mind, emotion, sensation, or physical condition as it exists at the moment the statement is made.[65] The rules deem these ***1292** statements reliable because they are contemporaneous and based on one's own unique perception.[66]

Rule 804 provides additional hearsay exceptions for instances when the declarant is unavailable.[67] A declarant is deemed unavailable if she falls into one of several delineated categories that preclude her from testifying.[68] One hearsay exception conditioned upon unavailability is if the statement, "when made, . . . had so great a tendency . . . to expose the declarant to civil or criminal liability" that "a reasonable person in the declarant's position would have made [it] only if the person believed it to be true."[69]

Second, a hearsay statement may be admitted under one of the Rule 801(d) hearsay exemptions,[70] which are discussed below.[71]

Third, a statement may bypass the hearsay rule if it does not meet all the criteria for hearsay.[72] For example, because hearsay must be offered for the truth of the matter asserted, if a statement is not offered into evidence for the purpose of proving a fact that it asserts, it is not hearsay, and it may be admissible.[73] The statement must still be relevant[74] and not substantially more prejudicial than probative.[75] To be relevant, the fact that the statement was made must tend to prove or disprove something independent of the truth of the statement itself.[76] But offering a statement to prove something other than its truth creates a risk that the jury may nevertheless accept the statement as true.[77] Therefore, for that statement to be admissible under Rule 403, that particular risk must not substantially outweigh the probative value of the nonhearsay purpose for which the statement is offered.[78]

Of particular importance to this Note's discussion of Rule 106 is the potential not-for-truth use of statements to help the factfinder better ***1293** understand a conversation, event, or the subsequent actions of a person who heard the statement.[79] In other words, a statement can be used not to prove the truth of the matter asserted, but rather to provide "context."

2. Nonhearsay Purpose: Statements Offered for Context

Parties may use a statement for many purposes other than to prove the truth of the matter asserted. For example, in United States v. Colón-Díaz,[80] the First Circuit found that it was not plain error to admit statements suggesting that the defendant was the owner of a drug-selling location when the statements were only offered for the context of a law enforcement investigation.[81] In that case, the district court properly admitted the statements insofar as they explained why the investigators went to a particular location and why some investigators gave

certain directions to each other.[82] Moreover, each time such a statement was elicited, the judge gave the requested instruction to the jurors that they were not to accept any of the statements as proof that the defendant owned the location.[83]

But Rule 403 places limits on using such statements for this limited purpose. In United States v. Johnson,[84] the Second Circuit strongly criticized the district court for admitting several statements only as context to explain a subsequent investigation.[85] In Johnson, the district court allowed a Drug Enforcement Agency (DEA) special agent to testify to many incriminating statements from various informants (including drug-purchasing customers) that corroborated suspicions the DEA already had about the defendant's illegal activity.[86] Although the Second Circuit upheld the conviction because of overwhelming evidence of guilt,[87] the court scolded the prosecution for abusing "context" as a justification.[88] In particular, the agent should have explained that the DEA's actions were based on conversations with informants without disclosing the highly prejudicial substance of those conversations.[89]

In this way, Rule 403 constrains nonhearsay use of prejudicial statements for context.[90] Often, though, the probative value of context increases when ***1294** it responds to an argument or suggestion that the opposing party has made; this can tip the scales in favor of admitting the evidence.[91]

Another type of context is a "reciprocal and integrated utterance;"[92] the statement is offered not for the truth but to understand something said in response. In United States v. Sorrentino,[93] the court admitted a recorded conversation between the defendant and a confidential informant, offered by the prosecution.[94] The court reasoned that the defendant's statements were not hearsay because they were statements by a party opponent under Rule 801(d)(2)(a), and the informant's statements were not hearsay because they were only offered to make the conversation understandable.[95]

3. Nonhearsay Purpose: Explaining Expert Witness Testimony

Another nonhearsay use, not unlike "context," is when a party wants to elicit otherwise inadmissible evidence upon which an expert has relied in forming her opinion. Under Rule 703, a court may allow testimony that might otherwise be hearsay, not to prove the truth of the matter asserted, but instead to help the jury understand and evaluate the expert's opinion.[96] However, unlike context, statements that are offered under Rule 703 must pass a different balancing test than the one in Rule 403: their probative value must substantially outweigh their prejudicial effect, rather than the other way around.[97] If the court admits this evidence, the judge, upon request, must instruct the jury to consider it only to evaluate the expert's opinion, not as substantive evidence.[98] Without this limitation, an expert could testify to an inadmissible fact because it supported and explained her opinion, and then on closing argument, the attorney could use that testimony to argue that the same fact had been proven.[99]

***1295** Limiting instructions in this context may be particularly hard for a jury to understand.[100] If an expert has testified that she credited this hearsay evidence as true and used it to come to a

conclusion, how can a juror use that hearsay to evaluate the opinion without crediting it as true as well?[101] Because of this difficulty, some commentators have argued that experts should not disclose any inadmissible underlying data, while others have said that all inadmissible underlying data should be received without limiting instructions.[102]

However, the use of limiting instructions avoids the problems with either of these extremes. As one commentator notes, without disclosing any underlying data, two competing experts could testify that they consulted the same data and came to opposite conclusions, and the jury would have to choose one blindly over the other.[103] But if a jury is allowed to consider everything the expert says as substantive evidence, this gives the expert too much power to decide what is relevant and even what is admissible.[104] Thus, perhaps courts consider the use of limiting instructions the best of flawed options.[105] Notably, these instructions once again restrict the attorneys' ability to use the underlying data for an impermissible purpose, that is, as proof of the truth of the matter asserted.[106]

The reverse balancing test was added when Rule 703 was amended in 2000, and reflects a policy consideration: it weighs heavily against using experts as "conduits" for hearsay by having them simply repeat what they have been told without relating it to their opinions.[107] Again, these kinds of statements can be prejudicial in the sense that a lay jury might use them as proof of the truth of the matter asserted.[108]

4. Party Opponent and Other Asymmetries in Who Can Offer Statements Under Various Rules

There are several rules of evidence that may allow one party to offer a statement, document, or recording into evidence while the other party cannot.[109] The most obvious example is the party opponent exemption to ***1296** hearsay. Under Rule 801(d)(2), a statement is not hearsay if offered against the party who made the statement, even when used to prove the truth of the matter asserted.[110] Under this rule, however, the party who made that same statement would not be allowed to offer it herself to prove the truth of the matter asserted.[111]

This exemption to the hearsay rule is a product of the adversarial system.[112] Normally, hearsay is objectionable because the person who made the statement is not testifying and cannot be cross-examined on the reliability of that statement.[113] But the opposing party cannot complain that the speaker is untrustworthy, not present, or not subject to cross-examination when she herself is the one who made the statement.[114]

However, the same reasoning does not apply when a party, such as a criminal defendant, offers her own out-of-court statements (usually through someone else's testimony) into evidence to prove the truth of the matter asserted.[115] The rule is concerned with preventing a party from making "an end-run around the adversarial process by, in effect, testifying without swearing an oath, facing cross-examination, or being subjected to first-hand scrutiny by the jury."[116]

An asymmetry could also arise if a criminal defendant testified at her first trial but was retried for the same offense and chose not to testify a second time.[117] Rule 804(a) determines whether a

witness is considered unavailable for the purpose of applying the hearsay exceptions of Rule 804.[118] Under Rule 804(a)(1), a defendant in this situation would be unavailable to the prosecution because, as the defendant in a criminal trial, she would be exempted from testifying if she chose not to.[119] But because not testifying is her choice, she would not be "unavailable" to herself as a witness.[120] Rule 804(b)(1) excepts certain kinds of prior testimony from the hearsay rule, but only if the declarant is unavailable.[121] Therefore, the ***1297** prosecution could offer the defendant's prior testimony to prove the truth of the matter asserted, but the defendant could not.[122]

Asymmetries like this are not limited to hearsay rules. For example, a situation might arise concerning the rules governing original documents and recordings[123] in which a document is unavailable at trial because it is in the possession of a third party.[124] Party A could call Party B as an adverse witness and question her about the document to prove its contents under Rule 1007.[125] But because Rule 1007 only allows a party to question the opposing party about a document, after Party A's attorneys finished, Party B's attorneys would not be able to question Party B any further to prove the contents of that document unless they could produce the original.[126]

These asymmetries can create a Rule 106 problem. When one party is allowed to offer a statement and the other is not, the first party might offer an incomplete or misleading version of that statement. It is unclear whether the opposing party is then able to offer the remainder in response.[127]

D. Rule 106: Finishing Each Other's Sentences

This section discusses Rule 106's stated purpose, the equivalent common law "rule of completeness," how Rule 106 functions in a proceeding, and the scope of the "fairness test" that defines the kinds of statements to which it applies. This section also summarizes the only Supreme Court case to thoroughly address Rule 106 and the policy concerns underlying the Rule.

1. Completeness Purposes of Rule 106

Federal Rule of Evidence 106 reads: "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."[128] According to the Advisory Committee notes, this rule has two goals. First, it tries to prevent the "proponent" from selectively presenting statements in a misleading way.[129] It achieves this by allowing the "opponent" to provide the context in which the original portion of the statement should be understood.[130] Second, it allows the opponent to provide that context immediately, to reduce the risk that a jury will be ***1298** prejudiced or misled if the remainder is not presented until later in the trial.[131]

Rule 106, notably, does not contain a proviso stating that it may only admit evidence subject to

the other Federal Rules of Evidence.[132] When Rule 106 was drafted, the Justice Department requested a proviso be inserted after "any other writing or recorded statement" that would have read, "which is otherwise admissible or for which a proper foundation is laid."[133] The Advisory Committee declined to adopt this proviso, claiming, without explanation, that it was implicit in Rule 106.[134] Even after subsequent requests for clarification, the Advisory Committee did not take a position on whether the rule would allow inadmissible evidence for the purposes of completeness, but said only that the "fairness" test would be sufficient to exclude inadmissible evidence.[135]

2. Rule 106's Common Law Roots

Rule 106 is "an expression of the rule of completeness."[136] It has been said that "[t]he rule of completeness, both at common law and as partially codified in Rule 106, functions as a defensive shield against potentially misleading evidence proffered by an opposing party."[137] The rule of completeness is a common law doctrine that treats evidence and testimony about statements differently than evidence and testimony about actions.[138] Unlike a sequence of events, which can be broken down into individual acts, the law has long recognized that a sequence of words often attempts to express a single idea, one that a jury can only fully understand when it hears all of the words.[139] Common law verbal completeness is concerned both with creating verbal precision and having all the parts of a statement.[140]

When a statement is incomplete, either because it is imprecise or because part of it is missing, common law completeness distinguishes between mandatory completeness (the evidence must be complete before it is admissible at all) and optional completeness (the opponent may request admission of the remainder).[141] Of the two, optional completeness more ***1299** closely resembles Rule 106, because the opponent is the party who wants to admit the remainder.[142]

Optional verbal completeness uses a three-prong test to determine whether the opposing party may enter the remainder of an incomplete statement that has been admitted. The three prongs are as follows:

> (a) No utterance irrelevant to the issue is receivable;
>
> (b) No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not itself testimony.[143]

Prong (a) makes sure that the only remainders admitted are actually relevant to understand the portion; if a remainder is irrelevant, it does not matter that they are made at the same time or

contained within the same writing as the portion.[144] Prong (b) has come to mean "the whole of what was said at the same time on the same subject."[145] According to Wigmore, prong (c) recognizes that the remainder would be hearsay if it asserted facts or tended to prove the truth of the matter asserted.[146] Instead, it can only be admitted for a limited purpose: to help the factfinder interpret the portion correctly.[147] Wigmore gives the following example from the Bible: "There is no God" is a misleading portion if the full statement is "[t]he fool hath said in his heart, there is no God."[148] The remainder--"the fool hath said in his heart"--does not have to be true; adding it to the beginning of the statement need only clarify that this biblical passage does not deny the existence of God. According to Wigmore, the remainder's only permissible purpose is to help the listener understand this point.[149] However, prong (c) has never been universally accepted,[150] and one can see how the remainder might be used as the speaker's affirmation of a faith that only a fool would deny.

When an opponent invokes common law verbal completeness, the appropriate time to admit the remainder is during cross-examination of the ***1300** proponent's witness or else in the opponent's case in chief.[151] This usually applies to oral statements because, at common law, writings were almost always admitted in their entirety.[152]

3. How Rule 106 Functions in the Context of a Proceeding

Unlike common law completeness as described above, Rule 106 affects the point in the trial at which the opponent can introduce a remainder.[153] At common law, in most cases the opponent would often have to wait until her case in chief, or at least until cross-examination, before entering a remainder into evidence.[154] Rule 106 allows the party entering the remainder to interrupt as soon as the portion is offered, whatever examination is being conducted at the time.[155] In this way, Rule 106 addresses the risk that the jury will be irreparably misled by the portion if they are forced to wait for the remainder.[156]

The Advisory Committee notes to Rule 106 clarify that, unlike at common law, "[f]or practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations."[157] However, many courts have found that Rule 611(a) gives the judge the same discretion to apply the principles of Rule 106 to oral statements.[158] Also, a party may be able to use Rule 106 to enter a document or recording into evidence, even if the proponent does not offer any portion of it directly, if the proponent instead uses a substantial part of the written or recorded statement to cross-examine a witness.[159]

Rule 106 does not exclude initially offered portions that are misleading. Instead, it offers the opponent a chance to offer a remainder if necessary for a fair interpretation.[160] However, if there is no remainder available that could correct the misleading impression, the court may exclude the portion ***1301** under Rule 403.[161] When an opponent wants to admit a remainder, the burden is on the opponent to identify which portions of the statement are necessary to qualify the portion that has already been admitted.[162] Failure to identify these portions at trial may prevent an appellant from asserting a Rule 106 error on appeal.[163] But, if the opponent fails to object under Rule 106 at the time the portion is offered, the rule does not preclude her from trying to

admit the remainder later in the trial, such as during cross-examination or in the opponent's case in chief.[164]

4. Rule 106's Scope: What Must Be Admitted in "Fairness"?

When a court decides whether to admit a remainder, it should not be overinclusive or underinclusive. If a court does not admit a remainder, a proponent's incomplete portion could go unexplained and mislead the jury.[165] On the other hand, admitting all or too much of the remainder may clutter the record or waste time if that remainder does not actually help the jury understand the portion.[166] The Supreme Court has not defined the scope of Rule 106; in fact, it has only once discussed Rule 106 at length.[167] However, circuit courts have articulated various tests to determine whether a remainder "in fairness ought to be considered at the same time."[168] For the purposes of this Note, these tests will be called "fairness tests."

For example, in United States v. McCorkle,[169] the Seventh Circuit held that the doctrine of verbal completeness does not extend to remainders that are either (1) "irrelevant to the issue," or (2) "more of the remainder . . . than concerns the same subject, and is explanatory of the first part."[170] Meanwhile, several circuits have articulated positive fairness tests to determine whether Rule 106 applies: the remainder must be "necessary to (1) explain the admitted portion, (2) place the admitted portion in context, ***1302** (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding."[171]

5. The Fairness Test in Practice[172]

In practice, courts often--but not always--apply the fairness test first to determine whether Rule 106 should apply at all before analyzing other potential evidentiary problems with the remainder. Sometimes a remainder is necessary to give meaning to a word in the portion. In United States v. Perryman,[173] the prosecution entered into evidence part of a transcript of the defendant's sworn statements when an attorney examined him regarding an insurance claim.[174] In one of the statements that the government entered, the defendant agreed with the attorney that he "obviously didn't pay it."[175] The court found that an excerpt from one page earlier was necessary for the jury to understand that "it" was a promissory note, and held that the defendant should be allowed to enter this excerpt.[176]

Other times, the remainder may not be necessary to give meaning to a word in the portion, but rather to dispel an improper inference the jury might draw from the incomplete version of the statement. For example, in United States v. Harper,[177] the prosecution entered into evidence a part of the defendant's postarrest statement in which he stated that he would probably be charged with possession of stolen property after the police found guns in his house.[178] The court allowed the defendant to offer the remainder because it explained his prediction. His guns looked like hunting guns, and because nobody in the house had a hunting license, the defendant assumed the police would think he had stolen them.[179] Presumably, the remainder could rebut the inference that by predicting he would be charged with possession of stolen property, the defendant was admitting that the guns were stolen.[180]

***1303** In United States v. Castro-Cabrera,[181] the defendant was charged with reentering the United States after being deported.[182] During a previous deportation hearing, the defendant was asked twice in a row to which country he claimed citizenship; the first time, he answered, "Hopefully United States through my mother," while the second time, he answered, "I guess Mexico until my mother files a petition."[183] After the government offered only the second answer into evidence, the court found that the first answer was admissible as a remainder because it gave a fairer understanding of the defendant's answer.[184] Without the remainder, the portion was a clear admission of Mexican citizenship, whereas both answers together suggested that the defendant was unsure or thought he had dual citizenship.[185]

In United States v. Haddad,[186] the defendant admitted to the police that he was aware of marijuana found under a bed, but not the gun that was found inches away from it.[187] The Seventh Circuit held that once the prosecution elicited testimony that the defendant admitted knowing about the marijuana, the defendant should have been allowed to elicit the part about not knowing the gun was there.[188] The court reasoned that the jury might infer that because he knew about the hidden marijuana, the defendant also knew about the gun right next to it.[189] In contrast, another Seventh Circuit case held that a defendant who admitted to smoking marijuana but claimed not to know about crack cocaine hidden in the car was not allowed to use Rule 106 to elicit the second part of this statement.[190] The court distinguished Haddad because merely admitting to smoking marijuana near hidden crack cocaine did not imply that the defendant knew it was there the ***1304** way that knowing about hidden marijuana right next to a hidden gun would imply that Haddad knew that both objects were there.[191]

There are limits on using a remainder to dispel inferences. Generally, a remainder under the fairness test has to be explanatory of the portion that it completes, not just of the defendant's theory of the case. In United States v. Lewis,[192] Defendant Billingsley, charged with firearm possession and conspiracy to possess cocaine, could not elicit testimony from the agent who interviewed him about how Billingsley never mentioned any of his co-defendant's criminal associates by name.[193] 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 explained the defendant's theory of the case in general, it did not contextualize any of the defendant's statements to which the agent had already testified. Accordingly, no remainders were necessary.[194]

A remainder is often more likely to fail the fairness test when it was made at a different time or on a different day than the portion. In United States v. McAllister,[195] the prosecution elicited testimony from the defendant's bankruptcy attorney that the defendant had made omissions in his bankruptcy documentation.[196] The court did not allow the defendant to use Rule 106 to enter a recording from his bankruptcy hearing, partially because the hearing took place weeks after the documents had been filed and the government had not entered any portion of that hearing into evidence.[197] Likewise, in a mail and wire fraud conspiracy case, the prosecution entered into evidence an instant message from the defendant stating that he had work for the recipient if the recipient "abandon[ed his] morals."[198] The defendant was not allowed under Rule 106 to submit

text messages from several weeks earlier that said he believed their operation was not a scam, because the court found that it was too far removed in time to be contextually related.[199] However, not all remainders need to be from the same conversation or the same day in order to pass the fairness test.[200]

***1305** Finally, the simplest rationale for excluding an offered remainder under the fairness test is that it does not explain the portion. For example, in United States v. Gonzalez,[201] the court found that the trial court did not err in the following scenario: after the prosecution offered the defendant's postarrest statement in which he implicated his co-defendant as someone who robbed drug dealers, the court prohibited the defendant from eliciting the remainder, indicating that his brother kept him out of the drug business.[202] The court reasoned that there was nothing misleading about the portion--that the co-defendant robbed drug dealers--in the absence of the remainder, which was only self-serving hearsay.[203] For similar reasons, Rule 106 does not often apply to self-exculpatory statements and protests of innocence that do not otherwise explain the portion.[204]

One scholar has attempted to categorize the various ways that a remainder might be necessary to complete a portion, in an effort to identify which of these categories do and do not fall within the scope of Rule 106 as it has been applied by various courts.[205] First, a remainder might change the grammatical understanding of the portion.[206] Second, a remainder might directly reduce the probability that the portion is true.[207] Third, a remainder might undermine the credibility of the portion.[208] Fourth, a remainder might change or qualify the inference drawn from the portion.[209] Finally, a remainder might raise a related but distinct factual inference than the one that the portion raises.[210] The scholar notes that the fourth and fifth categories have the potential to be excluded because they are not remainders in the most restrictive sense.[211]

***1306** 6. The Supreme Court Avoids Defining the Scope of Rule 106

In Beech Aircraft Corp. v. Rainey,[212] the Supreme Court used relevance principles to address the use of a remainder.[213] Declining to decide whether Rule 106 was implicated, a seven-justice majority held that "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and therefore admissible under Rules 401 and 402."[214] Importantly, the Supreme Court resolved a completeness problem without resorting to Rule 106.

In Rainey, a product liability suit against an aircraft manufacturing company for equipment malfunction, plaintiff Rainey was the widower of one of the pilot-victims.[215] The defense called Rainey as an adverse witness, and questioned him about two statements he made in a letter written several months after the fatal accident, which purported to give his opinion as to the cause of the accident.[216] The first such statement was that his wife attempted to cancel the fatal flight because she was concerned about her pilot student's fatigue, and the second statement was that the proximity of his wife's plane to another plane may have caused one of his wife's crew to turn the plane suddenly to the right.[217]

On cross-examination, Rainey's own attorney asked him whether that same letter concluded that the cause of the accident was mechanical malfunction and not pilot error.[218] That was, in fact, Rainey's conclusion in the letter, but the trial court excluded his answer as an improper opinion.[219]

The Supreme Court held that exclusion of this answer was reversible error because Rainey was not allowed to correct a misleading impression.[220] The defense's questions may have given the impression that Rainey's letter attributed the crash to pilot error, when in fact the letter explicitly attributed it to mechanical malfunction.[221] The Court found that the plaintiff should have been allowed to clarify this.[222] The Court reasoned that such testimony was not an improper opinion because the plaintiff only offered it to rebut the defense's implication that Rainey had since changed his mind about the cause of the accident because of the lawsuit.[223] Talking about the portion of the letter in which Rainey ***1307** explicitly attributed the crash to mechanical failure was the only way to counteract that impression.[224]

Furthermore, even though the defense had not objected to Rainey's letter on hearsay grounds, the Court found that the statement was not hearsay.[225] The Court explained that the statement was not offered for the truth of the matter asserted but rather "to prove what Rainey had said about the accident six months after it happened, and to contribute to a fuller understanding of the material the defense had already placed in evidence."[226] Thus, the Court concluded that a correct understanding of the hearsay rule would not bar Rainey from offering this remainder.[227]

II. Complete Chaos: The Circuits Split on Admissibility and Methodology

The circuit courts have been split for decades over whether Rule 106 allows into evidence a remainder that would otherwise be inadmissible, for hearsay reasons or otherwise.[228] Even today, circuit and district court opinions acknowledge this split, but do not try to resolve it.[229] Nor does the Supreme Court seem likely to resolve it, since the only Supreme Court case to discuss Rule 106 declined to use the rule to decide the case.[230]

The simplest way to express this circuit split is as a yes or no question: If the remainder of a statement "in fairness ought to be considered at the same time"[231] as the portion offered by the proponent,[232] must it nevertheless be excluded or limited if it violates a different rule of evidence, such as hearsay? Or, does Rule 106 allow a remainder to trump rules of evidence that would otherwise exclude or limit it?

But this split is a bit more complicated than answering these questions with a "yes" or "no." On the one hand, United States v. Sutton[233] represents the school of thought that Rule 106 was specifically designed so that it would not be subject to any of the other rules of evidence.[234] On the other hand, many courts insist that Rule 106 should be subject to all the other ***1308** rules of evidence. These courts typically do so in dicta, because they also find that the remainder fails the fairness test.[235]

United States v. LeFevour represents the middle-ground interpretation.[236] In LeFevour, Judge Posner suggested in dicta that if an otherwise inadmissible remainder is necessary to correct a misleading impression, two solutions exist: either the remainder becomes admissible for the limited purpose of correcting the misleading impression, or else the portion must be excluded if a consideration such as privilege renders the remainder inadmissible.[237] This section of the Note considers these three possibilities and their implications.

A. The United States v. Sutton Approach: The Remainder Is Admissible

At least seven circuits have held at various times that if a remainder passes the fairness test, no other rule of evidence should exclude it from being entered under Rule 106. These include the D.C.,[238] First,[239] Second,[240] Third,[241] Fourth,[242] Seventh,[243] and Tenth Circuits.[244]

First, in Sutton, the D.C. Circuit noted that Rule 106 is contained in the section of the rules that broadly governs the more familiar rules of admissibility.[245] The court also explained that, unlike the other "major rule[s] of exclusion,"[246] Rule 106 has no proviso subjecting it to any other rules.[247] Therefore, the D.C. Circuit concluded that it should be construed broadly, reasoning that the drafters would have known to write it more narrowly had it been intended to be subject to the other rules.[248]

***1309** Moreover, the court considered Rule 106's legislative history, stating that it showed that the drafters considered and rejected a proviso subjecting Rule 106 to the other rules of evidence.[249] The court found, therefore, that any evidence necessary to contextualize the portion should be admitted, subject only to common law relevance.[250]

As applied to Sutton's specific facts, once the prosecution admitted portions of phone conversations between the defendant and his former co-conspirator that tended to show consciousness of guilt, the defendant should have been allowed to enter other portions of another phone conversation with the same person, separate in time, to counter that inference, despite that conversation otherwise being inadmissible hearsay.[251]

More recently, in United States v. Lopez-Medina,[252] the Tenth Circuit relied on Sutton's reasoning when it allowed the prosecution to admit otherwise inadmissible hearsay testimony from the defendant's half-brother under Rule 106.[253] The way this case used Sutton's Rule 106 approach was particularly expansive.[254] The government offered Lopez-Ahumado a sentence reduction in exchange for his cooperation, but Lopez-Ahumado refused to testify against Lopez-Medina or anyone else.[255] Prior to trial, the defense proffered evidence that the half-brother had pled guilty to establish ***1310** that Lopez-Ahumado had possessed the drugs by himself.[256] The prosecution initially objected to the plea as inadmissible hearsay, but eventually agreed to its admission so long as the factual allocution implicating Lopez-Medina could be admitted as well.[257] The defense acknowledged that the factual allocution could be admitted if the defense sought to enter the plea.[258] The judge tentatively agreed.[259]

During trial, defense counsel cross-examined an officer about the half-brother pleading guilty to possession of the drugs.[260] The judge then allowed the prosecution to enter the factual allocution of the plea into evidence.[261] Defense counsel did not object but sought to enter the entire plea agreement, which showed that the government had offered Lopez-Ahumado a sentence reduction in exchange for cooperation.[262] The trial court refused to receive that part of the agreement.[263]

In closing argument, the prosecutor used Lopez-Ahumado's factual allocution as affirmative evidence of the defendant's guilt, arguing that the drugs in the truck belonged to the defendant just like Lopez-Ahumado stated in his plea.[264] After the prosecutor argued that "the final nail in the coffin for [[Lopez-Medina] was his half-brother's admission under oath in court," and remarked that "his own half brother [sic] fingers him,"[265] defense counsel posed a rhetorical question in response. He asked, "Why did he implicate his brother? I didn't get a chance to go there with you. You saw the evidence, all of you. Use your common sense. Read what's there. People make deals in this business."[266]

The Tenth Circuit ruled that Rule 106 made the factual allocution admissible.[267] Using a positive fairness test similar to that described above,[268] the court found that the plea allocution was necessary to correct the misleading impression that Lopez-Ahumado possessed the drugs by himself.[269] The court agreed with Sutton that Rule 106 allows otherwise inadmissible evidence to be entered because it is not subject to the other rules of evidence.[270]

*1311 B. The "Remainder Is Not Admissible" Approach

At least five circuits have at times endorsed the opposite proposition to the Sutton approach, holding that a remainder must otherwise be admissible or else be excluded. These include the Second,[271] Fourth,[272] Sixth,[273] Seventh,[274] and Ninth Circuits.[275] Almost all of these decisions seem to support the proposition in dicta,[276] but more recently, a case in the Sixth Circuit based its exclusion of a remainder solely on the understanding that Rule 106 does not make hearsay admissible.[277]

In United States v. Terry,[278] the Second Circuit held that (1) Rule 106 did not apply to oral statements and (2) even if it did apply, the rule could not make the defendants' self-serving hearsay statements admissible.[279] A prosecution witness testified that the defendants refused to have their palm prints taken, but the trial court would not allow the defendants to enter the remainder of their statement under Rule 106: that they would not give palm prints until they had spoken with their lawyers.[280] The Second Circuit found no error in this interpretation of Rule 106.[281] However, the court held that the statement should have been admitted under Rule 803(3), the state of mind exception.[282]

In United States v. Wilkerson,[283] the Fourth Circuit held Rule 106 inapplicable when a defendant sought to enter part of his own statement in a conversation.[284] The court reasoned that Rule 106

did not make inadmissible evidence admissible, but also held the rule inapplicable because the defendant's statement was oral and because no part of the ***1312** conversation that the defendant wanted to quote had been offered into evidence.[285]

More recently, in United States v. Crosgrove,[286] the Sixth Circuit recited a blanket rule that Rule 106 does not make hearsay admissible.[287] The circuit court then reasoned that the defendant's desired remainder, an instant message sent weeks before the portions (also instant messages) were ever sent, was too far removed in time to clarify anything about the portions.[288]

A particular pattern emerges in these cases. Courts of this view often state that Rule 106 cannot render inadmissible remainders admissible, but then go on to find other reasons not to admit the remainder: the remainder may fail the fairness test,[289] or may be an oral statement,[290] rendering Rule 106 inapplicable depending on the jurisdiction. Thus, the statement itself that Rule 106 does not trump the other rules is usually dicta.

Research does not uncover a case in which a court explicitly found that a remainder passed the fairness test and yet excluded it as hearsay. Recently, though, in United States v. Adams,[291] the Sixth Circuit strongly intimated that the prosecution's presentation of a recording was unfair within the meaning of Rule 106, but adhered to precedent by upholding the trial court's exclusion of the remainder.[292]

In Adams, 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, among other things.[293] The government was allowed to present portions of a phone recording in which two cooperating witnesses told Maricle about questions they had been asked during their grand jury testimony.[294] Cooperator Kennon relayed that he had been asked whether Kennon had used Maricle's influence to procure votes for a particular candidate.[295] Maricle responded by asking, "Did you promise anybody I'd do anything for them?" to which Kennon responded, "Only one was that Downy boy; Bobby Downy's brother."[296] Maricle was not allowed to present his very next response, "'That's one thing I did very seldom, promised to do, I never promised anybody that I would help somebody in a Court case . . . I don't believe having cases held over head ***1313** forever for some political thing.'"[297] Moreover, later in the same recording, Maricle denied knowing anything about the "Downy boy."[298]

Then the government presented another recording in which cooperator White told Maricle that she had been asked at grand jury whether Maricle had appointed her as an election officer.[299] Maricle responded, "Did I appoint you? (Laugh)," and White said "Yeah."[300] Once again, Maricle was not allowed to present the next thing he said, "'I don't really have any authority to appoint anybody.'"[301]

The defense argued that these omissions changed the meaning of the defendant's statements.[302] Although the Sixth Circuit agreed that "these examples highlight[ed] the government's unfair presentation of the evidence,"[303] it adhered to its precedent in United States v. Costner, holding that Rule 106 "'is not designed to make something admissible that should be excluded.'"[304] The

court noted that such a rule "leaves defendants without redress" for unfair presentation,[305] and suggested that the Sixth Circuit revisit its interpretation of Rule 106 en banc.[306]

Sometimes, courts that would require a hearsay exception to admit a remainder under Rule 106 will find that no exception exists even before analyzing the remainder under the fairness test. In United States v. Vargas,[307] the Seventh Circuit found that Rule 106 did not allow a defendant to show another part of his arrest video (a portion of which had already been shown) because there was no hearsay exception for his statement that he was there buying a truck.[308] The court never decided whether the remainder, the statement about the truck, passed the fairness test as necessary to explain the defendant's statement in the portion: that the defendant had money in his shoebox.[309] Likewise, in United States v. Fisher,[310] a district court in Michigan held that Rule 106 did not apply to the defendant's offered remainder because there was no applicable hearsay exception, and only then commented that even if there were a hearsay exception, the remainder was not sufficiently related to the portion to pass the fairness test.[311] Conducting the analysis in this order suggests that even if the remainder had passed the fairness test, it still may have been excluded ***1314** because there was no hearsay exception.[312] Finally, in United States v. Whaley,[313] the district court said in dicta that "[a]rguably, the redacted version of the statement distorts its meaning," but found that Rule 106 would not permit the defendant to offer the redacted portions into evidence because they were his own out-of-court hearsay statements.[314]

On the other hand, in United States v. McDarrah,[315] the Southern District of New York held that a remainder's value in understanding the portion was an acceptable nonhearsay purpose.[316] The law enforcement agent had taken notes and written a summary of his postarrest interrogation of the defendant.[317] On direct examination, the agent did not testify about the contents of those notes or the summary.[318] On cross-examination, the defense attorney asked repeatedly about how some of the defendant's statements to which the agent had just testified were missing from the summary, and how the statements in the summary purported to be the agent's words, not the defendant's.[319] The agent stated several times that the summary of the interview was not comprehensive and that he had paraphrased, but the defense attorney continued to cross-examine him on the subject.[320] Finally, the judge allowed the prosecution to enter the report under Rule 106 (even though the rule does not allow hearsay to be admitted) because it would be the best available way to clarify for the jury whether the agent's testimony was credible or not.[321]

These cases demonstrate that this approach has a few subdivisions: although all agree that hearsay is not admissible under Rule 106, some courts will end the analysis once they determine there is no hearsay exception and bypass the fairness test altogether,[322] while others perform the fairness analysis first and recognize that a necessary remainder may not be hearsay at all.[323]

C. A Middle Ground: United States v. LeFevour

United States v. LeFevour,[324] a prosecution of a corrupt former state court judge,[325] represents a middle ground between the most permissive and most restrictive approaches to remainder

admissibility.

***1315** In LeFevour, the prosecution offered the recording of an entire conversation between the defendant and a cooperating traffic court officer who helped the defendant take bribes.[326] The recorded conversation tended to show that the defendant knew who the witness had retained as a lawyer.[327] The defense tried unsuccessfully to enter the remainder of the recording, in which the cooperating witness told an FBI agent that he did his best to scare the defendant into talking during the conversation they had just had; the defendant was not on this part of the recording.[328] Ultimately, the Seventh Circuit affirmed the trial court's exclusion of this remainder because it was not necessary to correct a misleading impression.[329]

In his opinion for the LeFevour panel, Judge Posner set forth a different Rule 106 formulation. On the one hand, he criticized the opinion in Costner[330] for describing Rule 106 as only regulating order of proof, that is, for suggesting that Rule 106's only purpose is to force the presentation of the remainder immediately, rather than later in the trial.[331] Judge Posner stated that Rule 106 also allows the admission of otherwise inadmissible evidence.[332]

However, Judge Posner qualified this by saying that when otherwise inadmissible evidence is entered through Rule 106, it is for the limited purpose of correcting what would be a misleading impression.[333] He went on to say that, "if [the remainder] is inadmissible (maybe because of privilege), the misleading evidence must be excluded too."[334] Judge Posner reasoned that an opponent seeking to admit a remainder should only be concerned with "pulling the sting from evidence [the proponent] wanted to use against him."[335] Either excluding the entire statement, or admitting the remainder only to correct the misleading impression, would be enough to neutralize the portion without "overrid[ing] every privilege and other exclusionary rule of evidence in the legal armamentarium."[336]

Despite articulating a test, LeFevour is very infrequently cited as authority on Rule 106. Research does not disclose a case that applies ***1316** LeFevour to admit a remainder for the limited purpose of correcting a misleading impression.[337]

III. Completely Blindsided: Rainey, Not Rule 106, Governs Admissibility

Does Rule 106 allow a remainder that has passed the fairness test to be admitted into evidence despite being inadmissible under a different rule? This turns out to be a trick question. If a remainder is truly necessary to understand a misleading portion, then, as the Supreme Court makes clear in Rainey, it is ipso facto relevant for the limited nonhearsay purpose of providing context or dispelling the misleading impression that the jury might get without it.[338] So, if a remainder passes the "necessary" test in Rainey, it becomes admissible for "context" regardless of Rule 106, not because of it.[339]

This Part first discusses the theory of limited admissibility for remainders articulated in Rainey and inherent in the Federal Rules of Evidence. Next, it discusses the role of Rule 106, and why

using Rule 106 to trump other rules of evidence is both unnecessary and undesirable. Third, it describes the confusion created by the proposition that Rule 106 does not make inadmissible evidence admissible, and explains the methodological problems both of that approach and Judge Posner's approach. Fourth, this Part suggests steps a judge should take to decide a Rule 106 objection.

A. No Further than Needed: Toward a Limited Admissibility Approach to Necessary Remainders

Rainey's theory of remainder admissibility is just another example of the limited admissibility approach that the Federal Rules of Evidence embody in general.[340] In most cases, determinations of admissibility are driven by the purpose for which the evidence is used, not by some artificial category ***1317** into which the evidence falls. Evidence of a prior bad act is not inherently inadmissible; it is only inadmissible if used to show bad character.[341] An out-of-court statement is hearsay only if its purpose is to prove the truth of the matter asserted, and not merely that the words were said.[342] Testimony about a document is inadmissible only if that testimony is offered to "prove the content" of that document.[343]

In all of these cases, however, the same evidence is admissible if it can be used for a purpose other than the prohibited one. Of course, evidence must always be relevant, and cannot be more prejudicial than probative: unlike many rules, Rules 401, 402, and 403 are not subject to limited admissibility analysis.[344] On the other hand, when a rule bars the admission of certain kinds of evidence without regard to its purpose, or does so subject only to limited exceptions, this expresses a preference for excluding this kind of evidence that is stronger than normal.[345]

Rainey stays true to these concepts. Though it is improper to admit an out-of-court statement to prove the truth of the matter asserted (absent an exception), it is proper to admit the same statement for a not-for-truth purpose, so long as that use is relevant.[346] Rainey declares remainders ipso facto relevant for "context" when they are "necessary."[347] If limited in this way, as Rainey makes clear, we need not worry about the hearsay rule, because providing context or dispelling misleading impressions is not the same as using the remainder to prove the truth of the matter asserted.[348]

Of course, just as with any other application of limited admissibility analysis, a "necessary" remainder offered for "context" should be excluded if it is substantially more prejudicial than probative, in the sense that no limiting instruction could prevent the jury from using the remainder for the prohibited purpose.[349] Yet, if a remainder is necessary to avoid a misunderstanding, especially one that the proponent created by offering misleading evidence, the probative value of a necessary remainder will often be weighty enough to pass the Rule 403 balancing test.[350]

***1318** Consider the following example: in a personal injury suit, immediately after the injury occurs, the plaintiff says to the defendant, "Oh, by the way, when I testify against you next week

in your assault trial, I'm going to lie in court to make you pay for assaulting my brother last year." At trial, the defendant testifies that the plaintiff said, "I'm going to lie in court." The plaintiff seeks to elicit the entire statement, either by cross-examining the defendant, or testifying in rebuttal, but the defendant objects both on grounds that it is hearsay[351] and that it is evidence of the defendant's prior bad act.[352] The plaintiff can argue that the remainder is necessary for context, to dispel the misleading impression that the plaintiff was talking about the present lawsuit. This solves both the hearsay problem and the Rule 404(b) problem: a necessary remainder is not hearsay,[353] and the evidence is not being offered to prove that the defendant is a violent person, but rather so that the jury can understand what was said.[354]

Admittedly, it is a bit harder to justify using "context" as a permissible purpose to get around the restrictions of the original document rule. Consider the problem discussed above: under Rule 1007, the proponent questions the opponent about an unavailable document that has been the subject of previous testimony or writing by the opponent, in order to prove a misleading portion of its contents.[355] The opponent is barred by Rule 1002 from testifying to prove the remainder of the document on redirect examination.[356] Under Rainey, the remainder is both relevant and nonhearsay,[357] but Rule 1002 prohibits testimony to prove the content of the document without the original.[358]

Research does not disclose a case (applying Rule 106 or otherwise) in which this particular problem arises. The best solution, however, is to draw an analogy between using a "context" statement not to prove the truth of the matter asserted[359] and using it not to prove the content of the document.[360] The remainder of the document would be offered, not to prove the content ***1319** of the remainder but only to clarify the content of the portion by providing context.[361]

The Rainey understanding of remainder admissibility also squares well with the asymmetrical aspects of the Federal Rules of Evidence.[362] Just as limiting admissibility based on the purpose of the evidence reflects policy concerns,[363] so too does limiting admissibility based on who is offering it.[364] For example, the reason defendants are barred from admitting their own exculpatory hearsay statements is so that they cannot, in effect, testify without being cross-examined.[365] But when a proponent takes advantage of an asymmetry to offer a misleading portion, knowing that the rule is unavailable to the opponent, the limited admissibility approach strikes the correct balance. On the one hand, it prevents the proponent from offering evidence that cannot be rebutted. On the other hand, it respects the policy reasons behind those asymmetries by keeping the opponent from using remainders for any purpose but "context." This prevents the opponent from overriding the rules by offering the remainder as substantive proof.[366]

Finally, the Rainey approach has at least some support in the common law. Although common law roots are never absolutely uniform, the three-pronged test that Wigmore recognized resembles this approach in the sense that the first two prongs resemble various versions of the Rule 106 fairness test,[367] and the third prong similarly limits the remainder's purpose to interpreting the portion.[368]

But can we really say that a remainder that would otherwise be hearsay is offered for some other reason than to prove the truth of the matter asserted? To use one of Nance's examples, "I shot right at him, but I missed,"[369] it seems strange to say that "but I missed" could clarify "I shot right at him" without being accepted as true. It can be even less clear when the words of the portion are not misleading but give rise to a misleading impression. Using Lopez-Medina as another example, it is strange to think that the inference to the effect of, "those are my drugs and mine alone" could be ***1320** given any clarification without accepting the gist of the remainder, "those drugs belong to both my brother and myself" as true.[370]

This is somewhat similar to the difficulty of instructing jurors on how to use otherwise inadmissible facts and data to evaluate expert testimony.[371] But this analogy also offers a solution: when we say that a statement is not hearsay, we do not mean that the jury cannot evaluate whether the statement is true, but only that they may not use it as affirmative proof of that truth. After all, hearsay is an out-of-court statement offered to prove the truth of the matter asserted.[372] Therefore, the jury in Lopez-Medina could have been instructed that they could consider whether the statement to the effect of, "those drugs belong to both my brother and myself" would dispel the inference that Lopez-Ahumado had said that the drugs were his alone,[373] but not as independent evidence tending to prove that Lopez-Medina possessed the drugs.[374] This may be a razor-thin distinction, but it remains valuable because it constrains the attorneys, as well.[375] The prosecutor in Lopez-Medina would not have been allowed to argue, essentially, "we know the defendant is guilty because his brother says so."[376] There is certainly value in preventing attorneys from telling the jury to use evidence incorrectly. And, just as in the Rule 703 context, admitting the remainder as nonhearsay and giving limiting instructions is a better option than either trumping all other rules of evidence or leaving the jury completely in the dark.[377]

More generally, though, the Rainey approach resembles other legitimate, similar nonhearsay uses. In Sorrentino, the statements of the person talking to the defendant became admissible for context because the conversation ***1321** would be unintelligible without it,[378] not unlike an incomplete portion. Or sometimes, like in United States v. Gilliam, where the defense painted a misleading portrait of a police officer's motivations, context becomes more relevant when it can dispel incorrect inferences, again, not unlike a remainder.[379] It should not be a particularly controversial idea that when a statement provides "context" or helps a jury understand the underpinnings of something important, it is probably relevant for some reason besides proving the truth of the matter asserted.

In short, the purpose of a Rainey remainder is not to act as affirmative proof, but only to negate any incorrect inference that would necessarily arise from leaving the portion incomplete. The remainder cannot prove what it says; it can only show the jury that the portion does not mean what the proponent says it means.

B. Unnecessary Trumping: Why Rule 106 Need Not Wipe Out the Other Rules

Where does Rule 106 come into play in all of this? For any "necessary" remainder within the meaning of Rainey, Rule 401 and Rule 402 do all of the work to make it admissible.[380] But is that enough for Rule 106 to accomplish its purpose?[381]

It should be. The reason it is so difficult to draw the distinction between Rule 106 and the ipso facto relevance of necessary remainders in Rainey is because the tests are very similar. If a remainder passes the Rule 106 fairness test, it must be necessary to understand the portion.[382] If that remainder is necessary to understand the portion, it is ipso facto relevant under Rainey.[383] If it is relevant under Rainey, then, per Rainey, it also has a legitimate nonhearsay purpose.[384] Therefore, any statement that passes the fairness test of Rule 106 is ipso facto relevant and has a legitimate nonhearsay use: to clarify the portion or dispel any improper inference it suggests.

Put simply, if a remainder passes the fairness test of Rule 106,[385] it will pass Rainey's "necessary" test[386] and be admissible. Conversely, if a remainder is not necessary under Rainey, it will not pass the fairness test of Rule 106, and Rule 106 should not apply at all. What, then, is Rule 106's purpose? The answer is written right into the language of the rule: it allows the opponent to interrupt the proponent as ***1322** soon as a misleading portion has been offered.[387] This was not part of the common law[388] and it is not something that the Rainey rule can accomplish by itself.[389] In addition, particularly in cases where the remainder is admissible independent of Rainey, like a remainder that falls into a hearsay exception,[390] Rule 106's fairness test[391] still applies to determine whether the remainder must be presented immediately, or if it can wait until a later point in the trial.[392]

What about using Rule 106 to make the remainder admissible for some purpose other than "context" or dispelling misleading inferences, as in Sutton and Lopez-Medina?[393] If it is true, as this Note argues,[394] that the "context" purpose for which a remainder is admitted under Rainey is sufficient to clarify the portion, then Rule 106 need not go any further than that.[395] To interpret Rule 106 otherwise is to ignore the value of limited admissibility evident in the federal rules without accomplishing anything that Rule 106 sets out to do. Though these cases may correctly admit the remainder, they incorrectly allow use of that remainder without restriction, or as substantive evidence of what the remainder asserts.

The Advisory Committee clearly states two goals for Rule 106: correcting misleading impressions created by a lack of context, and preventing the harmful effect of delaying that correction to a later point in the trial.[396] The ability of the rule to interrupt testimony addresses this second concern; it ensures that the remainder can be offered immediately, so that the jury is not left with a misleading impression for so long that it cannot be corrected.[397] It follows, then, that the fairness test addresses the first purpose, by defining what remainders are "necessary" to correct those misleading impressions.[398]

If a remainder is relevant under Rainey and admitted for the limited purpose of correcting a misleading impression, then it has already ***1323** accomplished Rule 106's stated purpose.[399] The misleading impression has been countered because the opponent has used the remainder to show why the initial portion might not mean what the proponent wants the jury to think it means.

In a case like Lopez-Medina, the remainder might be devastating to the proponent's misleading inference: the defendant's attorney wanted the jury to believe that the defendant's brother had taken sole responsibility for possessing the drugs, yet the brother's complete statement flatly contradicted that inference, crippling the credibility of that argument.[400] That is enough to accomplish Rule 106's stated purpose. Although using the brother's full statement was undoubtedly helpful to the prosecution's case,[401] to the extent that it was used as affirmative proof of the defendant's guilt, it was not helpful for the reasons Rule 106 was intended to be helpful.[402] It was used as a sword, to shoehorn inadmissible evidence into the record, not a shield, to prevent a misunderstanding.[403]

If using Rule 106 to trump rules of evidence does very little to advance the rule's goals, then the benefit of allowing inadmissible evidence is very small. This only makes the costs seem that much higher in comparison. By ***1324** allowing the jury to consider the factual allocution for its truth, that Lopez-Ahumado actually did possess the drugs jointly with the defendant, the admitted remainder gave the government an extra witness whose testimony was never subject to cross-examination.[404] This flies in the face of the reasons behind the hearsay restriction[405] for little benefit.

Or, to return to the hypothetical about the personal injury suit above,[406] if Rule 106 trumped the prohibition on hearsay, the plaintiff would be allowed to offer the remainder as affirmative proof that three years prior the defendant assaulted his brother. Even worse, if Rule 106 trumped Rule 404(b), the plaintiff's attorney would be allowed to argue to the jury that the defendant is more likely to have caused the plaintiff's injury because he is a violent person. Rule 404(b) exists precisely to prevent these kinds of arguments from being made.[407]

The only situation in which Rule 106 might need to trump a rule of evidence to get the remainder admitted would be if the rule in question did not allow evidence for "context" at all.[408] But again, these rules likely manifest a stronger preference than other rules for exclusion by delineating particular exceptions or allowing no exceptions at all, and ought to be respected rather than trumped by Rule 106.[409]

*1325 C. Right on Rule 106, Wrong on Rainey: The Other Two Approaches

This section will discuss the erroneous reasoning in both the most restrictive approach to remainder admissibility and the moderate analysis in LeFevour. Courts that take the restrictive view and insist Rule 106 does not make inadmissible hearsay admissible[410] do not misunderstand Rule 106, but often misunderstand Rainey. If a judge skips the fairness test and excludes the remainder only because no hearsay exception applies,[411] she has ignored the fact that, if the remainder passes the fairness test, it will automatically be admissible, not for the truth, but for context.[412] On the other hand, cases like McDarrah correctly recognize that remainders are capable of a nonhearsay use.[413] Thus, when courts claim that Rule 106 does not make inadmissible evidence admissible, they are correct, but fail to recognize that a necessary

remainder was never inadmissible in the first place.

This understanding could have answered the Sixth Circuit's concerns in Adams.[414] After determining that the government had unfairly presented the recorded phone conversations in a way that changed their meaning,[415] the trial court could have admitted any remainders necessary for the purpose of clarifying that, when Maricle was asking questions about the accusations leveled against him, he was not admitting to doing the things of which he was accused.[416] Thus, without revisiting the question of whether ***1326** Rule 106 trumps other rules, the Sixth Circuit could have given the defendant his "redress."[417]

The error in the LeFevour approach[418] is subtler. This approach is consistent with Rainey's theory of remainder admissibility except where it credits Rule 106 itself with making inadmissible evidence admissible for the same kind of limited purpose.[419] LeFevour[420] was decided before Rainey,[421] so it is not surprising that Judge Posner found this power within Rule 106 itself, and it does the same thing as Rainey without using the rule directly.[422] Nevertheless, it is sounder to base admissibility on relevance as Rainey does because relevance is fundamental to admissibility,[423] and because it avoids suggesting that Rule 106 trumps other evidence rules.

D. A Complete Walkthrough: Handling a Rule 106 Objection

In a trial or other proceeding, when the proponent offers a portion of a statement and the opponent objects under Rule 106, the judge should assess the objection in several steps.

First, the judge should require the opponent to identify the parts of the remainder that she would like to have admitted contemporaneously with the proponent's portion.[424]

Second, the judge should allow the proponent to object to the court receiving the remainder or remainders at that time. If the proponent does not object, the judge should admit the evidence without qualification.

Third, if the proponent objects, the judge should examine the remainder or remainders that the opponent has offered. If the objection is to hearsay, the judge should determine if there is any independent hearsay exception or exemption under which it falls.[425] Likewise, if the objection is not to hearsay but rather to the original document rule, the judge should determine whether any of the exceptions apply.[426]

If there is an applicable exception, the evidence is admissible, but the court must still determine whether the evidence should be received immediately or if it may be delayed until later in the trial. If it passes the fairness test,[427] the judge should admit the remainder or remainders under the applicable exception and should not give the jury a limiting instruction.[428] If the evidence fails the fairness test, the judge should allow ***1327** it to be admitted at an appropriate later time, because it is admissible but not necessary to complete the portion at that time.[429]

In this step or in any other step, the judge should apply the fairness test as follows: weigh whether the offered statements are necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact about what was said or meant, or (4) insure a fair and impartial understanding.[430] No remainders that (1) are irrelevant to the issue of what was said or (2) go beyond explaining the portion pass this test.[431]

If the objection is on any other grounds besides hearsay or the original document rule, the judge should skip this third step.[432]

Fourth, if no hearsay or original document rule exception applies, or if the proponent's objection is based on a rule that excludes evidence for specific impermissible purposes but allows it for any other purpose,[433] the judge should apply the fairness test[434] to determine whether the remainder may be offered at that time for "context." If the remainder fails the fairness test, the judge should not admit it at that time.

However, if the proponent objects on grounds that the remainder violates a rule of evidence for which there are no exceptions[435] or limited, delineated exceptions,[436] the judge should exclude the remainder.[437] If the portion without the remainder is then substantially more misleading than it is probative, the judge should exclude the portion as well.[438]

Fifth, if the remainder passes the fairness test, the judge should consider whether admitting it for the limited purpose of "context" would be substantially more prejudicial than probative; that is, whether the jury is likely to use the remainder for the impermissible purpose despite being instructed otherwise, and how harmful that improper use would be.[439] If the objection is to hearsay, the judge should consider specifically whether the jury is likely to use the remainder as affirmative proof of the truth of the matter asserted, and whether that improper use would be harmful to the proponent.[440] If the remainder fails the Rule 403 balancing test,[441] the judge should exclude the remainder. If the portion without the remainder is ***1328** then substantially more misleading than it is probative, the judge should exclude the portion as well.[442]

Sixth, if the remainder passes the Rule 403 balancing test, the judge should allow the opponent to offer it into evidence at that time. Upon request, the judge should instruct the jury that it is not to consider this evidence for whatever impermissible purpose that would have made it inadmissible.[443] If the remainder would be hearsay if offered to prove the truth of the matter asserted, the judge should add the following instruction: "[Proponent] presented the statement, [portion]. Then, [Opponent] offered you the statement, [remainder]. This latter statement is admitted for only one purpose: so that you may better understand what the first statement actually meant.[444] You may consider this latter statement to be true insofar as it changes your understanding of what was meant by the first statement.[445] But you may not consider the latter statement as proof that any fact it asserts on its own is actually true."[446]

Since an otherwise inadmissible remainder becomes admissible for context through Rules 401 and 402, and not Rule 106, failure to raise a timely objection should not preclude remainders coming in for context or any other permissible purpose later on in the case.[447]

If a remainder was admitted for context, then before closing arguments, the judge should instruct the attorneys that they may not argue using the remainder for any other purpose than that for which it was admitted.[448] If the remainder would have been hearsay but for limiting its purpose to providing context, the judge should instruct the attorneys that they are not to use any statement asserted in the remainder as affirmative proof, namely that a fact is true because the declarant said so in the remainder.[449]

Conclusion

In an evidentiary system where the purpose for which evidence is offered matters, having the correct interpretive framework for admissibility can make a tremendous difference, even if in subtle ways. This is an area in need of clarity and uniformity, both so that misleading statements are not presented without correction, but also so the rule is not abused as a back door to admit improper testimony, or proper testimony for improper reasons.

Limiting the admissibility of remainders so that they achieve no more than their proper purpose strikes the right balance. It preserves the policy ***1329** decisions inherent in the Federal Rules of Evidence while still allowing parties to correct misleading impressions. The methods described above should help courts untangle a complex problem, and should ensure that no more incriminating ghosts speak out from the witness stand in the name of completeness.

Footnotes

a1 J.D. Candidate, 2014, Fordham University School of Law; B.A., 2011, Columbia University. I would like to thank my advisor, Professor James Kainen, for challenging me to clarify my ideas, and my mother and father for teaching me the value of a good argument.

1 United States v. Lopez-Medina, 596 F.3d 716, 724-25 (10th Cir. 2010).

2 Id. at 729 (internal quotation marks omitted).

3 Id. at 722-23.

4 Id. at 723.

5 Id. at 725.

6 Id. at 723-25.

7 Id. at 725-26.

8 Id. at 729.

9 Fed. R. Evid. 106.

10 See infra Part II.

11 See Fed. R. Evid. 802.

12 Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988).

13 For clarity, this Note will use the following terminology: "proponent" will mean the party who initially offers a portion of the statement, document, or recording; "portion" will mean the original part of a statement, document, or recording that the proponent offers; "opponent" will mean the party against whom the portion is offered; and "remainder" will mean the other part or parts of the statement that the opponent wishes to offer to complete the portion.

14 Fed. R. Evid. 401.

15 Id. R. 402. Compare id., with id. R. 106 (including no similar limitations on admissibility).

16 Id. R. 403.

17 Id. R. 403 advisory committee's note.

18 Id. R. 611(a).

19 Id.

20 See infra Part I.D.

21 Fed. R. Evid. 105.

22 See infra Part I.B.

23 1 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual § 105.02[1] (10th ed. 2011).

24 Id. § 105.02[4].

25 Id.

26 Id.

27 Id. § 105.02[2].

28 Id.

29 See id. (citing Gray v. Busch Entm't Corp., 886 F.2d 14 (2d Cir. 1989)).

30 See Daniel D. Blinka, Ethical Firewalls, Limited Admissibility, and Rule 703, 76 Fordham L. Rev. 1229, 1235 (2007). But see 1 McCormick on Evidence § 59, at 259-60 (John W. Strong ed., 5th ed. 1999) ("Realistically, the instruction may not always be effective, but admission of the evidence with the limiting instruction is normally the best reconciliation of the competing interests.").

31 See Blinka, supra note 30, at 1235.

32 See id. at 1236.

33 1 Saltzburg et al., supra note 23, § 105.02[1].

34 1 McCormick on Evidence, supra note 30, § 59, at 259. The limited admissibility approach is not without its critics. One criticism is that it allows for "lawyerly 'mischief,'" namely, that attorneys will use the existence of a single permissible purpose as a pretext to admit evidence that they hope the jury will actually consider for its impermissible purposes. See Blinka, supra note 30, at 1237-41.

35 Fed. R. Evid. 404(b).

36 Id. R. 404 advisory committee's note (quoting 6 Cal. Law Revision Comm'n, Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence 615 (1964), available at http://clrc.ca.gov/pub/Printed-Reports/Pub054.pdf).

37 Id. R. 404(b).

38 Id. R. 407.

39 See 2 Saltzburg et al., supra note 23, § 407.02[2].

40 See id. For a criticism of this rationale, see id.

41 See Fed. R. Evid. 408 advisory committee's note (stating that, while evidence of an offer to settle a claim cannot be used as evidence of the claim's validity or amount, or for impeachment purposes, because of a policy to promote settlement, it may be used for any other purpose); id. R. 409 advisory committee's note (stating that an offer to pay medical, hospital, or similar expenses for an injury is not admissible to prove liability, so as not to discourage people from making humane gestures); id. R. 411 (stating that, while having or not having liability insurance cannot be used to prove or disprove negligence, so as to prevent juries from deciding cases on improper grounds, it can be used for other purposes).

42 See, e.g., id. R. 412 (prohibiting the use of a victim's sexual history or predisposition and providing only limited and definite exceptions); id. R. 704(b) (unqualifiedly barring an expert opinion as to whether or not a criminal defendant had a "mental state or condition that constitutes an element of the crime charged or of a defense").

43 See, e.g., id. R. 412 advisory committee's note (stating that the Rule protects alleged victims from intrusions into privacy, embarrassment, and sexual stereotyping).

44 Id. R. 1001(a).

45 Id. R. 1001(b).

46 Id. R. 1002. An original 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." Id. R. 1001(d).

47 5 Saltzburg et al., supra note 23, § 1002.02 [1].

48 Fed. R. Evid. 1002.

49 Id. R. 1003. "A 'duplicate' means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." Id. R. 1001(e). A duplicate may be used in lieu of an original "unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Id. R. 1003.

50 5 Saltzburg et al., supra note 23, § 1002.02[1]; see R.R. Mgmt. Co. v. CFS La. Midstream Co., 428 F.3d 214, 216-17 (5th Cir. 2005) (holding that affidavits and an excerpted and redacted version of a written agreement were offered to prove the contents of the agreement and thus were inadmissible under Rule 1002).

51 See, e.g., United States v. Smith, 566 F.3d 410, 412-14 (4th Cir. 2009) (holding that an expert witness could testify to information he read in books and databases to come to his conclusion about where certain guns were manufactured).

52 See supra note 49 and accompanying text.

53 Fed. R. Evid. 1004(a).

54 Id. R. 1004(b).

55 Id. R. 1004(c).

56 Id. R. 1004(d).

57 Id. R. 1007.

58 Id. R. 801(a)-(c).

59 Id. R. 802.

60 See generally id. R. 803; id. R. 804.

61 4 Saltzburg et al., supra note 23, § 803.02[1].

62 Fed. R. Evid. 803(4) advisory committee's note.

63 Id. R. 803(2) advisory committee's note.

64 Id. R. 803(1) advisory committee's note.

65 Id. R. 803(3).

66 4 Saltzburg et al., supra note 23, § 803.02[4][a].

67 See Fed. R. Evid. 804.

68 See id. R. 804(a). For example, the declarant may be dead, see id. R. 804(a)(4), may refuse to testify despite a court order, see id. R. 804(a)(2), or may be exempted from testifying by privilege, see id. R. 804(a)(1).

69 Id. R. 804(b)(3)(A). This particular exception requires "corroborating circumstances that clearly indicate its trustworthiness." Id. R. 804(b)(3)(B).

70 Id. R. 801(d). Hearsay "exemptions" are a different category than hearsay "exceptions" under Rules 803 and 804.

71 See infra Part I.C.4.

72 See Fed. R. Evid. 801(a)-(c).

73 4 Saltzburg et al., supra note 23, § 801.02[1][b]. Upon request, the judge must instruct the jury to consider this evidence only for the purpose for which it was offered, not as proof of the truth of the matter asserted. See Fed. R. Evid. 105.

74 Fed. R. Evid. 402.

75 Id. R. 403.

76 4 Saltzburg et al., supra note 23, § 801.02[1][b].

77 Id.

78 Id.; cf. Shepard v. United States, 290 U.S. 96, 98, 103-04 (1933) (holding that a wife's hearsay statement that her husband had poisoned her could not be restricted in purpose to prove only that she wanted to live, rather than the truth of the matter asserted, where "[t]he reverberating clang of those accusatory words would drown all weaker sounds").

79 See 4 Saltzburg et al., supra note 23, § 801.02[1][b].

80 521 F.3d 29 (1st Cir. 2008).

81 See id.

82 Id. at 33-35.

83 Id.

84 529 F.3d 493 (2d Cir. 2008).

85 Id. at 497-98.

86 Id.

87 Id. at 502.

88 See id. at 501-02.

89 Id.

90 See id. at 501 ("When the evidence is proper with respect to an unimportant issue but improper and prejudicial on a crucially important issue, it is unlikely to pass the balancing test of Rule 403."); see also, e.g., United States v. Williams, 133 F.3d 1048, 1050-52 (7th Cir. 1998) (finding error in allowing an FBI agent to testify about an anonymous tip that the defendant was the person who robbed a bank, because the testimony's prejudicial value in implicating the defendant substantially outweighed the probative value of explaining the investigation).

91 For example, in United States v. Gilliam, the trial court did not abuse its discretion when it permitted testimony that, after leaving the crime scene, the police officer received an anonymous tip about a second gun at that crime scene. United States v. Gilliam, 994 F.2d 97, 103-04 (2d Cir. 1993). The defendant had implied on cross-examination that the only reason the officer returned to the scene was to harass the defendant and his friend. Id. This increased the probative value of the fact that the anonymous tip was made (regardless of whether or not it was true), because it tended to show that the officer went to the scene to recover the gun, not to harass the defendant. See id.

92 United States v. Metcalf, 430 F.2d 1197, 1199 (8th Cir. 1970).

93 72 F.3d 294 (2d Cir. 1995).

94 Id. at 298.

95 Id.; see also United States v. Catano, 65 F.3d 219, 225 (1st Cir. 1995); United States v. Beal, 940 F.2d 1159, 1161 (8th Cir. 1991).

96 See Fed. R. Evid. 703 ("[I]f the facts or data [underlying an opinion] would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."); 3 Saltzburg et al., supra note 23, § 703.02[4].

97 Fed. R. Evid. 703.

98 Id. R. 703 advisory committee's note.

99 See Ian Volek, Note, Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later, 80 Fordham L. Rev. 959, 973 (2011).

100 See supra Part I.A.2.

101 See Volek, supra note 99, at 973.

102 Compare Ronald L. Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand. L. Rev. 577, 584-86 (1986) (arguing that experts should only be allowed to briefly describe inadmissible documents upon which they have relied), with Paul R. Rice, Inadmissible Evidence As a Basis for Expert Opinion Testimony: A Response to Professor Carlson, 40 Vand. L. Rev. 583, 586 (1987) (arguing that reliance by an expert should except statements from hearsay).

103 See Volek, supra note 99, at 998.

104 See id. at 998-99.

105 See id. at 999.

106 See id. at 1000.

107 3 Saltzburg et al., supra note 23, § 703.02[4].

108 See id.

109 Professor Nance discusses at length these asymmetries and their interactions with both Rule 106 and common law completeness. See Dale A. Nance, A Theory of Verbal Completeness, 80 Iowa L. Rev. 825, 876-80 (1995) [[hereinafter Nance, A Theory] (discussing asymmetry created by hearsay rules as well as original document requirements); Dale A. Nance, Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence, 75 Tex. L. Rev. 51, 92-96 (1996) [hereinafter Nance, Federal Rules] (discussing asymmetry in the admissibility requirements of Rule 801(d)(1)(A) and Rule 801(d)(1)(B) that would prevent an opponent from entering the remainder of a witness's prior statement).

110 Fed. R. Evid. 801(d)(2)(A). Rule 801(d)(2) contains other rules that treat statements made by others as though they were made by an opposing party. See id. R. 801(d)(2)(B)-(E).

111 Id. R. 801(d)(2)(A).

112 4 Saltzburg et al., supra note 23, § 801.02[6][a].

113 Id.

114 Id.

115 Id. § 801.02[6][c].

116 United States v. McDaniel, 398 F.3d 540, 545 (6th Cir. 2005).

117 See Nance, A Theory, supra note 109, at 876.

118 Fed. R. Evid. 804(a).

119 Id. R. 804(a)(1); see Nance, A Theory, supra note 109, at 876.

120 See Nance, A Theory, supra note 109, at 876.

121 Fed. R. Evid. 804(b)(1).

122 See Nance, A Theory, supra note 109, at 876-77.

123 See supra Part I.B.2.

124 See Nance, A Theory, supra note 109, at 877-78.

125 Fed. R. Evid. 1007; see Nance, A Theory, supra note 109, at 877-78.

126 See Nance, A Theory, supra note 109, at 877-78.

127 For a discussion of this problem, see infra Part II.

128 Fed. R. Evid. 106; cf. Fed. R. Civ. P. 32(a)(6) ("If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.").

129 Fed. R. Evid. 106 advisory committee's note.

130 Id.

131 Id.

132 See United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

133 21A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5071 (2d ed. 2005).

134 Id.

135 Id. § 5078.1. For a more detailed discussion of the legislative history of Rule 106, see Andrea N. Kochert, Note, The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story, 46 Ind. L. Rev. 499, 513-16 (2013).

136 Fed. R. Evid. 106 advisory committee's note.

137 Echo Acceptance Corp. v. Household Retail Servs., Inc., 267 F.3d 1068, 1089 (10th Cir. 2001).

138 7 John Henry Wigmore, Evidence in Trials at Common Law § 2094 (James H. Chadbourn ed., 1978).

139 Id.

140 Id.

141 Id. § 2095.

142 Compare id., with Fed. R. Evid. 106 ("If a party introduces ... a writing or recorded statement, an adverse party may require [[its] introduction ...." (emphasis added)). On the other hand, only mandatory verbal completeness seems to require that the remainder be admitted at the same time as the portion, since the evidence is admitted either in its entirety or not at all. 7 Wigmore, supra note 138, § 2095.

143 7 Wigmore, supra note 138, § 2113 (emphasis omitted); see People v. Schlessel, 90 N.E. 44, 45 (N.Y. 1909).

144 7 Wigmore, supra note 138, § 2113.

145 Id. (internal quotation marks omitted).

146 Id.

147 Id.

148 Id.

149 Id.

150 See, e.g., Simmons v. State, 105 So. 2d 691, 694 (Ala. Ct. App. 1958) (holding that the principle of verbal completeness "makes admissible self serving statements which otherwise would be inadmissible").

151 7 Wigmore, supra note 138, § 2115.

152 Id. § 2116.

153 21A Wright & Graham, supra note 133, § 5072.1. One exception is when, in mandatory common law completeness, the proponent must offer the entire statement at the same time or else not offer any of it. 7 Wigmore, supra note 138, § 2095.

154 See 21A Wright & Graham, supra note 133, § 5072.1.

155 Id.

156 Id.

157 Fed. R. Evid. 106 advisory committee's note. One such practical reason is that a written or recorded statement has finite boundaries and can be "completed" simply by reading the whole document or playing the whole recording, whereas defining the boundaries of an oral statement is more difficult. See James P. Gillespie, Note, Federal Rule of Evidence 106: A Proposal To Return to the Common Law Doctrine of Completeness, 62 Notre Dame L. Rev. 382, 388 (1987).

158 See, e.g., United States v. Range, 94 F.3d 614, 620-21 (11th Cir. 1996); United States v. Li, 55 F.3d 325, 329 (7th Cir. 1995); United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987). But see United States v. Mitchell, 502 F.3d 931, 965 n.9 (9th Cir. 2007); United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996); United States v. Terry, 702 F.2d 299, 313-14 (2d Cir. 1983). This Note takes no position on which is the correct view, but does not exclude from consideration cases concerning oral statements if they are useful examples.

159 United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979).

160 21A Wright & Graham, supra note 133, § 5078.

161 Id.

162 United States v. Sweiss, 814 F.2d 1208, 1212 (7th Cir. 1987).

163 See id. at 1213.

164 Fed. R. Evid. 106 advisory committee's note.

165 See 1 McCormick, supra note 30, § 56, at 248-52.

166 See id.

167 Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988). The Court in Rainey declined to decide the scope of Rule 106 by finding that the evidence had a nonhearsay use. Id. at 172-74.

168 Fed. R. Evid. 106.

169 511 F.2d 482 (7th Cir. 1975).

170 Id. at 487. The court held that this test was not met when the defendant sought to introduce a remainder of his admissions to IRS agents because none of his statements in the remainder contradicted or explained the portion, namely, that the defendant failed to file his tax returns on time. See id. at 486-87. This decision interprets the common law doctrine of verbal completeness, rather than Rule 106. See id. at 486-87. The decision predates Rule 106. See Gillespie, supra note 157, at 384 n.24. However, many courts subsequently have treated McCorkle as though its holding is applicable to Rule 106. Id.; see, e.g., United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986); United States v. Crosby, 713 F.2d 1066, 1074 (5th Cir. 1983).

171 United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984) (citing United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982)); see United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992) (articulating a test weighing the same four factors but with an "and" instead of an "or"); see also United States v. Branch, 91 F.3d 699, 728 (5th Cir. 1996) (holding that Rule 106 applies only to remainders that are relevant and necessary either to qualify, explain, or contextualize the portion); United States v. Alvarado, 882 F.2d 645, 651 (2d Cir. 1989) ("[T]he rule is violated only where admission of the statement in redacted form distorts its meaning or excludes information substantially exculpatory of the declarant.").

172 Because some courts subject oral statements to the same tests as written or recorded statements, some of the following examples will be oral statements because they are able to illustrate what passes the fairness test.

173 No. 11-CR-0100-CVE, 2012 WL 1664198 (N.D. Okla. May 11, 2012).

174 Id. at *1.

175 Id. (internal quotation marks omitted).

176 Id.

177 No. 05-CR-6068L, 2009 WL 140125 (W.D.N.Y. Jan. 20, 2009).

178 Id. at *4.

179 Id.

180 See id. at *7.

181 534 F. Supp. 2d 1156 (C.D. Cal. 2008).

182 Id. at 1157.

183 Id. at 1160 (internal quotation marks omitted).

184 Id. at 1160-61.

185 Id. at 1160.

186 10 F.3d 1252 (7th Cir. 1993).

187 Id. at 1258.

188 Id. at 1259.

189 Id. Haddad's reading of Rule 106 to dispel misleading inferences is probably too broad. In Harper and Castro-Cabrera, the inferences concerned what the defendants' incomplete statements meant. See supra notes 181-85 and accompanying text. In Haddad, however, the misleading inference was not that the defendant, by confessing he knew about the drugs, was also confessing he knew about the gun. Instead, the "misleading" inference was that because the defendant knew about the drugs, he also knew about the gun. See Haddad, 10 F.3d at 1259. In this sense, the incomplete statement to the effect of, "I know about the drugs," is not really a misleading statement because that statement does not confess to knowing about the gun. It merely proves a fact--he knew about the drugs--that would make it more likely he also knew about the gun right next to it, which he denied. Determining the proper bounds of the fairness test is beyond the scope of this Note, but understanding how broad some courts have made those bounds is helpful to understanding the correct approach to admitting remainders. See infra Part III.

190 United States v. Doxy, 225 F. App'x 400, 402-03 (7th Cir. 2007).

191 Id.

192 641 F.3d 773 (7th Cir. 2011).

193 Id. at 784-85.

194 Id. The court noted that the proper way to present this theory would be for the defendant to take the stand and explain it, rather than depend on self-serving hearsay, and that this method did not violate the defendant's Fifth Amendment rights by forcing him to take the stand. Id. But see United States v. Marin, 669 F.2d 73, 85 n.6 (2d Cir. 1982) (expressing concerns that excluding a remainder would unfairly force defendants to waive their Fifth Amendment rights).

195 693 F.3d 572 (6th Cir. 2012).

196 Id. at 585.

197 Id. at 584-85. The court also found that there was no contradiction between the statements made in the portion and in the remainder. Id.

198 United States v. Crosgrove, 637 F.3d 646, 661 (6th Cir. 2011).

199 Id.

200 See, e.g., United States v. Sutton, 801 F.2d 1346, 1369-71 (D.C. Cir. 1986) (holding that portions of a phone conversation ought in fairness to be admitted under Rule 106 after the government offered into evidence several other phone conversations from different days and with different speakers).

201 399 F. App'x 641 (2d Cir. 2010).

202 Id. at 645.

203 See id.

204 See, e.g., United States v. Vargas, 689 F.3d 867, 876-77 (7th Cir. 2012) (holding that the portion of the defendant's arrest video, in which he explains he was only present with money to buy a truck, was not a necessary remainder under Rule 106 after the government played the portion of the tape in which the defendant says there is money in his shoebox).

205 Nance, A Theory, supra note 109, at 832-33.

206 Id. at 832 (portion: "Yes, I sawed him then"; remainder: "but I ain't seen him later that day").

207 Id. at 832-33 (portion: "I killed him"; full statement: "I may have killed him").

208 Id. (portion: “I killed him”; remainder: “as I would kill any invader from Mars”).

209 Id. (portion: “I shot right at him”; remainder: “but I missed”).

210 Id. (portion: “I killed him”; remainder: “in self-defense”).

211 See id. at 833.

212 488 U.S. 153 (1988).

213 Id. at 172.

214 Id. (emphasis added).

215 Id. at 156.

216 Id. at 159.

217 Id. at 159-60.

218 Id. at 160.

219 Id. at 160.

220 Id. at 172-73.

221 See id.

222 Id.

223 Id.

224 See id.

225 Id. at 173 n.18.

226 Id.

227 See id.

228 Compare United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously."), with United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) ("Rule 106 ... would not render admissible the evidence which is otherwise inadmissible under the hearsay rules.").

229 See, e.g., United States v. Bucci, 525 F.3d 116, 133 (1st Cir. 2008) ("Other circuits have held differently, but we adhere to our own precedent." (citation omitted)).

230 See Rainey, 488 U.S. at 172.

231 Fed. R. Evid. 106.

232 The tests for determining whether the remainder meets this requirement are discussed above. See supra notes 170-71 and accompanying text.

233 801 F.2d 1346 (D.C. Cir. 1986).

234 Id. at 1368.

235 See, e.g., United States v. Lentz, 524 F.3d 501, 526 (4th Cir. 2008). In cases like this, the remainders never fell within the scope of Rule 106 in the first place, because they would not pass the "in fairness" standard. See supra notes 170-71 and accompanying text.

236 United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986).

237 Id. at 981.

238 See United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

239 See United States v. Bucci, 525 F.3d 116, 133 (1st Cir. 2008); United States v. Awon, 135 F.3d 96, 101 (1st Cir. 1998).

240 See United States v. Johnson, 507 F.3d 793, 796 (2d Cir. 2007).

241 See United States v. Green, 694 F. Supp. 107, 110 (E.D. Pa. 1988), aff'd, 875 F.2d 312 (3d Cir. 1989).

242 See United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988).

243 See United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986). In this case, however, the court qualified the admissibility of the evidence, allowing it only for the limited purpose of avoiding a misunderstanding of the portion. See id.

244 See United States v. Lopez-Medina, 596 F.3d 716, 735-36 (10th Cir. 2010).

245 See United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

246 See id. at 1368 & n.16 (citing Fed. R. Evid. 402, 501, 602, 613(b), 704, 802, 806, 901(b)(10), 1002).

247 An example of this kind of proviso is found in each of the cited rules. See supra note 246. For instance, Rule 402 subjects the admissibility of relevant evidence to exceptions provided by "the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court." Fed. R. Evid. 402.

248 See Sutton, 801 F.2d at 1368.

249 See id. at 1368 n.17.

250 Id. at 1369.

251 Id. at 1366-69. Defendant Sucher was convicted of various bribery- and conspiracy-related charges when he sold information and confidential documents from the Department of Energy to defendant Sutton through several intermediaries. Id. at 1348-49. The government introduced several recorded phone conversations between Sucher and one of the intermediaries, Peacock (who was secretly cooperating with the investigation), tending to show Sucher's consciousness of guilt, because they tended to show he was afraid that two of the other intermediaries were going to turn him in. Id. at 1366-67. At trial, Sucher sought to introduce a portion of the recording of yet another conversation with Peacock, which occurred close in time to the ones introduced by the government, but the government objected on hearsay grounds. Id. at 1367. The trial court wrongly (according to the circuit court) excluded four portions of the conversation, all of which were Sucher's statements. Id. Each statement tended to clarify that he had not known he was doing anything illegal when he gave the documents to one of the intermediaries. Id. Sucher claimed that the statements would show he was not afraid that the intermediaries would truthfully report his role, but rather that he was afraid they would falsely implicate him. Id. at 1368. The trial court rejected this argument. Id.
As a side note, to the extent that the statements offered as remainders showed Sucher was afraid of being falsely implicated at the time he made them, see id., they probably could have been admitted independently of Rule 106 as statements of his then-existing state of mind. See Fed. R. Evid. 803(3).

252 596 F.3d 716 (10th Cir. 2010). For the narrative of this case, see supra notes 1-8 and accompanying text.

253 Lopez-Medina, 596 F.3d at 735-36.

254 The Tenth Circuit in Lopez-Medina declined to decide the case on other potential grounds, namely, whether the defendant waived his Confrontation Clause rights by questioning Officer Johnson about Lopez-Ahumado's plea, because the court found Rule 106 to be sufficient grounds to justify the admission of this testimony despite the Confrontation Clause. See id. at 734-35. The Confrontation Clause and how it may interact with Rule 106 is beyond the scope of this Note.

255 Id. at 723.

256 Id.

257 Id.

258 Id.

259 Id. at 724.

260 Id. at 724-25.

261 Id. at 725.

262 Id.

263 Id.

264 Id. at 729.

265 Id. (internal quotation marks omitted).

266 Id.

267 Id. at 734.

268 See supra notes 170-71 and accompanying text.

269 Lopez-Medina, 596 F.3d at 735.

270 Id. at 735-36.

271 See, e.g., United States v. Terry, 702 F.2d 299, 314 (2d Cir. 1983) ("Rule 106 does not render admissible evidence that is otherwise inadmissible.").

272 See, e.g., United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) ("[E]ven if, as Wilkerson claims, Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible under the hearsay rules.").

273 See, e.g., United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982) ("The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded.").

274 See 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." (citation omitted)).

275 Compare United States v. Mitchell, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (observing that Rule 106 "does not render" otherwise inadmissible evidence admissible), with United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996) (stating that the rule "'does not compel admission"' (quoting Phx. Assocs. III v. Stone, 60 F.3d 905, 913 (2d Cir. 1995))).

276 See Nance, Federal Rules, supra note 109, at 64-66.

277 See United States v. Adams, 722 F.3d 788, 826-27 (6th Cir. 2013); see also infra notes 291-306 and accompanying text.

278 702 F.2d 299 (2d Cir. 1983).

279 Id. at 313-14.

280 Id.

281 Id.

282 Id. The remainder was evidence of the defendants' then-existing state of mind insofar as their statement was to the effect of, "we intend to refuse giving palm prints until we speak with our lawyers first." See id. at 314.

283 84 F.3d 692 (4th Cir. 1996).

284 Id. at 696.

285 See id.

286 637 F.3d 646 (6th Cir. 2011).

287 Id. at 661.

288 See id. at 661.

289 See id.

290 See Wilkerson, 84 F.3d at 696.

291 722 F.3d 788 (6th Cir. 2013).

292 See id.

293 Id. at 799-800.

294 Id. at 826-27.

295 Id. at 826.

296 Id. at 826-27.

297 Id. at 827.

298 Id.

299 Id.

300 Id.

301 Id.

302 See id.

303 Id.

304 Id. at 826 (quoting United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982)).

305 Id. at 827.

306 Id. at 826 n.31.

307 689 F.3d 867 (7th Cir. 2012).

308 Id. at 876.

309 See id. at 870, 876.

310 No. 06-CR-20415-2, 2008 WL 2605405 (E.D. Mich. July 1, 2008).

311 Id. at *1.

312 See id. at *1.

313 No. 3:10-CR-169, 2011 WL 3843699 (E.D. Tenn. Aug. 26, 2011).

314 Id. at *7.

315 No. 05 Cr. 1182(PAC), 2007 WL 273799 (S.D.N.Y. Jan. 31, 2007).

316 Id. at *10.

317 Id. at *1.

318 Id. at *2-3.

319 Id.

320 Id.

321 Id. at *10; see also Greener v. Cadle Co., 298 B.R. 82, 91-92 (N.D. Tex. 2003) (holding that two additional business documents that were necessary for context were not hearsay at all when offered for that purpose).

322 See supra notes 307-14 and accompanying text.

323 See supra notes 315-21 and accompanying text.

324 798 F.2d 977 (7th Cir. 1986).

325 Id. at 979.

326 Id. at 980-81.

327 Id. at 981.

328 Id.

329 Id. at 981, 985.

330 684 F.2d 370 (6th Cir. 1982).

331 LeFevour, 798 F.2d at 981.

332 Id.

333 Id.

334 Id.

335 Id.

336 Id. Judge Posner's "pulling the sting" rationale has been criticized as too narrow. See Nance, Federal Rules, supra note 109, at 98 (arguing that the proponent of an incomplete statement runs the risk that the jury may use the remainder "to reach a conclusion more favorable to the opponent than it would have reached if neither part were introduced").

337 In the few instances where LeFevour has been cited in a case with an arguably inadmissible remainder, the remainder did not pass the fairness test to fall within the scope of Rule 106. See United States v. Reese, 666 F.3d 1007, 1018-20 (7th Cir. 2012) (holding that self-serving hearsay did not come in under Rule 106 because the remainder was a conversation with a different person and not contextually related to the proponent's offered portion); United States v. Pendas-Martinez, 845 F.2d 938, 943-44 (11th Cir. 1988) (holding that asking a few questions on cross-examination about a document summarizing the government's case theory did not effectively enter a portion of the document into evidence so as to allow the prosecution to offer the rest as a remainder); United States v. Vargas, No. 08 CR 630, 2011 WL 116826, at *2 (N.D. Ill. Jan. 6, 2011) (holding that a defendant who made inculpatory statements in a conversation--offered by the prosecution in its entirety--was not entitled to offer exculpatory statements from a later conversation).

338 See supra note 214 and accompanying text; see also Donald F. Paine, The Rule of Completeness, 38 Tenn. B.J. 31, 31 (2002) ("The best approach is to handle the problem with an instruction to the jury. If the contextual statement is otherwise inadmissible hearsay, the judge should instruct the jury to consider it only as affecting the weight given the original statement.").

339 See supra note 226 and accompanying text.

340 See supra Part I.B.

341 See supra notes 35-37 and accompanying text.

342 See supra notes 72-73 and accompanying text.

343 See supra note 46 and accompanying text.

344 See supra notes 14-17 and accompanying text. It would not make sense to say, for example, that irrelevant evidence is admissible if it is offered for a different purpose than the one for which it is irrelevant. Nor, for that matter, would it make sense to say that evidence that is substantially more prejudicial than probative is still admissible for a different purpose, because "undue prejudice" is defined as using evidence for an impermissible reason. See supra notes 16-17 and accompanying text.

345 See supra note 42.

346 See supra notes 72-78 and accompanying text.

347 See supra note 214 and accompanying text.

348 See supra note 226 and accompanying text.

349 See supra notes 21-25 and accompanying text.

350 See supra notes 16-17 and accompanying text. Gilliam provides a good analogy: when the defense tried to mislead the jury by making it look like the officer's reason for returning to the scene was to harass the defendant, rather than to respond to the anonymous phone call about the second gun, the probative value of admitting the statement about the gun for "context" increased. See United States v. Gilliam, 994 F.2d 97, 103-04 (2d Cir. 1993); supra note 91 and accompanying text. Of course, if a portion is so misleading that a remainder is necessary, but the misleading impression it creates is not particularly damaging, while the remainder is highly prejudicial, the court would be right to exclude the remainder. See Fed. R. Evid. 403.

351 The defendant would have offered this statement under the party-opponent exemption because the plaintiff is the party-opponent, but the plaintiff is not the party-opponent to herself, and thus could not offer her own statements under this exemption. See supra notes 110-11 and accompanying text.

352 See supra notes 35-37 and accompanying text.

353 See supra notes 224-25 and accompanying text.

354 See supra notes 35-37 and accompanying text.

355 See supra notes 123-26 and accompanying text.

356 See supra notes 123-26 and accompanying text.

357 See supra notes 214, 225-26 and accompanying text.

358 See supra note 46 and accompanying text.

359 See supra notes 72-76 and accompanying text.

360 See supra note 46 and accompanying text.

361 Smith provides another good analogy in the expert witness context: the court found that testifying to the contents of documents to explain expert conclusions was not the same as testifying to prove the content of those documents. See United States v. Smith, 566 F.3d 410, 412-14 (4th Cir. 2009); supra note 51 and accompanying text. For further discussion of the analogies between nonhearsay use under Rule 703 and for "context" of necessary remainders, see infra notes 371-77 and accompanying text.

362 See supra Part I.C.4.

363 See supra Part I.B.

364 See supra notes 112-16 and accompanying text.

365 See supra notes 115-16 and accompanying text.

366 Rainey's holding that a necessary remainder is not hearsay solves all of the asymmetries of the hearsay rule. See supra notes 110-22 and accompanying text. For a discussion of how this theory of remainder admissibility solves the asymmetries of the original document rule, see supra notes 355-61 and accompanying text.

367 Compare supra note 143 and accompanying text, with supra notes 170-71 and accompanying text.

368 See supra notes 143-50 and accompanying text.

369 See Nance, A Theory, supra note 109, at 832.

370 See supra notes 256-57 and accompanying text.

371 See supra notes 100-06 and accompanying text.

372 Fed. R. Evid. 801 (emphasis added).

373 See supra notes 256-57 and accompanying text.

374 See Paine, supra note 338, at 31. In fact, it is possible to analyze each of Nance's categories in this way. See supra notes 205-11 and accompanying text. In category I, "but I ain't seen him later that day" does not prove that the declarant did not see the person, but only that when the declarant said "I sawed him then," "sawed" does not mean "to cut with a saw." See supra note 206 and accompanying text. In category II, the remainder, "may have," is not affirmative proof that the declarant "may have" killed someone, but rather it shows that the statement, "I killed him" is not certain. See supra note 207 and accompanying text. In category III, the remainder, "as I would kill any invader from Mars," need not prove the declarant's steadfastly violent patriotism for Earth, but need only qualify the inference that "I killed him" is a credible confession. See supra note 208 and accompanying text. In category IV, "but I missed" may be credited as true for the purposes of dispelling the inference that "I shot right at him" means "I shot him," but not as independent evidence that the speaker missed, were such proof relevant for some reason. See supra note 209 and accompanying text. Finally, in category V, the remainder "in self-defense" could be used to counter the inference that "I killed him" was an unqualified confession, but not as affirmative proof that the declarant did kill in self-defense. Thus, if the declarant had the burden to prove self-defense, this statement could not be used to meet that burden and the judge should instruct the jury accordingly. See supra note 210 and accompanying text.

375 See supra note 106 and accompanying text.

376 See supra note 265 and accompanying text.

377 See supra notes 100-05 and accompanying text.

378 See supra notes 93-96 and accompanying text.

379 See supra note 91 and accompanying text.

380 See supra note 214 and accompanying text.

381 See supra notes 128-31 and accompanying text.

382 See supra notes 170-71 and accompanying text.

383 See supra note 214 and accompanying text.

384 See supra note 226 and accompanying text.

385 See supra notes 170-71 and accompanying text.

386 See supra note 214 and accompanying text.

387 See supra notes 153-56 and accompanying text.

388 See supra note 153 and accompanying text.

389 Perhaps Rule 611(a), which controls order of proof, would allow a judge the discretion to admit the remainder as soon as the portion is offered, see supra notes 19-20 and accompanying text, but Rule 106 insists upon it more forcefully and is more explicit. See supra notes 153-56.

390 See supra notes 60-67 and accompanying text.

391 See supra notes 170-71 and accompanying text.

392 Fed. R. Evid. 106 advisory committee's note.

393 See supra Part II.A.

394 See supra Part III.A.

395 Other commentators have found differently. See Nance, Federal Rules, supra note 109, at 96 ("[T]he remainder should be admissible for any purpose as to which the original incomplete part is admissible and as to which the former qualifies or explains the latter."); Kochert, supra note 135, at 517-18, 527 (endorsing Judge Posner's view in LeFevour).

396 See supra notes 128-31 and accompanying text.

397 See supra notes 153-56 and accompanying text.

398 See supra notes 173-204 and accompanying text.

399 See supra notes 128-31 and accompanying text; see also supra notes 335-36 and accompanying text (discussing how the rule in LeFevour limited the use of remainders to "pulling the sting" of misleading evidence).

400 See supra notes 260-62 and accompanying text. Lopez-Medina is an unusual example because there is no clear evidentiary basis for admitting the half-brother's plea in the first place, which is why the prosecution objected initially. See supra note 257 and accompanying text. One might argue that this entire case falls outside the scope of Rule 106 because the portion was not admissible, and thus its instructive value is limited. However, this fear is unfounded, because it is possible to imagine an alternate fact pattern in which Lopez-Ahumado's statement that the drugs were his would be excepted from hearsay while his statement incriminating his brother would not be. For example: Imagine Lopez-Ahumado is speaking to a confidential informant who, unbeknownst to him, is wearing a recording device. When the police arrive at Lopez-Ahumado's home, he watches as they approach the truck and confiscate the methamphetamine from inside of it. He turns to the informant as this is happening, becomes agitated, and yells, "Those officers are taking my drugs!" A few moments pass, Lopez-Ahumado calms himself, and the police have moved away from the truck when Lopez-Ahumado says to the informant, "Looks like the police took the drugs that belonged to me and my brother." At trial, the defense seeks to enter the first part of the statement as an excited utterance, and is successful because it is an exception to hearsay. See Fed. R. Evid. 803(2); supra note 63 and accompanying text. When the defense offers the first part at trial to argue once again that Lopez-Ahumado was the sole possessor of the drugs, the remainder would not be excepted from hearsay if Lopez-Ahumado were no longer excited or agitated when he said it, so the remainder could not come in for the truth. The court would be left to decide whether the remainder, implicating the brother, ought in fairness to be admitted under Rule 106. See supra Part I.D.4.

401 See supra notes 264-65 and accompanying text.

402 See supra notes 128-31 and accompanying text.

403 In this context, Nance's criticism of LeFevour seems unfounded. See supra note 336. Here, while it may have been tactically unwise for the defendant to enter his brother's plea into evidence, the consequence that his brother's statement became affirmative evidence of his guilt is too important to be explained away as a "risk" he had to "bear" when introducing the statement. See Nance, Federal Rules, supra note 109, at 98. Here, merely using the remainder to "pull[] the sting" is a fairer result. See United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986).

404 See supra notes 260-66 and accompanying text.

405 See supra note 113 and accompanying text.

406 See supra notes 351-54 and accompanying text.

407 See supra notes 35-36 and accompanying text. This problem is only compounded when courts apply a fairness test that is broader than it probably should be. Under the Sutton approach, in Haddad, the remainder to the effect of, "I didn't know about the gun," would be admitted for its truth, rather than merely to clarify for the jury that the defendant had not confessed to possessing everything under the bed. See supra notes 186-89 and accompanying text. Absent a limiting instruction, the defense attorney could then argue that statement as though the defendant said it in court. See supra note 32 and accompanying text. This would open a back door through the party opponent rule for remainders that probably were not necessary in the first place. See supra notes 115-16 and accompanying text; supra note 189.

408 See supra note 42.

409 See supra notes 42, 345 and accompanying text. United States v. West provides an interesting example of what this might look like. United States v. West, 962 F.2d 1243 (7th Cir. 1992). Although not a Rule 106 case, West implicates "completeness." In a bank robbery case, a court-appointed doctor examined the defendant to assist him in preparing an insanity defense. Id. at 1244-45. The doctor found that, although the defendant had a schizoaffective disorder on the day he robbed the bank, he still understood the wrongfulness of the crime as he was committing it. Id. at 1245. Because not understanding the difference between right and wrong is the standard for legal insanity, such a finding was inconsistent with that defense. Id. However, the doctor's conclusion that the defendant knew right from wrong when he robbed the bank was inadmissible because Rule 704(b) bars an expert from testifying as to whether the defendant was legally insane. Id. at 1246-47; see supra note 42. The Seventh Circuit held that the doctor should have been allowed to testify, in support of the insanity defense, that the defendant had the psychological disorder, but should have been barred from testifying that the defendant knew right from wrong on the day of the crime. Id. at 1250. The court conceded that this result made little sense, but found that the legislative policy behind Rule 704(b) demanded it. Id. at 1248-49.
This case addresses a similar concern as Rule 106: if the doctor testified that the defendant had a psychological disorder (this is like the portion), the jury might be misled into thinking the doctor concluded the defendant did not know right from wrong when he committed the robbery, when in fact the doctor reached the exact opposite conclusion (the remainder). See id. at 1246-47. The court in West was willing to reach what it found to be an illogical result because Rule 704(b) clearly excluded the remainder without qualification. See id. at 1247-50.
Under the same rationale, Rule 106 should not be interpreted to admit a remainder that violates a strict exclusionary rule of evidence. One can imagine, for example, a remainder concerning an alleged victim's sexual behavior that, if offered during the defendant's case in chief, would be barred by Rule 412 unless it met one of the exceptions. See supra note 42. The policy concerns underlying this strong prohibition should not change just because the sexual behavior evidence is contained within a necessary remainder. See supra note 43. If the portion without the remainder is so misleading as to be unduly prejudicial, the entire statement may still be excluded under Rule 403. See supra note 334 and accompanying text.

410 See supra Part II.B.

411 See supra notes 307-14 and accompanying text. Because courts have misunderstood the role of Rule 106, they have often applied the fairness test rather than applying the test in Rainey. See supra notes 307-14 and accompanying text. But what they are actually skipping is the Rainey test.

412 See supra notes 338-43 and accompanying text.

413 See supra notes 315-21 and accompanying text.

414 See supra notes 309-13 and accompanying text.

415 See supra notes 309-10 and accompanying text.

416 See supra notes 302-08 and accompanying text.

417 See supra notes 312-13 and accompanying text.

418 See supra Part II.C.

419 See supra notes 330-34 and accompanying text.

420 United States v. LeFevour, 798 F.2d 977 (7th Cir. 1986).

421 Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988).

422 See supra notes 330-34 and accompanying text.

423 See supra notes 14-15, 212-14 and accompanying text.

424 See supra notes 163-64 and accompanying text.

425 See, e.g., Fed. R. Evid. 801(d), 803-804.

426 See Fed. R. Evid. 1003-1004, 1007.

427 See supra notes 170-71 and accompanying text.

428 See Fed. R. Evid. 105. Of course, if a limiting instruction would be required for any other reason unrelated to this analysis, it should still be given.

429 See supra notes 170-71 and accompanying text.

430 See supra note 171 and accompanying text.

431 See supra note 170 and accompanying text.

432 This is because other kinds of objections will likely require the court to determine whether the evidence is admitted for a proper purpose, and the admission of such remainders will turn on whether the remainder is correctly offered for "context." See supra Part I.B.

433 See supra Part I.B.

434 See supra notes 430-31 and accompanying text.

435 See, e.g., Fed. R. Evid. 704(b).

436 See, e.g., id. R. 412.

437 See supra notes 408-09 and accompanying text.

438 See supra notes 408-09.

439 See supra notes 16-17, 21-25 and accompanying text.

440 See supra notes 21-25, 100-06 and accompanying text.

441 See Fed. R. Evid. 403.

442 See id.

443 See supra notes 21-24 and accompanying text.

444 See supra notes 214, 226 and accompanying text.

445 See supra notes 371-77 and accompanying text.

446 See supra notes 371-77 and accompanying text.

447 See supra note 214 and accompanying text; see also Fed. R. Evid. 106 advisory committee's note.

448 Fed. R. Evid. 105.

449 Cf. supra note 106 and accompanying text.

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Tab 4

URE 404. Character Evidence; Crimes or Other Acts
Supreme Court Conference
May 13, 2020

Judge Welch and John Lund met with the Supreme Court on May 13th to seek feedback and guidance on the Committee's questions regarding URE 404. Specifically, the Committee sought answers to the following:

1. Does the Court want to exercise its rule-making authority to promulgate 404(d), or does it feel that explicitly permitting the use of similar crimes in sexual assault cases is a policy question best left to the legislature?

2. Does the Court want to incorporate the requirements of the Doctrine of Chances as delineated in Utah case law into Rule 404 (outlined in the rule draft)? Or, would the Court prefer that Utah case law continue to address the requirements/workings of the Doctrine of Chances on a case-by-case basis? In addition, does the Court have thoughts on whether a model jury instruction regarding the doctrine of chances should be pursued?

The Committee's latest draft of URE 404 was attached, not for approval, but to facilitate the discussion. Below is a summary of the discussion:

1. **Whether to incorporate 404(d) (which, in effect, adds a FRE 413 provision to URE 404):** The Justices want the Evidence Advisory Committee to discuss and debate the underlying policy issues regarding 404(d) (as proposed). The Justices indicated that this issue is within the Court's rule making authority (it is not an issue for the Legislature). The Evidence Advisory Committee is to vote on whether 404(d) should be promulgated.

****Note: To aid the Committee's discussion of policy issues re: 404(d), read this law review article: "The Politics Behind Federal Rules of Evidence 413, 414, and 415" by Michael S. Ellis.*

2. **Whether to incorporate the Doctrine of Chances (DOC) into URE 404:** Justice Lee indicated that it would NOT be helpful to have the foundational requirements of the DOC as part of URE 404. He did, however, indicate that it might be helpful if URE 404 addressed the applicability/scope of the DOC (i.e., what are the types of cases where the DOC would and would not apply?). The Committee is tasked with deciding this issue.

****Note: To understand the current controversies that are entailed in this issue, it is important for the Committee members to read Judge Harris's concurrences in the following two cases: (1) State v. Lane, 2019 UT App 86, and State v. Murphy, 2019 App 64.*

Draft of URE 404 with two additions: (1) a Doctrine of Chances provision, and (2) A FRE 413 type provision.

Rule 404. Character Evidence; Crimes or Other Acts.

(a) Character Evidence.

(a)(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(a)(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(a)(2)(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(a)(2)(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(a)(2)(B)(i) offer evidence to rebut it; and

(a)(2)(B)(ii) offer evidence of the defendant's same trait; and

(a)(2)(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(a)(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(b)(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(b)(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(b)(2)(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(b)(2)(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(b)(3) Permitted Uses; Doctrine of Chances. The court may admit prior act evidence for a proper, non-character statistical inference under the Doctrine of Chances. This Doctrine is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over. Doctrine of Chances evidence involves rare events happening with unusual frequency.

(b)(3)(A) Evidence admitted under the Doctrine of Chances must meet the following four foundational requirements, and the trial court shall make specific findings with respect to each of these.

(b)(3)(A)(1) Materiality. The issue for which the uncharged misconduct evidence is offered must be in bona fide dispute.

(b)(3)(A)(2) Similarity. Each uncharged incident must be roughly similar to the charged crime, and there must be some significant similarity between the charged and uncharged incidents to suggest a decreased likelihood of coincidence, and thus an increased probability that the defendant committed all such acts.

(b)(3)(A)(3) Independence. Each accusation must be independent of the others. The existence of collusion among various accusers would render ineffective the comparison with chance repetition.

(b)(3)(A)(4) Frequency. The defendant must have been accused of the crime or suffered an unusual loss more frequently than the typical person endures such losses accidentally.

(b)(3)(B) The trial court shall determine by a preponderance of the evidence whether the prior acts occurred.

(b)(3)(C) Evidence admitted under the Doctrine of Chances is subject to admission under Rule 403.

(b)(3)(D) In all cases in which Doctrine of Chances evidence is admitted, the trial court shall instruct the jury as to the proper use of such evidence. The jury shall be instructed on both the permitted and prohibited uses of the Doctrine of Chances evidence.

(b)(3)(E) The notice requirements in 404(b)(2) apply to Doctrine of Chances evidence.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(c)(1) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(c)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(c)(3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c)(4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

(d) Evidence of Similar Crimes in Sexual Assault Cases.

(d)(1) Permitted Uses. In a criminal case in which a defendant is accused of sexual assault, the court may admit evidence that the defendant committed any other acts of sexual assault to prove a propensity to commit the crime charged.

(d)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(d)(3) For purposes of this rule "sexual assault" means an act committed under state law as defined in [Utah Code Section 76-5-405; insert other pertinent code sections].

(d)(4) Rule 404(d) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Effective April 1, 2008

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Original Advisory Committee Note. Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of State v. Doporto, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. The court should consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).