AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

April 13, 2021 / 5:15 p.m. – 7:15 p.m.

Meeting held via WEBEX

Approval of Minutes • *February 9, 2021*	Action	Tab 1	John Lund
URE 507.1 back from public comment • No comments • SB 53 passed (effective July 1, 2021)	Discussion	Tab 2	Chris Hogle
Supreme Court Conference Update: • URE 512 (out for public comment) • URE 1101 (out for public comment) • URE 106 (SC sent back to Committee)	Action	Tab 3	Judge Welch Keisa Williams
URE 404(b): Doctrine of Chances	Action	Tab 4	Judge Welch
URE 504 Subcommittee	Action	Tab 5	Nicole Salazar-Hall Jennifer Parrish Melinda Bowen
URE 506. Physician and mental health therapist-patient • *State v. Bell*	Discussion	Tab 6	John Lund Dallas Young

Queue:

- Ongoing Project: Law Student Rule Comment Review

2021 Meeting Dates:
June 8, 2021
September 14, 2021
October 12, 2021
November 9, 2021

Rule Status:
URE 106 – Back to Committee
URE 404 – Committee. Will send 404(b) and (d) together.
URE 504 - Committee
URE 506 – Creating subcommittee
URE 507.1 – Committee. Back from public comment
URE 512 – Out for public comment
URE 1101 – Out for public comment

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
February 9, 2021
5:15 p.m.-7:15 p.m.
Via Webex

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Melinda Bowen	Adam Alba		Keisa Williams
Teneille Brown	Deb Bulkeley		Minhvan Brimhall
Sarah Carlquist	Nicole Salazar-Hall		
Tony Graf			
Mathew Hansen			
Ed Havas			
Chris Hogle			
Hon. Linda Jones			
John Lund, Chair			
Hon. Richard McKelvie			
John Nielsen			
Jennifer Parrish			
Hon. Vernice Trease			
Hon. Teresa Welch			
Hon. David Williams			
Dallas Young			

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1. WELCOME AND APPROVAL OF MINUTES:

Mr. Lund asked for any corrections to the January 12, 2021 meeting minutes. The committee identified a typo, "doctrine of change." Teneille Brown moved to approve the minutes as amended. Sarah Carlquist seconded the motion. The motion passed unanimously.

2. Legislative Rapid Response Subcommittee:

- URE 507.1 (NEW)
- HJR 009

Mr. Hogle: New rule 507.1 is modeled after URE 507, the privilege rule for first responders. BESTs would include individuals who typically respond to calls regarding a potential crime or

disturbance and they may hear something that could be evidence of a crime. We included exceptions to the physician-patient rule because it didn't seem like the BEST privilege should be broader than the physician-patient privilege. We received positive feedback from the director of medical services.

Mr. Hansen: In Davis County, sheriff's deputies are employed and trained as both deputies and EMTs. Under the rule, anything a mentally ill person said on the scene could be considered privileged, but it may also be probable cause for an arrest. How would this rule apply under those circumstances?

Mr. Hogle: It may depend on the reasonableness of the perception of the person making the communication. The Department of Health is creating guidelines. There will need to be some way to differentiate between the two roles. If it's a behavioral health intervention, the communication would likely be covered by the privilege, but that would need to be clearly announced.

Ms. Carlquist: The rule seems to be focused more on the patient's reasonable belief of the role the person is playing to determine whether the privilege is triggered. I like that; it solves part of the problem. Maybe the sheriff/EMT should have an idea about whether they're responding to a crime or a mental health crisis. They could introduce themselves as a BEST and advise the individual that anything they say will be privileged.

Mr. Hogle: A lot of this will be driven by the guidelines. The idea behind the legislation is to prevent the unnecessary escalation of a mental health crises by sending untrained responders. SB 53 passed the Senate, but I'm not sure if it passed the House. The rule won't take effect until the guidelines are in place.

Mr. Young: This is part of Senator Thatcher's broader initiative to establish a 988 mental health crisis number. With time and public education, these concerns will diminish.

Mr. Lund: House Joint Resolution 9 (HJR 9) is circulating at the Legislature. It adds the 404(d) language we've been discussing. I'm not sure where things stand. Our 404(d) work is complete, but we were asked to wait and incorporate the doctrine of chances amendments at the same time.

Ms. Williams: This came from Representative Handy through Mike Drechsel. Mike let him know that the Committee has been engaged in this work for a while. Rep. Handy said that HJR 9 isn't going anywhere this session, he just wanted to get it on the legislature's radar in order to make it a study item during the interim session.

3. Supreme Court Memos and rule drafts:

- URE 512
- URE 1101
- URE 106

URE 512:
Ms. Williams: The changes I incorporated in the rule draft where discussed by the Committee at an earlier meeting. The rule draft and memo are ready for review and approval for presentation to the Supreme Court.

Mr. Nielsen: Does the reference to the rules of criminal procedure in (e)(2) refer to a particular rule of criminal procedure, or should it be Rule 7 of rules of civil procedure?

Ms. Carlquist: Wouldn't this apply to civil cases as well?

After further discussion, the Committee determined that a reference to the rules of procedure is unnecessary. Ms. Williams will refer the issue to the rules of criminal procedure to see if they want to articulate a process for these motions.

Mr. Lund: Elsewhere in the rules, language regarding exceptions to privileges isn't framed as "disclosures that waive" or "disclosures that do not waive" the privilege. I recommend changing the title of (e) to "Exceptions" and mirroring the language in other rules by amending the end of (e)(1) to "…the privilege in paragraph (b) does not apply in the following circumstances..."

The Committee agreed with Mr. Lund's proposed amendments and made a few minor changes to the memo. Mr. Neilsen moved to approve URE 512 and the memo as amended. Mr. Hogle seconded and the motion passed unanimously.

URE 1101:
Mr. Lund: The memo is a great summation of where we are with URE 1101 and it's exactly the kind of work the Court really appreciates. The Committee already approved the rule draft. This is just on for review.

After discussion, the Committee agreed to send the memo and rule draft to the Supreme Court as drafted.

URE 106:
Judge Welch: At the last meeting, the Committee voted to send URE 106 to the Supreme Court with a recommendation that it be published for comment. The memo includes both the majority and minority views and addresses other issues the Court asked the Committee to consider. The Court asked how URE 106 would interplay with URE 403, recommended a new committee note,

and asked what scholars and other states are saying about URE 106 issues. I also noted that the federal rules committee has been looking at amending FRE 106.

Mr. Lund: The Committee voted to approve the rule draft at the last meeting. This is on for a review of the memo.

After further discussion, the Committee cleaned up the formatting in the rule draft to clearly identify the proposed amendments and noted that there were a few typos in the memo. With those changes, the Committee agreed to send the rule and memo to the Court as amended.

4. Doctrine of Chances:

Judge Welch: The subcommittee is divided on the best approach. There are two different rule drafts and committee notes for consideration. We are looking for feedback from the Committee and maybe a vote. The subcommittee can then prepare a memo for the Court and bring it back to the next meeting.

The subcommittee also recommends that the Supreme Court ask the appropriate advisory committee to create a model jury instruction on the application of the Doctrine of Chances. A jury instruction was recommended by Judge Harris in his concurring opinion in *State v. Lane* and by Professor Imwinkelried in a recent law review article.

The first proposed rule draft by Mr. Nielsen includes a short, one-sentence amendment in URE 404(b)(2). The committee note then flushes out the Doctrine of Chances, referring to the four foundational requirements, and references important caselaw.

The second proposed rule draft by Ms. Carlquist includes standalone subsection (b)(3), addressing the Doctrine of Chances. Mr. Young recommended incorporating the word "statistical." The committee note is more succinct and does not include references to caselaw.

Ms. Carlquist: My understanding is that the Supreme Court wants a very simple, clean rule. Every practitioner knows what the 404(b)(2) permitted uses are, so creating a standalone subsection is less of a shock to the system. Admitting something under the Doctrine of Chances is a very different analysis from the traditional 404(b)(2) analysis. The Supreme Court discussed unusual statistical frequency in *State v. Argueta*, saying judges can't rely on their gut because their own personal experience may influence their decision. What a judge thinks is rare may actually be more common.

Mr. Neilsen: I put the Doctrine of Chances language under (b)(2) because that is the "permitted uses" section and the Doctrine of Chances is a permitted use. I understand the *Argueta* position on statistical frequency, but I think there are circumstances where you don't need an expert witness to provide statistics on how many people have been accused of killing brides in

bathtubs. Some things can be intuitive, *Argueta* notwithstanding. There are certainly circumstances where statistical evidence should be required, but I didn't want to give the impression that it's required in every circumstance.

Ms. Parrish: I prefer the body of the rule in example #1 and the committee note in example #2. If we went with example #2, (b)(3) should be under (b)(2) because it is a permitted use.

Mr. Lund: The committee note in example #1 reads like it ought to be in the rule. I'm concerned that the Court would ask why it isn't incorporated in the language of the rule itself.

Judge Williams: I agree. If we start listing a whole host of cases, what do we do when there's a new case or one of those cases gets overruled? Are we going to be policing that?

Judge Welch: The first time this rule proposal went to the Court, they said it wouldn't be helpful to include the four foundational requirements in the rule itself and that it would be more helpful for the rule to address applicability.

Mr. Hogle: I think it's helpful to include case citations. Without those citations in the committee note, if an important case is overruled, it won't be as easy for practitioners to find. Everyone knows (or should know) that you should shephardize a case before relying on it. I prefer the committee note in example #1.

Judge Welch: Normally I wouldn't advocate for a note with a lot of caselaw, but it's so important here. Caselaw really fleshes out how the Doctrine of Chances works. This is a doctrine that was created and developed in caselaw. I recommend a committee note with at least the fundamental cases.

Mr. Lund: Isn't a doctrine and a theory the same thing? I can't think of a rule of evidence that uses the word "theory," much less "doctrine." I think the Doctrine of Chances itself is a pretty discrete, definable element. I'm worried about adding the word "theory" as well. Is it necessary? Also, is it possible to create a new standalone section titled "Doctrine of Chances" and then articulate what it is with either example #1 or #2 language, but not use the term "Doctrine of Chances" again?

Ms. Carlquist: I agree that we could get rid of "theory."

Mr. Young: I agree with Judge Welch. If someone is new to the Doctrine of Chances, it might be hard for them to find the fundamental cases. They may get there by searching "doctrine of chances," but I think this lends itself to an inexperienced practitioner.

Mr. Neilsen: I agree with Mr. Young. I think we need the phrase "Doctrine of Chances" in the rule somewhere.

Mr. Lund: I think the first two sentences in the committee note in example #2 address that issue. I don't think the term "Doctrine of Chances" should be in the body of the rule at all, but I would support making it a heading. I think our job is to articulate how the doctrine can be applied as opposed to just saying, "Doctrine of Chances." Does it do that now? I think explaining the four foundational requirements would be more important for a practitioner than just using the phrase.

Judge Welch: The problem with just including the sentence in (b)(2) in example #1 is that caselaw says that evidence may be admitted only if you meet certain requirements. What we're wrestling with is how to include the foundational requirements. Right now, they are in the committee note. We could make a recommendation and let the Court decide whether they want to move it into the rule. I do think we need the phrase "Doctrine of Chances" in the rule itself because it is the mechanism by which evidence involving rare events can come in.

Mr. Havas: After hearing that the Doctrine of Chances is fleshed out and informed by caselaw, I think we should include case citations in the committee note, especially after the Court told us they don't want all of the foundational requirements in the rule itself. In example #1, I would delete the word "theory" in (b)(2) and keep the more expansive committee note with case citations.

Judge Welch: I agree with Mr. Havas.

Ms. Carlquist: I agree as well, but I wonder if by tacking the sentence onto the end of (b)(2), someone will see it as limiting the other permissible purposes. Do you need multiple incidents just to prove intent?

Mr. Neilsen: I tried to address that by saying, "may also be admitted."

Ms. Carlquist: One of the concerns brought up in *State v. Lane* was that 404(b) prohibits the use of evidence for propensity purposes, so there was some question about whether it's fair to use the Doctrine of Chances. Does that really just give rise to propensity evidence? And then in *State v. Murphy*, Judge Harris said if the goal of 404(b) evidence is to prohibit the, "he did it before, he'll did it again" inference, any statistical or probability evidence you're using about the defendant's character to rebut the truth of an alleged victim's statement can only give rise to a propensity inference, violating the 404(b) purpose of prohibiting propensity reasoning. I agree that the committee note in example #2 feels very rule-like and substantive, but I'm happy to write that portion of the memo. In a footnote in *State v. Richins*, the Court of Appeals said that when Doctrine of Chances evidence is used to rebut claims of fabrication, it's just straight out propensity evidence. That case is before the Supreme Court right now so they're probably going to decide the issue.

Mr. Lund: Can we merge the two committee notes to address some of those issues?

Mr. Neilsen: This is somewhat of a philosophical question. Judge Harris doesn't think it's possible to show a prior act without saying something about who someone is. He said the whole point of the 404 character bar is to say you can't infer that somebody did something based on an inference about the character of who they are. I disagree. I think it's valid to show a pattern of intent without saying they're a bad person - they acted with the same motive, the same state of mind. The committee note in example #2 says the evidence may not be admitted to rebut a claim of self-defense or fabrication, but that is the core 404(b) evidence.

Mr. Havas: I purposely avoided using "statistical frequency" in my proposed language because I think that has the potential to cause confusion or be misleading. I think it should be frequent and rare, but whether it is statistically significant adds a different element than is necessary.

Mr. Hogle: I agree with Mr. Havas. Let's leave that to caselaw.

Mr. Young: I made that suggestion because it was an important consideration in *Argueta*. The assessment of frequency cannot be based solely on intuition, but it gets tricky when you talk about whether something is statistically significant. That term means something entirely different to someone in social sciences or statistics. It seems like the *Argueta* court left the window open for judicial notice that something is sufficiently rare. It doesn't have to be "statistical," but I would prefer having something in the rule to signal that trial courts aren't supposed to just fly by the seat of their pants when making that assessment.

Mr. Havas: I agree with Mr. Young. I was opposed to the term "statistical" because it could be interpreted differently in other fields. I think what the court was talking about is that this is supposed to be based on evidence, not on gut reaction or intuition. I think that could be adequately addressed in a committee note.

Mr. Neilsen: I recommend removing "statistical" and changing (b)(2) in example #1 to read, "Evidence of rare events shown to occur with unusual frequency may also be admitted under the doctrine of chances."

Mr. Young moved to approve the revised version of the rule draft in example #1 and to have the subcommittee further develop the committee note along the lines of the Committee's discussion. Mr. Hogle seconded and the motion passed unanimously. The Committee also agreed to include a recommendation that the Court refer the issue to the appropriate advisory committee to create a model jury instruction.

5. URE 504 Subcommittee:

- **LPPs and Regulatory Sandbox**

Mr. Lund: As a reminder, we have some privilege work to do around the regulatory sandbox and licensed paralegal practitioners. It would likely be a revision to the client privilege rule. Ms.

Parrish, Ms. Salazar-Hall, and Ms. Bowen have agreed to sit on the subcommittee. They will bring something back for the Committee's review at the next meeting.

Next Meeting: April 13, 2021, 5:15 pm, Webex video conferencing

Tab 2

Rule 507.1. Behavioral Or Medical Emergency Services Technician-Patient

(a) Definitions

(a)(1) "Patient" means a person who consults or is examined or interviewed by a behavioral or medical emergency services technician.

(a)(2) “Behavioral or medical emergency services technician” means a person who:

(a)(2)(A) is or is reasonably believed by the patient to be delivering medical, mental or emotional health services in an emergency context within a scope and in accordance with guidelines established by the Utah Department of Health as a behavioral emergency services technician, paramedic, or emergency medical services technician; and

(a)(2)(B) is engaged in the diagnosis or treatment of a mental, emotional, or medical condition.

(a)(3) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(a)(4) "Mental health therapist" means a person who:

(a)(4)(A) is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and

(a)(4)(B) is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) **Statement of the Privilege.** A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a medical or behavioral emergency services technician for the purpose of diagnosing or treating the patient. The privilege applies to:

(b)(1) diagnoses made, treatment provided, or advice given by a medical or behavioral emergency services technician;

(b)(2) information obtained by a behavioral or medical emergency services technician through examination of the patient; and

(b)(3) information transmitted among a patient and a behavioral or medical emergency

services technician and other persons who are participating in the diagnosis or treatment under the direction of a physician or mental health therapist. Such other persons include guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) **Who May Claim the Privilege.** The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician, mental health therapist, or behavioral or medical emergency services technician at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) **Exceptions.** No privilege exists under paragraph (b) in the following circumstances:

(d)(1) **Child Neglect or Abuse.** For communications to a behavioral or medical emergency services technician that is evidence of actual or suspected child neglect or abuse.

(d)(2) **Danger to Patient or Others.** For communications to a behavioral or medical emergency services technician that is evidence a patient is a clear and immediate danger to the patient or others.

(d)(3) **Condition as Element of Claim or Defense.** For communications relevant to an issue of the physical, mental, or emotional condition of the patient:

(d)(3)(A) in any proceeding in which that condition is an element of any claim or defense; or

(d)(3)(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense.

(d)(4) **Hospitalization for Mental Illness.** For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; and

(d)(5) **Court Ordered Examination.** For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

Effective date to coincide with the effective date of Department of Health guidelines governing the function and scope of Behavioral Emergency Service Technicians.

BEHAVIORAL EMERGENCY SERVICES AMENDMENTS

2021 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Daniel W. Thatcher

House Sponsor: Jefferson S. Burton

LONG TITLE

General Description:

This bill enacts requirements and provisions relating to behavioral emergency services technicians.

Highlighted Provisions:

This bill:

- defines terms;
- creates a new license for behavioral emergency services technicians and advanced behavioral emergency services technicians;
- requires the Utah Department of Health to administer the license, including setting initial and ongoing licensure and training requirements;
- enacts provisions relating to the new license for behavioral emergency services technicians, including certain testimonial exceptions; and
- makes technical and corresponding changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a special effective date.

Utah Code Sections Affected:

AMENDS:

26-8a-102, as last amended by Laws of Utah 2019, Chapter 265

26-8a-103, as last amended by Laws of Utah 2017, Chapters 326 and 336

26-8a-206, as enacted by Laws of Utah 1999, Chapter 141

26-8a-302, as last amended by Laws of Utah 2017, Chapter 326

26-8a-307, as enacted by Laws of Utah 1999, Chapter 141

78B-5-901, as enacted by Laws of Utah 2018, Chapter 109

78B-5-902, as enacted by Laws of Utah 2018, Chapter 109

ENACTS:

78B-5-904, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **26-8a-102** is amended to read:

26-8a-102. Definitions.

As used in this chapter:

(1) (a) "911 ambulance or paramedic services" means:

(i) either:

(A) 911 ambulance service;

(B) 911 paramedic service; or

(C) both 911 ambulance and paramedic service; and

(ii) a response to a 911 call received by a designated dispatch center that receives 911 or E911 calls.

(b) "911 ambulance or paramedic service" does not mean a seven or ten digit telephone call received directly by an ambulance provider licensed under this chapter.

(2) "Ambulance" means a ground, air, or water vehicle that:

(a) transports patients and is used to provide emergency medical services; and

(b) is required to obtain a permit under Section 26-8a-304 to operate in the state.

(3) "Ambulance provider" means an emergency medical service provider that:

(a) transports and provides emergency medical care to patients; and

(b) is required to obtain a license under Part 4, Ambulance and Paramedic Providers.

(4) (a) "Behavioral emergency services" means delivering a behavioral health intervention to a patient in an emergency context within a scope and in accordance with

guidelines established by the department.

(b) "Behavioral emergency services" does not include engaging in the:

(i) practice of mental health therapy as defined in Section 58-60-102;

(ii) practice of psychology as defined in Section 58-61-102;

(iii) practice of clinical social work as defined in Section 58-60-202;

(iv) practice of certified social work as defined in Section 58-60-202;

(v) practice of marriage and family therapy as defined in Section 58-60-302; or

(vi) practice of clinical mental health counseling as defined in Section 58-60-402; and

(vii) practice as a substance use disorder counselor as defined in Section 58-60-502.

[~~(4)~~] (5) "Committee" means the State Emergency Medical Services Committee created by Section 26-1-7.

[~~(5)~~] (6) "Direct medical observation" means in-person observation of a patient by a physician, registered nurse, physician's assistant, or individual licensed under Section 26-8a-302.

[~~(6)~~] (7) "Emergency medical condition" means:

(a) a medical condition that manifests itself by symptoms of sufficient severity, including severe pain, that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in:

(i) placing the individual's health in serious jeopardy;

(ii) serious impairment to bodily functions; or

(iii) serious dysfunction of any bodily organ or part; or

(b) a medical condition that in the opinion of a physician or his designee requires direct medical observation during transport or may require the intervention of an individual licensed under Section 26-8a-302 during transport.

[~~(7)~~] (8) "Emergency medical service personnel":

(a) means an individual who provides emergency medical services or behavioral emergency services to a patient and is required to be licensed under Section 26-8a-302; and

(b) includes a paramedic, medical director of a licensed emergency medical service

provider, emergency medical service instructor, behavioral emergency services technician, and other categories established by the committee.

[~~(8)~~] (9) "Emergency medical service providers" means:

(a) licensed ambulance providers and paramedic providers;

(b) a facility or provider that is required to be designated under Subsection 26-8a-303(1)(a); and

(c) emergency medical service personnel.

[~~(9)~~] (10) "Emergency medical services" means:

(a) medical services[~~,~~];

(b) transportation services[~~, or both rendered to a patient.~~];

(c) behavioral emergency services; or

(d) any combination of the services described in Subsections (10)(a) through (c).

[~~(10)~~] (11) "Emergency medical service vehicle" means a land, air, or water vehicle that is:

(a) maintained and used for the transportation of emergency medical personnel, equipment, and supplies to the scene of a medical emergency; and

(b) required to be permitted under Section 26-8a-304.

[~~(11)~~] (12) "Governing body":

(a) is as defined in Section 11-42-102; and

(b) for purposes of a "special service district" under Section 11-42-102, means a special service district that has been delegated the authority to select a provider under this chapter by the special service district's legislative body or administrative control board.

[~~(12)~~] (13) "Interested party" means:

(a) a licensed or designated emergency medical services provider that provides emergency medical services within or in an area that abuts an exclusive geographic service area that is the subject of an application submitted pursuant to Part 4, Ambulance and Paramedic Providers;

(b) any municipality, county, or fire district that lies within or abuts a geographic

service area that is the subject of an application submitted pursuant to Part 4, Ambulance and Paramedic Providers; or

(c) the department when acting in the interest of the public.

[~~(13)~~] (14) "Medical control" means a person who provides medical supervision to an emergency medical service provider.

[~~(14)~~] (15) "Non-911 service" means transport of a patient that is not 911 transport under Subsection (1).

[~~(15)~~] (16) "Nonemergency secured behavioral health transport" means an entity that:

(a) provides nonemergency secure transportation services for an individual who:

(i) is not required to be transported by an ambulance under Section 26-8a-305; and

(ii) requires behavioral health observation during transport between any of the following facilities:

(A) a licensed acute care hospital;

(B) an emergency patient receiving facility;

(C) a licensed mental health facility; and

(D) the office of a licensed health care provider; and

(b) is required to be designated under Section 26-8a-303.

[~~(16)~~] (17) "Paramedic provider" means an entity that:

(a) employs emergency medical service personnel; and

(b) is required to obtain a license under Part 4, Ambulance and Paramedic Providers.

[~~(17)~~] (18) "Patient" means an individual who, as the result of illness [~~or~~], injury, or a behavioral emergency condition, meets any of the criteria in Section 26-8a-305.

[~~(18)~~] (19) "Political subdivision" means:

(a) a city or town located in a county of the first or second class as defined in Section 17-50-501;

(b) a county of the first or second class;

(c) the following districts located in a county of the first or second class:

(i) a special service district created under Title 17D, Chapter 1, Special Service District

Act; or

(ii) a local district under Title 17B, Limited Purpose Local Government Entities - Local Districts, for the purpose of providing fire protection, paramedic, and emergency services;

(d) areas coming together as described in Subsection 26-8a-405.2(2)(b)(ii);

(e) an interlocal entity under Title 11, Chapter 13, Interlocal Cooperation Act; or

(f) a special service district for fire protection service under Subsection 17D-1-201(9).

[~~(19)~~] (20) "Trauma" means an injury requiring immediate medical or surgical intervention.

[~~(20)~~] (21) "Trauma system" means a single, statewide system that:

(a) organizes and coordinates the delivery of trauma care within defined geographic areas from the time of injury through transport and rehabilitative care; and

(b) is inclusive of all prehospital providers, hospitals, and rehabilitative facilities in delivering care for trauma patients, regardless of severity.

[~~(21)~~] (22) "Triage" means the sorting of patients in terms of disposition, destination, or priority. For prehospital trauma victims, triage requires a determination of injury severity to assess the appropriate level of care according to established patient care protocols.

[~~(22)~~] (23) "Triage, treatment, transportation, and transfer guidelines" means written procedures that:

(a) direct the care of patients; and

(b) are adopted by the medical staff of an emergency patient receiving facility, trauma center, or an emergency medical service provider.

Section 2. Section **26-8a-103** is amended to read:

26-8a-103. State Emergency Medical Services Committee -- Membership -- Expenses.

(1) The State Emergency Medical Services Committee created by Section 26-1-7 shall be composed of the following [~~17~~] 19 members appointed by the governor, at least six of whom shall reside in a county of the third, fourth, fifth, or sixth class:

(a) five physicians licensed under Title 58, Chapter 67, Utah Medical Practice Act, or

Title 58, Chapter 68, Utah Osteopathic Medical Practice Act, as follows:

(i) one surgeon who actively provides trauma care at a hospital;

(ii) one rural physician involved in emergency medical care;

(iii) two physicians who practice in the emergency department of a general acute hospital; and

(iv) one pediatrician who practices in the emergency department or critical care unit of a general acute hospital or a children's specialty hospital;

(b) two representatives from private ambulance providers;

(c) one representative from an ambulance provider that is neither privately owned nor operated by a fire department;

(d) two chief officers from fire agencies operated by the following classes of licensed or designated emergency medical services providers: municipality, county, and fire district, provided that no class of medical services providers may have more than one representative under this Subsection (1)(d);

(e) one director of a law enforcement agency that provides emergency medical services;

(f) one hospital administrator;

(g) one emergency care nurse;

(h) one paramedic in active field practice;

(i) one emergency medical technician in active field practice;

(j) one licensed emergency medical dispatcher affiliated with an emergency medical dispatch center; [~~and~~]

(k) one licensed mental health professional with experience as a first responder;

(l) one licensed behavioral emergency services technician; and

[~~(k)~~] (m) one consumer.

(2) (a) Except as provided in Subsection (2)(b), members shall be appointed to a four-year term beginning July 1.

(b) Notwithstanding Subsection (2)(a), the governor:

(i) shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of committee members are staggered so that approximately half of the committee is appointed every two years;

(ii) may not reappoint a member for more than two consecutive terms; and

(iii) shall:

(A) initially appoint the second member under Subsection (1)(b) from a different private provider than the private provider currently serving under Subsection (1)(b); and

(B) thereafter stagger each replacement of a member in Subsection (1)(b) so that the member positions under Subsection (1)(b) are not held by representatives of the same private provider.

(c) When a vacancy occurs in the membership for any reason, the replacement shall be appointed by the governor for the unexpired term.

(3) (a) Each January, the committee shall organize and select one of its members as chair and one member as vice chair. The committee may organize standing or ad hoc subcommittees, which shall operate in accordance with guidelines established by the committee.

(b) The chair shall convene a minimum of four meetings per year. The chair may call special meetings. The chair shall call a meeting upon request of five or more members of the committee.

(c) Nine members of the committee constitute a quorum for the transaction of business and the action of a majority of the members present is the action of the committee.

(4) A member may not receive compensation or benefits for the member's service, but may receive per diem and travel expenses in accordance with:

(a) Section 63A-3-106;

(b) Section 63A-3-107; and

(c) rules made by the Division of Finance pursuant to Sections 63A-3-106 and 63A-3-107.

(5) Administrative services for the committee shall be provided by the department.

Section 3. Section **26-8a-206** is amended to read:

26-8a-206. Personnel stress management program.

(1) The department shall develop and implement a statewide program to provide support and counseling for personnel who have been exposed to one or more stressful incidents in the course of providing emergency services.

(2) This program shall include:

(a) ongoing training for agencies providing emergency services and counseling program volunteers; [~~and~~]

(b) critical incident stress debriefing for personnel at no cost to the emergency provider[~~.~~]; and

(c) advising the department on training requirements for licensure as a behavioral emergency services technician.

Section 4. Section **26-8a-302** is amended to read:

26-8a-302. Licensure of emergency medical service personnel.

(1) To promote the availability of comprehensive emergency medical services throughout the state, the committee shall establish:

(a) initial and ongoing licensure and training requirements for emergency medical service personnel in the following categories:

(i) paramedic;

(ii) medical director;

(iii) emergency medical service instructor; [~~and~~]

(iv) behavioral emergency services technician;

(v) advanced behavioral emergency services technician; and

[~~(iv)~~] (vi) other types of emergency medical personnel as the committee considers necessary; and

(b) guidelines for giving credit for out-of-state training and experience.

(2) The department shall, based on the requirements established in Subsection (1):

(a) develop, conduct, and authorize training and testing for emergency medical service

personnel; and

(b) issue a license and license renewals to emergency medical service personnel.

(3) The department shall coordinate with the Department of Human Services established in Section 62A-1-102, and local mental health authorities described in Section 17-43-301, to develop and authorize initial and ongoing licensure and training requirements for licensure as a:

(a) behavioral emergency services technician; and

(b) advanced behavioral emergency services technician.

[~~(3)~~] (4) As provided in Section 26-8a-502, an individual issued a license under this section may only provide emergency medical services to the extent allowed by the license.

[~~(4)~~] (5) An individual may not be issued or retain a license under this section unless the individual obtains and retains background clearance under Section 26-8a-310.

Section 5. Section **26-8a-307** is amended to read:

26-8a-307. Patient destination.

(1) If an individual being transported by a ground or air ambulance is in a critical or unstable medical condition, the ground or air ambulance shall transport the patient to the trauma center or closest emergency patient receiving facility appropriate to adequately treat the patient.

(2) If the patient's condition is not critical or unstable as determined by medical control, the ground or air ambulance may transport the patient to the:

(a) hospital, emergency patient receiving facility, licensed mental health facility, or other medical provider chosen by the patient and approved by medical control as appropriate for the patient's condition and needs; or

(b) nearest hospital, emergency patient receiving facility, licensed mental health facility, or other medical provider approved by medical control as appropriate for the patient's condition and needs if the patient expresses no preference.

Section 6. Section **78B-5-901** is amended to read:

Part 9. Public Safety Peer Counseling and Behavioral Emergency

Services Technicians

78B-5-901. Public safety peer counseling and behavioral emergency services technicians.

This part is known as "Public Safety Peer Counseling and Behavioral Emergency Services Technicians."

Section 7. Section **78B-5-902** is amended to read:

78B-5-902. Definitions.

As used in this part:

(1) "Communication" means an oral statement, written statement, note, record, report, or document made during, or arising out of, a meeting between a law enforcement officer, firefighter, emergency medical service provider, or rescue provider and a peer support team member.

(2) "Behavioral emergency services technician" means an individual who is licensed under Section 26-8a-302 as:

(a) a behavioral emergency services technician; or

(b) an advanced behavioral emergency services technician.

[~~(2)~~] (3) "Emergency medical service provider or rescue unit peer support team member" means a person who is:

(a) an emergency medical service provider as defined in Section 26-8a-102, a regular or volunteer member of a rescue unit acting as an emergency responder as defined in Section 53-2a-502, or another person who has been trained in peer support skills; and

(b) designated by the chief executive of an emergency medical service agency or the chief of a rescue unit as a member of an emergency medical service provider's peer support team or as a member of a rescue unit's peer support team.

[~~(3)~~] (4) "Law enforcement or firefighter peer support team member" means a person who is:

(a) a peace officer, law enforcement dispatcher, civilian employee, or volunteer member of a law enforcement agency, a regular or volunteer member of a fire department, or

another person who has been trained in peer support skills; and

(b) designated by the commissioner of the Department of Public Safety, the executive director of the Department of Corrections, a sheriff, a police chief, or a fire chief as a member of a law enforcement agency's peer support team or a fire department's peer support team.

[~~(4)~~] (5) "Trained" means a person who has successfully completed a peer support training program approved by the Peace Officer Standards and Training Division, the State Fire Marshal's Office, or the Health Department, as applicable.

Section 8. Section **78B-5-904** is enacted to read:

78B-5-904. Exclusions for certain communications.

In accordance with the Utah Rules of Evidence, a behavioral emergency services technician may refuse to disclose communications made by an individual during the delivery of behavioral emergency services as defined in Section 26-8a-102.

Section 9. **Effective date.**

This bill takes effect on July 1, 2021.

Tab 3

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Rule 106 Developments/Supreme Court Conference

2 messages

Judge Teresa Welch <twelch@utcourts.gov> Fri, Mar 19, 2021 at 11:42 AM
To: "JLund@parsonsbehle.com" <JLund@parsonsbehle.com>, Keisa Williams <keisaw@utcourts.gov>

Hello John and Keisa,

I am reaching out to both of you for three reasons: (1) to summarize the Rule 106 discussion that occurred at the Supreme Court Conference yesterday, (2) to inform you of a few follow-up events that occurred after the Conference, and (3) to provide suggestions of where we go from here regarding rule 106 issues. Here are the details:

Summary of Supreme Court Conference re: Rule 106: (1) The Justices were very appreciative of the Memo our Committee provided, and they found it helpful that we included the majority and minority opinions in the Memo; (2) After discussing various issues regarding our proposed rule, the Justices indicated that they want the Committee to "focus on getting the policy right, and to not be wedded to any Utah Case law that (we might currently feel) is hamstringing us;" (3) The Justices decided that it would be best to obtain information about the latest developments regarding the proposed federal rule 106 before taking any further steps regarding the proposed state rule.

Follow-up Events to the Supreme Court Conference: After the Conference, Justice Lee reached out via e-mail to John Bates (who is associated with the Federal Committees, but I am not clear of his title/role) to see if we could get more info regarding the status of any proposed changes to the federal rule. John Bates then forwarded Justice Lee's e-mail to Pat Schiltz (Chair of the Federal Advisory Evidence Committee) and Professor Daniel Capro (Reporter for the Federal Committee and Professor of Law at Fordham Law School in NY). Professor Capro then responded via e-mail and indicated, in part, the following:

"The Federal Advisory Committee on Evidence Rules has been working for several years on an amendment to Rule 106. At its [upcoming] meeting on April 30, it will be voting on whether to recommend to the Standing Committee that the amendment be released for public comment... the date for its effectiveness would be December 1, 2023. The Committee took a straw vote at its last meeting and was in favor of two changes: 1. Allowing the completing statement to be admissible over a hearsay objection; and 2. allowing completion with oral, unrecorded statements... (These amendments are consistent with a recent article on the Utah Law Review on Rule 106)."

In Professor Capra's e-mail, he attached a memo that he had prepared for the Advisory Committee's upcoming April meeting (which includes a draft rule amendment and draft committee note). He also attached the minutes of the last Federal Advisory Meeting (November of 2020), at which rule 106 was extensively discussed. Professor Capra's e-mail also expressed a willingness to help our Utah Committee with any rule 106 issues.

**After receiving these materials, Justice Himonas asked me (via e-mail) to reach out to Professor Capra. I responded that I was willing to do so, and that I would get up to speed with the issues regarding the developments of the proposed federal rule.

My thoughts and suggestions:

First: I can reach out to Professor Capra via e-mail (and cc both of you). I will ask Professor Capra if he is willing to share the following with our Committee: (1) The Meeting Minutes from the November 2020 Committee Meeting Re: the Federal Rule, and (2) The Memo he prepared for the upcoming April 30 Meeting.

Second: Our Committee will obviously want to track the results of the vote at the Federal Rule Committee's upcoming April 30 Meeting.

Third: John- if you think it might be helpful, we might want to ask Professor Capra at some point in the future to speak to our Committee. He is extremely well versed in Rule 106 issues. I will defer to your decision on that issue.

Please let me know if you have any questions, feedback, or suggestions. Otherwise, I will soon send an e-mail to Professor Capra (that cc's both of you) and request the materials that I mentioned above.

Thanks,
Teresa

Rule 106. Remainder of or Related Writings or Recorded Statements.

If a party introduces all or part of a writing or recorded statement, or testimony of the contents therof, an adverse party may require the introduction, at that time, or on cross-examination of that same witness, of any other part — or any other writing or recorded statement — that in fairness ~~ought to be considered at the same time~~is reasonably necessary to qualify, explain, or place into context any portion already introduced. If the other part, writing, or recorded statement is otherwise inadmissible under these rules, it may be admitted for the truth of the matter asserted, unless the court decides otherwise under rule 403.

Effective May/November 1, 20__

2020 Advisory Committee Note. The 2020 amendments clarify two things: first, that the rule applies to testimony of a written or recorded statement's contents, not just the writing or recording itself; and second, that the rule is an exception to other rules, such as hearsay. Prior cases left these issues unresolved. See, e.g., *State v. Sanchez*, 2018 UT 31, ¶¶ 50-60, 422 P.3d 866; *State v. Jones*, 2015 UT 19, ¶ 41 n.56, 345 P.3d 1195. Its terms now differ from the federal version.

Admissibility under this rule does not absolve a party of the duty to ensure an adequate record for appellate review.

~~**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. This rule is the federal rule, verbatim.~~

~~**Original Advisory Committee Note.** 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.~~

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

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

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

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

Members of the public attending were:

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

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

I. Opening Business

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

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

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

II. Approval of Minutes

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

III. Report on June 2020 Standing Committee Meeting

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

IV. Potential Amendment to FRE 702

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Regulating Overstatement of Expert Opinions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2) A draft including preponderance language in the opening paragraph of Rule 702 and a new subsection (e) regulating overstatement. This draft should be accompanied by a more comprehensive Advisory Committee note.

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

V. Proposed Amendment to Federal Rule of Evidence 106

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

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

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

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

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

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

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

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

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

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

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

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

VI. Federal Rule of Evidence 615 and Witness Sequestration

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

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

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

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

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

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

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

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

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

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

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

VII. CARES Act and an Emergency Evidence Rule

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

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

VIII. Future Agenda Items

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

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

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

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

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

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

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

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

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

IX. Closing Matters

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

Respectfully Submitted,

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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Proposed Amendment to Rule 106
Date: April 1, 2021

The Committee has been studying and discussing a request from Judge Paul Grimm to consider possible amendments to Rule 106. At the last meeting, the Committee made significant strides toward a proposed amendment to the Rule. At this meeting the Committee will decide whether to approve an amendment to Rule 106, with the recommendation that it be released for public comment.

Rule 106, known as the rule of completeness, currently provides as follows:

> **Rule 106. Remainder of or Related Writings or Recorded Statements**
>
> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

The problems raised by Judge Grimm arise mostly in criminal cases, but as seen in this memo there are a number of Rule 106 rulings in civil cases as well. And this should not be surprising, because Rule 106 issues arise whenever an advocate makes a selective, misleading presentation of a document or statement. The possible benefit in such a presentation is not limited to criminal cases.

Judge Grimm in *United States v. Bailey,* 2017 WL 5126163 (D.Md.), sets forth the following hypothetical to illustrate the need for a rule of completeness: There is an armed robbery and a gun is found. The defendant is being interrogated by a police officer and says, "yes I bought that gun about a year ago, but I sold it a few months later at a swap meet." The government in its case-in-chief, through the testimony of the police officer, seeks to admit only the part about the

defendant buying the gun. This part is admissible as a statement of a party-opponent under Rule 801(d)(2). The defendant contends that admitting only the first part of the statement makes for an unfair, misleading presentation --- because without the completing part, the jury will draw the inference that he implicitly admitted owning the gun at the time of the robbery, when in fact he did no such thing.[1]

Many courts require completion in the gun hypo, and that result is certainly supported by the policy underlying Rule 106. But a number of courts would not apply Rule 106, because they construe the rule to have two substantial limitations:

1. Some courts have held that Rule 106 cannot operate to admit hearsay; and the defendant's statement about selling the gun is hearsay.[2] These courts hold that Rule 106 is only about the order of proof and is not a rule that trumps other rules of exclusion.

2. Courts have correctly held that that the text of Rule 106 does not provide for completion of oral unrecorded statements. Most courts, however, have found a rule of completeness for oral statements in Rule 611(a) or the common law. Some courts have not --- perhaps because they have not been directed to Rule 611(a) or the common law by the party seeking completion.[3]

The Committee has reviewed and discussed Judge Grimm's proposals, which are: 1) to amend Rule 106 to allow a party to admit the party's statements over a hearsay objection, when they are necessary to complete an unfair, partial presentation of the party's statements; and 2) to extend Rule 106 to cover oral unrecorded statements.

At this point, the Committee has reached several points of agreement regarding an amendment to Rule 106:

● The Committee resolved two years ago to retain the "fairness" language in the Rule --- and therefore the criteria for invoking the rule of completeness will remain the same. The amendment, if proposed, would address only how a completing statement may be used.

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[1] One of my students had another example. The defendant, let's call him Eric, is on trial for shooting the deputy. He stated to the police: "I shot the sheriff, but I did not shoot the deputy." The government introduces the first part of the statement (probably admissible in most courts under Rule 404(b) to show intent, or background, or inextricably intertwined, or some such, and offered to create an inference that the defendant shot the deputy as well). The defendant seeks to complete with the remainder of the statement.

Another example bandied about is the government offering a statement of the defendant, "I killed him" while the defendant offers to complete this deleted portion: "with kindness."

[2] *See, e.g., United States v. Sanjar,* 853 F.3d 190, 204 (5th Cir. 2017): "When offered by the government, a defendant's out-of-court statements are those of a party-opponent and thus not hearsay. Rule 801(d)(2)(A). When offered by the defense, however, such statements are hearsay."

[3] The Supreme Court has stated that Rule 106 is only a "partial codification" of the common-law rule. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988).

● The Committee also resolved two years ago that an amendment, if proposed, would not change the existing rule with respect to the timing of completion.

Most importantly, the Committee at the last meeting took a straw poll on the two major issues: 1) whether completing information should be admissible over a hearsay objection; and 2) whether oral unrecorded statements should be covered by Rule 106 rather than by Rule 611(a) and the common law. Five Committee members and the Chair expressed a preference for the option that would both add oral statements and allow completion over a hearsay objection. One Committee member expressed a preference for an amendment that would add oral statements and admit completing statements for their non-hearsay context only. The Department of Justice voiced opposition to any amendment.

At the last meeting, the Chair asked the Reporter to prepare a draft amendment that would add oral statements and allow completion over a hearsay objection for the spring meeting. He also stated that the Committee Note should make it clear that the intent of the amendment was to displace common law --- just like every other Federal Rule of Evidence.

This memo is in four parts.[4] Part One discusses how and when Rule 106 applies, emphasizing that the requirements of the rule regarding the need for completion (which would not be changed by any proposed amendment) are stringent and that completion is rarely permitted. Part Two deals with the two major questions on which the courts are divided: 1) whether the rule operates as a hearsay exception, and 2) whether oral unrecorded statements are covered in one way or another. Part Three discusses some arguments in favor of and against an amendment to Rule 106, and the merits of various amendment alternatives that were presented at previous meetings. Part Four provides a draft of a proposed amendment to Rule 106, and a draft Committee Note, that reflects the position taken by a strong majority of the Committee in the straw poll at the last meeting.

At this meeting, the Committee will vote on whether a proposed amendment to Rule 106 will be approved, with the recommendation that it be released for public comment.

[4] Many passages from this memo are unchanged from the memo submitted for the Fall, 2019 meeting. But there are changes, additions, and deletions that have been made to include new case law, to provide responses to some of the arguments and suggestions made at the last meeting, and to adapt to the positions taken by the Committee at the last meeting, as discussed above. Also, language has been added to the draft committee note in response to suggestions made at the last meeting.

I. How and When the Rule Applies.

A. Rule 106 Applies in Narrow Circumstances

Because Committee members at previous meetings expressed concern about whether an amendment will allow rampant completion and constant disruption of the order of proof, this memo seeks to provide more perspective on the *very limited scope of the existing rule.* The possibility of completion arises only in very narrow circumstances. These narrow standards would not be expanded by any of the proposals the Committee is considering, because the Committee has agreed that the "fairness" language of the existing Rule 106 is being retained.[5]

Rule 106 contains important threshold requirements that provide a substantial limitation on the consequences of the amendments being considered. It is not in any sense an automatic rule that a defendant is allowed to admit all exculpatory parts of a statement whenever the government admits an inculpatory part. Mere relevance is definitely not enough. Rather, the court must find two things before the rule of completion is triggered:

1. The statement offered by the proponent creates an inference *about the statement* that is inaccurate --- i.e., it gives a distorted picture of what the statement really means.

AND

2. The completing statement that the adversary seeks to introduce is necessary to eliminate the unfair inference and to make the statement accurate as a whole.

The Grimm example of the gun possession is one in which both of the above requirements are met. The portion chosen by the government creates an inaccurate picture about what was actually said. "I bought the gun" creates an inference that you still have it (exactly the inference the government is seeking) --- so it is misleading. The completing information – "I sold it" --- is necessary to eliminate a misleading impression about what the defendant said.

By way of contrast, another hypo will show where the rule of completeness does *not* require admission. Assume that the defendant is charged with possession of a firearm. He states to a police officer, "I had the gun on me, but I never used it." The government will be allowed to admit the first part of that statement (as a party-opponent statement under Rule 801(d)(2)(A)) without having to complete with the second. That is because "I had the gun on me" creates no unfair inference in a prosecution for *possessing* the gun; it's simply a confession of the crime. On the other hand, if the defendant is charged with *using* the firearm, completion should be required, because the first portion of the statement, "I had the gun on me" creates an unfair inference that he probably used the gun, and the second portion is necessary to eliminate that misleading impression.

Because the triggering requirements for Rule 106 are so narrow --- and would not be expanded by any proposal the Committee is considering --- it seems very unlikely that amending

[5] Note that there is language in the draft Committee Note that emphasizes that nothing in the amendment will change the strict threshold requirements for invoking the rule.

it to trump the hearsay rule and to cover oral unrecorded statements will create a flood of completion requests. The D.C. Circuit Court of Appeals held that Rule 106 allows the use of hearsay evidence to complete a partial, misleading presentation, and in response to a "floodgates" argument the court stated that "[i]n almost all cases we think Rule 106 will be invoked rarely and for a limited purpose." *United States v. Sutton,* 801 F.2d 1346, 1369 (D.C.Cir. 1986). There is nothing in the reported cases in the D.C. Circuit, nor in other circuits following the same rule, to indicate that the floodgates have been opened on Rule 106 completeness arguments.

The Department argued at the last meeting that completion is allowed much more frequently than is shown in the reported cases. There are several possible responses to this anecdotal report:

- It figures that the reported cases would not be a perfect indicator on all the uses of completion; if the court allows completion, that ruling will usually be in favor of a criminal defendant and so it is an unlikely subject for appeal.

- It is hard to see how more completion is a bad thing. The cases, as seen below, are extremely narrow and ungenerous. It does not appear that the Department is saying that completion is automatic whenever the government uses a portion of any statement. If the fairness needle is moved to allow more completion than is seen in the reported cases, that would seem to be a fair development.

- If there is more completion, it must mean that courts are *already* finding completion to be permissible over a hearsay exception. If that is so, then the amendment will simply codify what is currently occurring. The Department has not stated that courts bent on completion are saying, "I would love to allow completion, but my hands are tied by the hearsay rule." Rather the Department is saying that there is more completion going on than we can see from the reported cases. It is hard to see, then, how an amendment will open up more floodgates.

- Perhaps the concern about floodgates is that it is only written and recorded statements that are being freely admitted, while the limitation on oral statements is keeping the courts from a deluge. But the fact is, as seen below, that most courts *are* admitting oral statements when necessary to complete. When that doesn't happen, it is usually because the proponent relies only on Rule 106, as opposed to Rule 611(a) and the common law. But surely the Department doesn't want to take advantage of lawyers who have innocently looked only to Rule 106, and who are not up on the Rule 611(a)/common law avenue to admissibility of an oral statement.

What follows are some reported examples of application of the fairness requirement of Rule 106, to illustrate the narrow circumstances in which it has been successfully invoked.

Here are some (the relatively few) examples of completion required:

● *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1983): In a felon-gun possession case, the defendant admitted to the police that he was aware of drugs found under a bed, but stated simultaneously that he knew nothing about the gun that was found near it. The government offered only the part of the statement conceding awareness of the drugs. The relevance of that portion was that if the defendant knew about the drugs, he was likely to know about the gun. But that was an unfair inference from the statement as a whole, because the defendant explicitly *denied* knowing about a gun. So the portion offered by the government was misleading. The Seventh Circuit held that once the prosecution elicited testimony that the defendant admitted knowing about the drugs, the defendant should have been allowed to elicit the part about not knowing the gun was there. Otherwise the jury would use the statement as if the defendant implicitly admitted to having a gun, when that was not the case.

● *United States v. Sweiss,* 800 F.2d 684 (7th Cir. 1986): The government admitted a recording of a conversation between the defendant and an informant, which indicated that the defendant knew in advance of the conversation about a plot to obstruct justice. The government argued that this showed the defendant knew independently about, and so was connected to, the plot. But a prior recording of a conversation between the defendant and the same informant indicated that the defendant had been told about the plot *by the informant*. In effect, the government split up the statements "yes I know" and "because you told me." The court held that the defendant had the right to introduce the prior recording under the rule of completeness, to dispel the misleading inference from the second recording that he had independent knowledge.

● *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005): This is a case where the prosecution conceded on appeal that the defendant's exculpatory statements, made in a post-arrest confession, should have been admitted under the rule of completeness. There is no discussion in the reported case of what those statements were, and why they were necessary to complete. The court stated that the prosecution was correct in making the concession.

● *Cuhaci v. Kouri Group, LP*, 2020 U.S. Dist. LEXIS 242583 (S.D. Fla. Dec. 28, 2020): This is an example of completion required in a civil case. In a lawsuit over the ownership of shares of stock, the plaintiff offered the front of the stock certificates at issue. The defendant sought to complete by introducing the back of the certificates. The court held that Rule 106 required the admission of the front and the back of the certificates. After quoting Rule 106, the court declared that the plaintiff's claim was squarely based on the underlying stock certificates, while the defendant's dismissal arguments "are largely

founded on the purported transfers or sales of those shares being void based on restrictions reflected on the reverse-side of the stock certificates." The court concluded that "in fairness," the factfinder should consider not only the front of the stock certificates but also the back.

Here are some of the (many more) examples of completion not required:

- *United States v. Altvater,* 954 F.3d 45 (1st Cir. 2020): In an insider trading prosecution, the government offered portions of the defendant's deposition before the SEC. The defendant argued that the government offered a "massaged" portion, edited to do as much damage as possible to the defendant's position at trial: that he traded on publicly available information based on his own idiosyncratic views. The defendant contended that Rule 106 required admission of all the redacted portions of the deposition. But the court held that the defendant had the burden of showing just how the portions offered by the government were misleading, and just how the redacted portions were necessary to correct any misimpression. The court stated that the defendant failed to "engage in the granular level of analysis" necessary to succeed on the completeness challenge. He requested that all redacted material be admitted "without attempting to meet his burden to explain why it would be necessary to admit into evidence each and every statement contained in the redacted material to dispel some alleged distortion caused by the government's redactions." Thus Rule 106 cannot be used for broadside claims that when portions are admitted, redactions must be admitted as well.

- *United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019): Police found a gun in a car that was driven by the defendant. At a trial for felon-gun-possession, the government offered the defendant's oral post-arrest statement admitting the gun was his. The defendant sought to complete with other statements to the police in which he said the car belonged to his girlfriend and he did not know about the gun. The court held that Rule 106 could be used to overcome a hearsay objection, and that while Rule 106 did not apply to oral statements, Rule 611(a) and the common law could be used to provide for admissibility on the same grounds as written and recorded statements under Rule 106. However, the completeness principle applied only if the portions admitted by the government were misleading, and the portions offered by the defendant corrected the misimpression. In this case, the standards for completion were not met:

> It is not uncommon for a suspect, upon interrogation by police, to first claim in a self-serving manner that he did not commit a crime, only thereafter to confess that he did. But the rule of completeness does not require the admission of self-serving exculpatory statements in all circumstances, see *United States v. Jackson*, 180 F.3d 55, 73 (2d Cir. 1999), 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."

- *United States v.Thiam,* 934 F.3d 89 (2nd Cir. 2019): The defendant was convicted for receiving bribes as a public official. He made inculpatory statements in his post-arrest interview, regarding his acceptance of bribes, that were admitted against him. He argued that the trial court erred in refusing to admit other excerpts of that interview under Rule 106. These excluded portions related to the role that other government officials played in the bribery scheme, and to personal loans that the defendant had received from other third parties. But these statements, while exculpatory, related to matters other than the defendant's activity. The court stated that "[b]ecause the rule of completeness is violated only where admission of the statement in redacted form distorts its meaning . . . it was within the district court's discretion to exclude these statements."

- *United States v. Hird,* 901 F.3d 196 (3rd Cir. 2018): The defendant was a ticket-fixing judge charged with perjuring himself in a grand jury proceeding. He argued that the trial court should have admitted the portion of his grand jury testimony in which he stated that he never provided favors. The court found that the statement was not necessary for completing the portions of his testimony in which he (falsely) denied receiving consideration for fixing tickets. The court stated that the excerpt that the defendant sought to admit "occurs many pages before the testimony regarded as perjurious," was "separated by the passage of time during questioning" and was "unrelated in the overall sequence of questions and to the answers grounding his conviction." The court held that the rule of completeness does not apply to statements that are remote in time and circumstances from the statement offered by the proponent.

- *United States v. Shuck,* 1987 U.S. App. Lexis 1519471, at *6 (4th Cir.): The defendant's previous statements about committing the charged crime were admitted, and he argued that his additional statements about how he had never been convicted of a crime should have been admitted to complete. The court found that completion was not necessary: "General rehabilitation, such as being free of a state or federal conviction * * * is not directly relevant to Shuck's admissions. Nor do such materials explain the passages introduced by the government. Nor were the additional portions necessary to avoid misleading the trier of fact."

- *United States v. Branch,* 91 F.3d 699, 728 (5th Cir. 1996): After the disaster at the Waco compound, Castillo was charged with using or carrying a firearm during a crime of violence. He confessed to donning battle dress and picking up guns when he saw ATF agents approaching. He also stated that he never fired a gun during the raid. The government offered the former statement and not the latter. The court found that the exculpatory statement was not necessary for completion --- the "cold fact" that Castillo had retrieved several guns during the day was neither qualified nor explained by the fact that he never fired them. Importantly, Castillo was charged with using *or carrying* a gun during a crime of violence, and this charge did not require a finding that he shot a gun. The court concluded as follows:

> We acknowledge the danger inherent in the selective admission of post-arrest statements. * * * [But] we do no violence to criminal defendants' constitutional rights by applying Rule 106 as written and requiring that a defendant demonstrate with particularity the unfairness in the selective admission of his post-arrest statement.

- *United States v. Portillo,* 969 F.3d 144 (5th Cir. 2020): This is a case in which the government sought to introduce completing statements, but the admission of the statements was found to be error. The government's cooperating witnesses were impeached with inconsistencies, and the trial judge admitted some accompanying consistent statements under Rule 106. The court's analysis is as follows:

> The government cites pages from the record where the defendants referred to specific portions of the statements that were later introduced at trial. But the government does not clearly explain why this questioning created a misleading impression about the entirety of the prior consistent statements. We have explained that the rule of completeness justifies admission of a statement only where it is necessary to qualify, explain, or place into context the portion already introduced. [citing cases]. The government has not demonstrated that the statements admitted into evidence were necessary to correct any misleading impressions created by the defendants' references to the prior statements.

- *United States v. Dotson,* 715 F.3d 576, 581 (6th Cir. 2013): In a trial on charges of child pornography and exploitation of a minor, the trial judge admitted portions of a written statement given by the defendant to authorities following his arrest in which he stated that he made videos and photos of the victim; but the court rejected the defendant's request to admit the entire statement. The omitted portions showed that Dotson had a rough upbringing and had been sexually abused as a child, and that he was concerned that the victim knew he was exploiting her. The court held that the portions admitted were not

misleading and the portions omitted were not necessary to correct any misleading impression. The omitted portions "did not in any way inform his admission that he photographed the victim, made videos of her, and downloaded sexually explicit images of other children from the internet."

● *United States v. Wandahsega*, 924 F.3d 868 (6th Cir. 2019): The defendant was convicted of abusive sexual contact with his six year old son. He sought to introduce a video of his supervised visit with his son, the victim, where his son hugged him and interacted well with him. The defendant offered the video under Rule 106, on the theory that it contradicted testimony from witnesses about the victim's assertions that the defendant abused him. But the court found Rule 106 inapplicable because the government never sought to admit any portion of the video. *Rule 106 does not provide a ground of admissibility simply because the evidence proffered to complete contradicts the opponent's evidence.*

● *United States v. Lewis,* 641 F.3d 773 (7th Cir. 2011): Billingsley, charged with firearm possession and conspiracy to possess cocaine, confessed in an interview. He sought to complete by eliciting testimony from the agent who interviewed him about how he had never mentioned any of his co-defendant's criminal associates by name. The court found that although this remainder could rebut the government's theory about the level of the defendant's involvement in the conspiracy, and could help to explain the defendant's theory of the case in general, it did not affect the meaning of any of the defendant's statements to which the agent had already testified. Accordingly, no remainders were necessary. Thus, a remainder under the fairness test has to be explanatory *of the portion that it completes*.

● *United States v. LeFevour,* 798 F.2d 977 (7th Cir. 1986): The court found that Rule 106 does not require the introduction of an entirely separate conversation, on a different subject matter, simply because it is relevant to the defense. Relevance is not a sufficient ground to allow completion under Rule 106.

● *United States v. Martinez-Camargo,* 764 Fed. Appx. 205 (9th Cir. 2019): A large shipment of marijuana was found in the defendant's car when she crossed the border. The government offered excerpts of the defendant's post-arrest statements. The defendant offered other portions in which she sought to explain her conduct and exculpate herself. The court held as follows:

> Martinez-Camargo's argument that the rule of completeness, Fed. R. Evid. 106, compels admission of the whole statement * * * fails. Rule 106 does not "require the introduction of any unedited writing or statement merely because an adverse

party has introduced an edited version." *United States v. Vallejos,* 742 F.3d 902, 905 (9th Cir. 2014). Rather, it applies only when the edited statement creates a misleading distortion of the evidence. Because the admitted portions of her statement were not misleading, the district court did not abuse its discretion in determining that Rule 106 does not compel the admission of the omitted portions of the statement.

● *United States v. Brown,* 720 F.2d 1059 (9th Cir. 1983): This was a completing attempt by the *government* that was unsuccessful. The government called witnesses who got plea deals, and introduced the deal terms on direct. The defendant argued on cross that there were promises made by the government that were not in the agreement. The government countered, for completeness purposes, with polygraph clauses in the agreements. But the court found the polygraph clauses not necessary for completion, because the defendant's attack was about what was *not* in the plea agreements.

● *United States v. Rodriguez,* 971 F.3d 1005 (9th Cir. 2020): This case did not involve a denial of completion but did emphasize the narrowness of the rule. The government offered a selection of recordings in a case where the defendant was attacking the investigation/prosecution as biased. Over the defendant's objection, the trial court instructed the jury that the government had presented "selective passages" of the recordings and "an opposing party is free to request the Court to order additional portions of a recording be played where necessary to place the portions played in context or to avoid any misleading impression resulting from just the portions played." The defendant argued that the instruction was error because it shifted the burden of proof and incorrectly suggested that both parties were equally able to introduce recordings where in fact the defendant would be barred from doing so under the hearsay rule. The court found no abuse of discretion, concluding that the instruction "aligned with the substance of Rule 106." But in a footnote, it cautioned against using such an instruction in the future:

> [T]he midtrial instruction was unnecessary and, as formulated, ran the risk of being incomplete or potentially misleading. While the instruction was consistent with Federal Rule of Evidence 106, *it failed to fully capture the restrictiveness of the rule of completeness, including the defendant's need to overcome significant evidentiary hurdles.*

● *United States v. Stein*, 2021 U.S. App. LEXIS 1963 (10th Cir. Jan. 25, 2021): Appealing from a false statements conviction, the defendant argued that the district court abused its discretion by denying his request under Rule 106 to play the entire recording of each of defendants' multi-hour meetings — over a hundred hours of recordings, collectively. The court found that the district court did not abuse its discretion in denying

Wright's request, as *(i)* Rule 106 requires completion only when necessary to clarify or explain the portion already admitted; and *(ii)* Wright did not identify which portions of the admitted statements required clarification; instead he argued broadly that the government's introduction of the recordings in clips was unfair.

- *United States v. Santos,* 947 F.3d 711 (11th Cir 2020): Appealing his conviction for obtaining naturalization wrongfully, the defendant argued that the trial court erred in excluding an exculpatory part of his confession. The court found no error. It noted that "Rule 106 does not automatically make the entire document admissible once one portion has been introduced." In this case, "the later exculpatory part of Santos's statement does not explain or clarify the earlier inculpatory part. In the first part, Santos admitted to Special Agent Laboy that he was arrested, convicted, and imprisoned for manslaughter in the Dominican Republic in the 1980's. This admission proved the fact of Santos's prior conviction. That is a separate and different topic from why Santos failed to mention his criminal history . . . on his Form N-400 application."

- *United States v. Lesniewski*, 2013 WL 3776235 (S.D.N.Y.): The court held that mere proximity of the omitted portion to the statements introduced does not justify completion. It found that the defendant's statements that were omitted were not necessary for completion because they were just "self-serving attempts to shoehorn after-the-fact justifications for his actions into description of his actions."

- *United States v. Nicoletti*, 2019 WL 1876814 (E.D. Mich.): A defendant charged with conspiracy to commit bank fraud argued that if the government was going to admit portions of wiretapped conversations that he had with a co-defendant, then all 13 hours of tape recordings should be included under Rule 106. The court stated that "[i]mportantly, Rule 106 *places the burden on the party seeking admission* to show that the additional evidence is relevant and provides context" and "only those parts which qualify or explain the subject matter of the portion offered by opposing counsel should be admitted." Because the defendant did not specifically identify which portion of the recordings would clarify the government's proffered evidence, Rule 106 provided no relief.

- *United States v. Rodriguez-Landa*, 2019 WL 175518 (S.D. Cal.): "The Court finds that Rule 106 does not permit the introduction of these statements as they are not 'part' of the same recorded conversation introduced by government exhibit Although these statements were physically captured on the same audio recording, they arise out of a different conversation with a different participant."

- *United States v. Benally*, 2019 WL 2567335 (D.N.M.): In a murder case, the government admitted excerpts from the defendant's recorded statements to special agents during an interrogation. The statements described the defendant's interactions with the decedent and included a portion of the interrogation where the defendant refused to apologize about the decedent's death. The defendant sought to admit additional excerpts, explaining how the fight began, that the decedent had a knife, that the decedent previously started fights with him, and that he "teared up" when making the statements to the agents. The court held that the excerpts chosen by the government were not misleading and that nothing in the portions offered by the defendant corrected any misimpression.

- *Rodriguez v. Miami-Dade County*, 2018 WL 3458324 (M.D. Fla.): In a Title VII action, the plaintiff admitted some call logs and the defendant argued that the rule of completeness required admission of all call logs to the same people. The court found that the defendant made no argument that the remainder of the logs was necessary to rectify any misleading impression created by the plaintiff.

Of all the reported Rule 106 cases in federal district courts, the ratio of "completion required" to "completion not required" is about 1/15.[6] That is unsurprising because Rule 106 is a narrow rule. It does not send the trial court on a quest through mounds of evidence to try to find something that is relevant for the opponent.

B. Rule 106 Can Protect the Government

The rule of completeness is not a one-way street in favor of a criminal defendant. The government has an interest in being allowed to complete misleading presentations of statements proffered by the defendant, and Rule 106 has been applied to protect the government in such circumstances. For example, in *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988), it was the prosecutor who offered prior statements of a witness on redirect examination in order to complete what had been selectively adduced on cross-examination; the court found no error in the trial court's allowing completion. And in *United States v. Maccini*, 721 F.2d 840 (1st Cir. 1983), the court held it proper to permit a prosecutor to have additional portions of a witness's grand jury testimony read, after defense counsel introduced a misleading portion of that testimony. Similarly, in *United States v. Mosquera,* 866 F.3d 1032, 1049 (11th Cir. 2018), the court held that Rule 106 applied when the defendant selectively admitted portions of an interview that a witness had with a government agent. The court noted that additional portions of the interview were properly admitted "to avoid misrepresentation."

[6] As stated above, the reported cases, while relevant, do not tell the whole story of how Rule 106 is used.

C. Rule 106 Can Apply in Civil Cases

As stated above, the possibility of a selective and unfair presentation is not limited to criminal cases. One example of completion required in a civil case is *Zahorik v. Smith Barney, Harris Upham & Co.,* 1987 U.S. Dist. Lexis 14078, at *6 (N.D. Ill.), which involved the introduction of charts that were misleading in the absence of the context in which they were prepared. The court found that it was "necessary to admit Huddleston's entire affidavit in order to explain the context in which the charts were prepared." It specifically noted that contemporaneous presentation of the affidavit was "preferable to Zahorek's suggestion that Smith Barney could correct any misinterpretations through the use of live testimony or deposition testimony." That was because, as the Advisory Committee Note to Rule 106 makes clear, repair work later in the trial may not be sufficient to correct the original misimpression.

See also Phoenix Assocs. III v. Stone, 60 F.3d 95, 101 (2nd Cir. 1995) (when financial statements prepared by an accountant were introduced, the trial court did not err in holding that the accountant's workpapers were necessary to complete, because the financial statements on their own were misleading); *Brewer v. Jeep Corp.,* 724 F.2d 653, 656 (8th Cir. 1983): In a product liability action, "the appellant was free to introduce the film containing the jeep rollovers but only upon the condition that the written study explaining these graphic scenes also be offered. The trial court's order required only that the complete report be admitted, the mundane as well as the sensational. In this the trial court was fair and its exercise of discretion was not an abuse."

D. Rule 106 Partially Codifies the Common Law

The Supreme Court has stated that Rule 106 is a "partial codification" of the common-law rule of completeness. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988). What follows is a short account of the common-law rule of completeness.

The common-law rule of completeness has been described as follows by the court in *United States v. Littwin,* 338 F.2d 141 (6th Cir. 1964):

> The general rule is that if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary.

This concept of completeness is one of fundamental fairness that courts have applied in some form since at least the 17th century. Wigmore characterized the doctrine as one of "verbal completeness" requiring that the whole of a "verbal utterance" on a single topic or transaction be taken together. Wigmore emphasized that verbal utterances are "attempts to express ideas in words" and that words may easily be distorted by presenting them in edited form.

Wigmore stressed that the principle of completeness "does no more than recognize the dictates of good sense and common experience," and laid out guidelines that courts could use to determine if the opponent should be allowed to introduce completing oral evidence. First, the purpose of introducing the remainder is to "obtain a correct understanding of the effect of the first part." Second, only the remainder that "concerns the same subject, and is explanatory of the first part" is allowed for purposes of completeness.

Common law courts permitted completion of both written and oral statements.[7] Courts typically required completion of oral statements when needed to provide the true "substance or effect" of a conversation.[8] Wigmore supported completion with oral statements, concluding that any dispute about the accuracy of a witness's recollection of an oral statement would raise a question of credibility for the jury.

Common-law courts grappled with the issue of completing statements that were otherwise inadmissible. Wigmore stated that remainders necessary to complete a misleading statement should be used only to give "context" to the portion of the statement already admitted and should not be used as substantive evidence.[9] *But most common-law courts disagreed with this "context only" approach to the evidentiary value of a completing remainder*.[10] Courts frequently permitted completion with an otherwise inadmissible hearsay statement without limiting the purpose for which the completing remainder was admitted. For example, in *United States v. Paquet*, 484 F.2d 208, 211 (5th Cir. 1973), the Fifth Circuit held that where a Secret Service agent was permitted to testify about part of a conversation between an informant and the Defendant, the Defendant was entitled to testify as to what the informant had told him. The court noted that the rule could overcome a hearsay objection, as "[t]he prosecution cannot give its version of a matter and thereafter muzzle the defendant." Some courts went so far as to characterize the right to complete as supplying an "independent exception to the rule against hearsay."[11]

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[7] *See* Weinstein on Evidence at 106-4.

[8] Wigmore at § 2097, p. 609 ("The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. He may give his "understanding" or "impression" as to the net meaning of the words heard.").

[9] Wigmore, at § 2100, p. 626.

[10] *See* Wigmore at § 2113, p. 660 (noting that "it is not uncommon for courts to treat the remaining utterance, thus put in, as having a legitimate assertive and testimonial value of its own – as if, having once got in, it could be used for any purpose whatever."); Wright & Graham, at § 5072.1, p. 393 ("the major purpose of the common law completeness doctrine was to provide an exception to those rules that prevented the opponent from showing how the proponent had misled the jury"). *See also Storer v, Gowen*, 18 Me. 174, 176-77 (1841) ("Both are equally evidence to the jury"); *Simmons v. State,* 105 So. 2d 691 (Ala. App. 1958) (completeness "makes admissible self-serving statements which otherwise would be inadmissible").

[11] *Rokus v. City of Bridgeport*, 463 A.2d 252, 256 (Conn. 1983). *See also Stevenson v. United States*, 86 F. 106, 108 (5th Cir. 1898) ("when the United States proved the conversations and declarations the accused was entitled to have the full conversation or conversations given in evidence"); California Law Revision Commission Tentative Recommendation and Study Related to Uniform Rules of Evidence, Article VIII, Hearsay Evidence, 599 (Aug.

In sum, the common-law rule of completeness is broader than Rule 106 in at least two respects: 1. Completing statements are generally admissible under the common law even though they are hearsay --- and while this is true in many courts under Rule 106, it is not true in others; 2) Oral statements are admissible for completion under the common law, but they are not admissible under the terms of Rule 106. As we will see, this disparity in coverage as to oral statements has been corrected by most courts, who rely on either Rule 611(a) or the common law to admit oral statements when necessary for completion --- but not all courts do so.

On the other hand, the most important aspect of the common law rule of completeness is incorporated in Rule 106. The treatises and cases show that the *trigger* for completion --- a distorted presentation and a completion that corrects the misimpression --- is essentially the same.

Confusion Caused by Retaining the Common Law

The apparent viability of the common law underneath the codified rule of completeness is, without doubt, a source of confusion. In very large part, the Federal Rules of Evidence supplant the common law. The original Reporter, Professor Cleary, stated that the goal of the project was that after the Rules were enacted, there would be no common law. Thus there is no common law of hearsay that is retained.[12] The common law limitations on habit evidence have been specifically abrogated by Rule 406. It's hard to see why the common law should be left to operate behind Rule 106 where it appears to have been superseded by every other rule.[13] There is no other rule of evidence that has been held to be subject to supplementation by the common law.

There is case law showing the confusion that is sown by the apparent retention of common law rules of completeness as a kind of backstop for Rule 106. For example, in the recent case of *United States v. Oloyede,* 933 F.3d 302 (4th Cir. 2019), one defendant, speaking to a police officer, made statements that inculpated him, and others that exculpated other defendants. Those other defendants moved for completion. Because the statements were oral, the defendants recognized that Rule 106 did not apply, but they maintained that "there is a still-viable common law on the rule of completeness" that should have allowed the entire statement to come in. The court responded:

> ***"While we doubt that a common law rule of completeness survives Rule 106's codification, we hold that any such common law rule cannot be used to justify the admission of inadmissible hearsay. See Federal Rule of Evidence 802 (Hearsay is not***

1962) ("To the extent that this section makes hearsay admissible, we may regard the section as a special exception to the hearsay rule.").

[12] See Rule 802, which provides that hearsay is inadmissible unless there is an exception --- and specifically not relying on common law as the source of any exception.

[13] Of course, privileges are an exception, but that is because Rule 501 (drafted by Congress over the opposition of the Advisory Committee) specifically provides that the federal common law of privilege is applicable. Rule 106 does not make a specific provision for common law.

admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules proscribed by the Supreme Court).”

There are several takeaways from this pithy remark:

1. The Court was apparently unaware of the Supreme Court’s statement about partial codification in *Beech Aircraft.* If the Fourth Circuit can’t get this right, how can we expect regular lawyers to do so?

2. While not citing *Beech Aircraft,* maybe the court just disagreed with the *Beech* declaration. After all, the *Beech* declaration was not a holding. And on the merits, for the reasons stated, it is far better to have a system with no residual common law lurking beneath the code --- where the whole point was to have a federal code of evidence *rather than* the murky common law.

3. The court is not saying that the common law did not allow completion with hearsay. (That would be wrong to say, as discussed above). Rather it is saying that the common law cannot be a source of *admitting* hearsay. Under Rule 802, *common law is not listed as one of the sources for admitting hearsay*. This makes sense from the Advisory Committee’s position, as the Committee was trying to supplant the common law of hearsay --- the last thing it wanted was a bunch of common law hearsay exceptions being used to muck up the Rule 803/804 exceptions. But it does present a problem if a party is relying on the common law to offer hearsay under the rule of completeness.

4. Why did nobody invoke Rule 611(a) for admitting the oral statements? I think the answer is that the whole area of “completeness” is just too complicated right now. There are too many sources to keep track of. Here was a case where the defense counsel was diligent --- counsel had done enough work to realize that a common-law argument remained (which means counsel did better research than the court did) --- but counsel didn’t pick up the scent on Rule 611(a).[14] That is just a sad state of affairs. It calls strongly for all completeness issues to be decided under one rule.

In sum, it is pretty clear that we would all be better off without a common law backstop to Rule 106. This is especially so because unlike some evidentiary questions that can be raised *in limine*, completion questions are usually raised *at trial* when a proponent offers just a portion of a statement. At that time, it is hard to expect the parties to have both the common law and Rule 611(a) in mind when they are seeking to solve a completion problem. It would clearly be *much better* if all completion issues were covered in a single rule. That is why the draft Committee Note *infra* states that the intent of the amendment is to completely displace the common law.

[14] It’s hard to criticize counsel for not raising Rule 611(a). That rule is a broadly written grant of authority that gives the judge a bunch of discretion to control the presentation of evidence. It doesn’t say anything about completion. When there is already a rule that specifically governs completion, one might be excused for not considering Rule 611(a).

II. The Two Major Questions on Which Courts are Divided

A. Can Hearsay Be Admitted When Necessary to Complete Under Rule 106?

The most important problem --- and dispute among the courts --- regarding Rule 106 is whether the Rule requires the court to admit a completing statement over a hearsay objection. As discussed in prior memos, a fair number of courts have held that even in the narrow situation in which completion is allowed, a defendant cannot invoke Rule 106 to counter a hearsay objection. The rationale given is that Rule 106 cannot operate as a hearsay exception because it is not styled as a hearsay exception and is not located in Article VIII, where all the hearsay stuff is supposed to be. But as also noted previously, a number of courts have reasoned that in order to do its job of correcting unfairness, Rule 106 *has to* operate as a rule that will admit completing evidence over a hearsay objection. *See, e.g., Gudava v. Ne. Hosp. Corp.*, 2020 U.S. Dist. LEXIS 25151 (D. Mass.) ("Regardless of whether it satisfies an exception to the hearsay rule, defendant cannot simultaneously rely on evidence of the First Warning it issued to Gudava and bar Gudava from introducing evidence of her written appeal of that warning. Fairness dictates that either all or none of the entire record of Gudava's First Warning, including her appeal, will be admitted.").

1. Conflict in the Cases:

Here is the conflicting case law on the hearsay question:

Cases holding or stating that Rule 106, when properly triggered, applies to overcome a hearsay objection to the remainder:

- *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986): The court notes that Rule 106 cannot do what it is intended to do --- correct a misleading impression --- unless it can be used as a vehicle to admit completing hearsay. The court also makes three important arguments for finding that Rule 106 operates as a hearsay exception:

> 1. "[E]very major rule of exclusion in the Federal Rules of Evidence contains the proviso, 'except as otherwise provided by these rules.' * * * There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed."
>
> 2. The DOJ petitioned Congress to add specific language stating that completing evidence had to be independently admissible. But Congress refused to add such language.
>
> 3. Rule 106 was patterned after the California rule, and that rule was (and is) known to allow for admissibility of hearsay when necessary to rectify a misleading statement.

- *United States v. Bucci,* 525 F.2d 116 (1st Cir. 2008) ("Case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.").

- *United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019) (Livingston, J.) ("when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced"); *United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007) (under Rule 106, "even though a statement may be hearsay, an omitted portion of the statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion").

- *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988): The *government* sought to complete with portions of the grand jury testimony of a witness. The defendant argued that the portions were hearsay. The court responded:

> The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed.R.Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness to be considered contemporaneously. The rule simply speaks to the obvious notion that parties should not be able to lift selected portions out of context. *United States v. Sutton,* 801 F.2d 1346, 1366–69 (D.C.Cir.1986).

- *United States v. Portillo,* 969 F.3d 144 (5th Cir. 2020) (stating in dictum that Rule 106 allows the admission of statements necessary to complete "even when they are otherwise barred by the hearsay rule" and citing a Fourth Circuit case for the proposition).

- *United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1983): "Ordinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible. But here the exculpatory remarks were part and parcel of the very statement a portion of which the Government was properly bringing before the jury, i.e. the defendant's admission about the marijuana. * * * The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence."

- *United States v. Harry,* 816 F.3d 1268 (10th Cir. 2016) (noting that the fairness principle of Rule 106 "can override the rule excluding hearsay" but finding that fairness did not require completion in the instant case). See also *United States v. Lopez-Medina,* 596 F.3d 716 (10th Cir. 2010) (completing hearsay was found admissible, the court reasoning that a party who introduces a misleading portion opens the door to a fair completion).

Cases holding or stating that Rule 106 cannot be used to admit evidence over a hearsay objection:

● *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) ("Rule 106 does not render admissible evidence that is otherwise inadmissible."); *Accord, United States Football League v. National Football League,* 842 F.2d 1335 (2nd Cir. 1988)("The doctrine of completeness, Rule 106, does not compel admission of otherwise inadmissible hearsay evidence.").

● *United States v. Hassan,* 742 F.3d 104 (4th Cir. 2014) (defendant's web postings were not admissible under Rule 106 because they were hearsay); *United States v. Lentz,* 524 F.3d 501 (4th Cir. 2008) ("Rule 106 does not render admissible the evidence which is otherwise inadmissible under the hearsay rules."). ***Accord*** *United States v. Oloyede,* 933 F.3d 302 (4th Cir. 2019).

● *United States v. Adams,* 722 F.3d 788 (6th Cir. 2013) (discussed infra, holding that Rule 106 does not operate to admit hearsay even if admission is necessary to prevent an unfair result; the court recognizes that the government offered a misleading portion but held that the defendant had no relief under Rule 106); *United States v. McQuarrie*, 2020 WL 2732226 (6th Cir.) ("We have held that the rule of completeness reflected in Rule 106 covers an order of proof problem; it is not designed to make something admissible that should be excluded. Although we have sometimes been critical of the rule, we have repeatedly held that exculpatory hearsay may not come in solely on the basis of completeness.").

● *United States v. Vargas*, 689 F.3d 867, 876 (7th Cir. 2012) ("a party cannot use the doctrine of completeness to circumvent Rule 803' s [sic] exclusion of hearsay testimony.").

● *United States v. Woolbright,* 831 F.2d 1390 (8th Cir. 1987): "Neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the 'ascertainment of the truth' empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception."

● *United States v. Hayat,* 710 F.3d 875, 896 (9th Cir. 2013) ("Rule 106 does not compel admission of otherwise inadmissible hearsay evidence."); *see also United States v. Cisneros*, 2018 WL 3702497 (C.D. Ca. July 30, 2018) (exculpatory statements in a post-arrest

interview could not be admitted under Rule 106 because they were hearsay, even assuming that they were necessary to clarify the defendant's inculpatory statements); *United States v. Encinas Pablo,* 2020 WL 516608 (D. Ariz.) (rejecting the defendant's argument that his hearsay statements should be admitted under the rule of completeness because "out of court statements not falling within an exception to the hearsay rule are inadmissible regardless of Rule 106").

In sum there is a clear conflict in the courts about whether Rule 106 can operate to overcome a hearsay objection.

2. Admitted for What Purpose?

In those cases where the courts have recognized that a remainder may be admitted under Rule 106 over a hearsay objection, there is some disagreement about the purpose for which that remainder is offered. The narrowest position is that the remainder can be offered not for its truth but only to put the original misleading statement in *context.* As such, it is not hearsay at all. Illustrative of this position is the recent opinion in *United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019), where the court states that "when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced."

In *Williams,* the statement offered for completion was not, in fact, found admissible because it didn't fit the strict fairness standards of Rule 106. In contrast, in most of the reported cases in which completing evidence *was* found admissible over a hearsay objection, it was found to be admissible *as proof of a fact.* Here are two examples:

- In *Sutton, supra,* the court held that defendant Sucher had the right under Rule 106 to admit portions of a conversation he had, where the government had admitted other portions that were misleading. The government offered Sucher's statements that he sent documents to Kolbert to show consciousness of guilt. The court treats the remainder in this way:

> Sucher's defense was that he innocently gave Kolbert the documents without any knowledge of illegality. Three of the four excluded statements *would support an inference consistent with that defense.* The second statement (2) could have *supported Sucher's assertion* that he provided documents to Kolbert out of a desire to cooperate with his fellow employee at DOE. The first (1) and fourth (4) statements would have *supported an inference* contrary to the government's contention that Sucher exhibited consciousness of his guilt. The possible contrary inference of (1) and (4) is that Sucher gave documents innocently, and was afraid that Kolbert may have falsely told Maxwell that Sucher, as the source of the documents, was a knowing and willing participant in the illegal conspiracy.

It is apparent that the court is holding that the completing statements are offered for the *fact* that Sucher had no consciousness of guilt. That's what it means to "support an inference." The trial court had excluded the statements on the ground that they were hearsay to prove Sucher's prior state of mind. And the appellate court is saying that, yes this is true, but it is *admissible* to prove that prior state of mind under Rule 106.

● In *Haddad, supra,* the Seventh Circuit held that when the government offered the defendant's statement, "the drugs were mine," the defendant should have been allowed to complete with the contemporaneous statement "but I don't know about the gun." The court found the exclusion to be harmless error, however. The analysis of why the completing statement should have been admitted, and the analysis of why exclusion was harmless, indicate that the court is saying that the statement should have been admitted to prove a fact --- that the defendant did not know about the gun:

> The marijuana that Mr. Haddad admitted placing under the bed was only some six inches from the implicated gun. The defendant in effect said "Yes, I knew of the marijuana but I had no knowledge of the gun." The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence. The error in the evidentiary ruling was, nevertheless, harmless.
>
> Even though Mr. Haddad did not testify, he called his girlfriend, Ms. McMullin, to the witness stand. She testified that it was she who purchased the gun and that she hid it from the defendant and that the defendant had no knowledge of the weapon. So the defendant got before the jury the same message that is contained in the exculpatory portions of his statement to Officer Linder, to-wit: that he had no knowledge of the gun.

So the court is saying that the error is harmless because there was already alternative *proof of the same fact*. Moreover, it makes no sense to say that "I know nothing about the gun" is admissible only for context. The only way it provides context is if it is true.

This is not to say that a completing statement can never be used by a proponent solely for context. It is just to say that a proponent should be able, if she so desires, to have the completing portion evaluated the same way as the portion admitted by the proponent --- as proof of a fact.

B. Does the Rule of Completeness Apply to Oral, Unrecorded Statements?

Rule 106 does not, by its terms, apply to oral statements that have not been recorded --- which is, as stated above, a departure from the common law.

The exclusion of unrecorded statements from Rule 106 has led most courts to find an alternative way to admit such statements when necessary for completion --- and this makes good sense because, as Judge Grimm stated, there is no rational basis for a categorical distinction between an oral statement and a recorded statement if each meets the fairness requirement of Rule 106.

One possible way that courts have allowed oral statements where necessary to complete is to rely on the common law rule of completeness. As stated above, the Supreme Court stated in *Beech Aircraft* that the common-law rule of completeness---which does cover unrecorded oral statements --- retains vitality. *See United States v. Sanjar,* 853 F.3d 190, 204 (5th Cir. 2017) (common law rule of completeness "is just a corollary of the principle that relevant evidence is generally admissible").

But most courts do not directly rely on the common law --- probably because, like the Fourth Circuit in *Oleyede, supra,* they don't think that a common law of evidence exists after the enactment of the Federal Rules of Evidence. Rather, most courts admit unrecorded statements for completion through an invocation of Rule 611(a), which grants courts the authority to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth."

The leading case on unrecorded statements and completeness under Rule 611(a) is *United States v. Castro,* 813 F.2d 571, 576 (2d Cir. 1987), where the court held that Rule 611(a), "compared to Rule 106, provides equivalent control over testimonial proof." The court concluded that "whether we operate under Rule 106's embodiment of the rule of completeness, or under the more general provision of Rule 611(a), we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties." *Accord United States v. Williams,* 930 F.3d 44 (2nd Cir. 2019) ("in this Circuit, the completeness principle applies to oral statements through Rule 611(a)").

The end result is that in most courts unrecorded statements are subject to the rule of completeness in the same measure as written statements --- but, weirdly, not under the very rule that governs completeness.

Other than the Second Circuit cases cited above, the following courts have explicitly recognized a rule of completeness applicable to oral unrecorded statements, usually under Rule 611(a):

- *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (unrecorded statements of a government witness properly admitted to complete).

- *United States v. Verdugo*, 617 F.3d 565 (1st Cir. 2010) ("the district court retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements"). *Compare United States v. Altvater,* 954 F.3d 45 (1st Cir. 2020) ("We note that Rule 106, by its text, does not apply to unrecorded oral statements. As such, Rule 106 could not be used to justify the admission of the unrecorded statements, . . . though other non-constitutional requirements might.").

- *United States v. Holden,* 557 F.3d 698, 704 (6th Cir. 2009): "The common law version of the rule was codified for written statements in Fed.R.Evid. 106, and has since been extended to oral statements through interpretation of Fed.R.Evid. 611(a). Courts treat the two as equivalent. *United States v. Shaver*, 89 Fed.Appx. 529, 532 (6th Cir.2004)."

- *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1993) (exculpatory portion of an oral confession should have been admitted to complete; declaring that Rule 611(a) gives the judge the same authority regarding unrecorded statements as Rule 106 grants regarding written and recorded statements).

- *United States v. Woolbright,* 831 F.2d 1390 (8th Cir. 1987) (stating that Rule 611(a) supports a rule of completeness for unrecorded statements that is the same as that applied to written and recorded statements under Rule 106; but holding that neither rule allows the admission of otherwise inadmissible hearsay).

- *United States v. Lopez-Medina*, 596 F.3d 716, 734 (10th Cir. 2010) ("We have held the rule of completeness embodied in Rule 106 is substantially applicable to oral testimony as well by virtue of Fed. R. Evid. 611(a)").

- *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005): "We have extended Rule 106 to oral testimony in light of Rule 611(a)'s requirement that the district court exercise 'reasonable control' over witness interrogation and the presentation of evidence to make them effective vehicles for the ascertainment of truth."

- *United States v. Green,* 694 F. Supp. 107, 110 (E.D. Pa. 1988), aff'd, 875 F.2d 312 (3d Cir. 1989) (dictum; the court finds that the rule of completeness applies to unrecorded statements, relying on Second Circuit authority, but finds the offered portion in this case to be not necessary for completion).[15]

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[15] The Fifth Circuit in *United States v. Sanjar,* 876 F.3d 725, 739 (5th Cir. 2017), in dictum, seems to recognize that oral statements might be admissible to complete under some circumstances (though in *United States v. Gibson,* discussed infra, it specifically held that oral statements were not admissible to complete):

> The language of Rule 106 expressly limits it "to situations in which part of a writing or recorded statement is introduced into evidence." That said, the Eleventh Circuit has held that testimony may nonetheless fall within the rule's ambit if it is "tantamount" to offering a recorded statement into evidence. But we have held that this standard is not met in the situation here when the agent neither read from the report nor quoted it.

Besides the user-*un*friendliness of having three separate sources of authority to cover the completeness problem (i.e., Rule 106 as to written and recorded statements and Rule 611(a) or the common law as to unrecorded oral statements), there is another important reason for amending Rule 106 to include coverage of unrecorded oral statements: There are some cases in which courts faced with a completeness argument as to unrecorded oral statements **simply say that Rule 106 does not apply, and so that is that *--- these courts do not evaluate the statement under Rule 611(a) or the common-law rule of completeness***. That is to say, they implicitly reject --- or just ignore --- the Second Circuit's view on applying the rule of completeness to unrecorded statements through Rule 611(a).

For example, in *United States v. Gibson,* 875 F.3d 179 (5th Cir. 2017), the defendant sought completion with an oral, unrecorded statement. The defendant relied on Rule 106 but the court stated that "Rule 106 applies only to written and recorded statements." That statement was true as far as it goes. But no effort was made to consider admissibility of the statement under Rule 611(a) or the common law.

To be fair to the court in *Gibson,* it is likely that defense counsel relied solely on Rule 106, and never raised Rule 611(a) or the common law rule of completeness with regard to unrecorded oral statements offered to complete. But that in itself might indicate a reason to treat both recorded and unrecorded statements under a single rule --- in order to avoid a trap for the unwary. Again, arguments about completeness usually arise right at the trial, when it is unlikely that most lawyers (or judges) will be thinking about sources of law outside Rule 106 when faced with a completeness problem. Clearly it would be better to have a single rule, in a rule book, that everyone can rely on at the time of trial.

The Fifth Circuit in *Gibson* is not the only court that has excluded unrecorded statements without resort to Rule 611(a) or the common law. ***The following courts also have made statements that end their analysis of oral statements with the language of Rule 106:***

- *United States v. Wilkerson,* 84 F.3d 692, 696 (4th Cir. 1996) (finding no relief from a misleading presentation because the completing statement was unrecorded and so Rule 106 does not apply).

- *United States v. Mitchell,* 502 F.3d 931, 965 n.9 (9th Cir. 2007) (refusing to consider completion with unrecorded statements because Rule 106 does not apply); *United States*

The common law rule of completeness, which is just a corollary of the principle that relevant evidence is generally admissible, does provide a right to cross examine. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988). The rule comes into play, however, only when the additional inquiry is needed to "explain, vary, or contradict" the testimony already given. The other statements by Sanjar that defense counsel sought to ask the agent about, many of which are assertions of innocence, were "not necessary to qualify, explain, or place into context" the limited statements the agent testified about on direct. [most citations omitted]

v. Hayat, 710 F.3d 875, 895 (9th Cir. 2013) ("our cases have applied the rule of completeness only to written and recorded statements"). In *United States v. Liera-Morales,* 759 F.3d 1105, 1111 (9th Cir. 2014), the 9th Circuit adhered to its view ***even though it recognized that other circuits allow oral statements to complete*:**

> By its terms, Rule 106 "applies only to written and recorded statements." *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir.2000). Consistent with Rule 106's text, we have recently observed that "our cases have applied the rule only to written and recorded statements." *United States v. Hayat*, 710 F.3d 875, 896 (9th Cir.2013) (internal quotation marks omitted). Nevertheless, at least two of our sister circuits have recognized that the principle underlying Rule 106 also applies to oral testimony "by virtue of Fed.R.Evid. 611(a), which obligates the court to make the interrogation and presentation effective for the ascertainment of the truth." *United States v. Mussaleen*, 35 F.3d 692, 696 (2d Cir.1994) (internal quotation marks omitted); accord *United States v. Li*, 55 F.3d 325, 329 (7th Cir.1995) ("[T]he rule of completeness applied to the oral statement.").

- *United States v. Ramirez-Perez,* 166 F.3d 1106 (11th Cir. 1999): The court held that the rule of completeness did not apply to the defendant's confession *even though it was written and signed*. That is because the officer who took the confession was asked at trial only about what the defendant said, not what the defendant wrote down. The court concluded that "[b]ecause the prosecutor questioned the agent only about what Maclavio said rather than about what was written in the document, Rule 106 did not apply."

> **Note: The result in *Ramirez-Perez* has to be wrong even in a circuit holding that Rule 106 does not apply to unrecorded statements. The proponent should not be able to avoid Rule 106 by asking the witness what he heard, when what he heard was placed in a record. The case provides a pretty good example of the need to treat recorded and unrecorded statements the same under the rule of completeness. The "oral statement" exception to Rule 106 is subject to abuse.[16]**

- *United States v. Cooya,* 2012 WL 1414855 (M.D. Pa.) ("Rule 106 applies only to written and recorded statements"; no attempt made to analyze completeness under Rule 611 or the common law rule of completeness).

To clarify, none of the above case law holds that Rule 611(a) and the common law *cannot* be used for completion of oral statements. These cases immediately above stop at Rule 106 and do not reach the Rule 611(a) question – often perhaps because the party seeking completeness never

[16] It should be noted that *Ramirez-Perez* is inconsistent with other authority in the 11th Circuit. See *United States v. Baker,* supra (applying Rule 611(a) to an oral statement offered to complete). But that inconsistency would seem to point to some cause for rule clarification, given the complexity of the Rule 611(a)/common law construct for oral statements that is currently employed by most courts.

asked the court to do so (though as seen above the Ninth Circuit recognizes the existence of the Rule 611(a) case law without explicitly rejecting it, but does not follow it). But the very fact that the party may not have directed the court outside the language of Rule 106 might counsel in favor of a clarifying amendment that would put all statements offered for completion *under a single rule*.

As Judge Campbell has said, we don't need to draft rules for good lawyers, as they can work things out. We need to draft rules for lawyers that read the rules the way they are written and go no further. If that is the case, there is a good argument for amending Rule 106 to cover oral statements --- because *it will not change the result that is currently reached in the many courts that have properly addressed the matter*, and it will help the parties and courts where lawyers read the rule and do no more.

Again to emphasize: adding oral statements to Rule 106 will not create a management problem for the court, because most courts have already properly recognized that oral statements *are covered by the rule of completeness.* Thus, it is not a question of opening the floodgates or changing the law in most courts. It is basically a question of making the rule less opaque and more user-friendly.

III. Questions Raised About the Proposed Amendment

A. Admissible Over A Hearsay Objection

If the conflict on Rule 106 is to be resolved, it seems apparent that it must be resolved in favor of admissibility (in *some* form) of the completing evidence – again assuming that the strict requirements for completion under Rule 106 are established. It seems simply wrong to hold that the adverse party can introduce a misleading portion of a statement, and then turn around and object to evidence that would fairly be offered to rectify the misleading impression. Professor Wright and Graham opine that construing Rule 106 to allow such injustice would violate the basic principles of Rule 102:

> No one has ever explained how these standards would be met by a construction that would allow a party to present evidence out of context so as to mislead the jury, [and] then assert an exclusionary rule to keep the other side from exposing his deception.

21A Wright et al., Federal Practice and Procedure, §5078.1.

What follows is a discussion of some of the arguments that have been made regarding an amendment that would allow completing evidence to be admissible over a hearsay objection.

1. Argument Against Amendment: The Testifying Alternative

Some courts have argued that a court's refusal to allow completion with hearsay statements is not unfair, because the defendant can simply rectify the situation by taking the stand and testifying to the completing statement. So for example, the argument is that the defendant in the Grimm hypothetical could simply take the stand and say, "when I told the officer I bought the gun, I also told him that I sold it before the crime."[17]

But there are a number of reasons why the defendant's testimony option is not a good solution to the unfairness problem:

1. The defendant, by testifying, might be subject to impeachment under the liberal tests employed by the courts under Rule 609 (a ship that has sailed for now); impeachment with a prior conviction is a pretty heavy cost to pay for restoring fairness after the government has engineered a misleading impression.

2. The testimony remedy ignores the advantage that Rule 106 presents as to the *timing* of completion. The rule recognizes that contemporaneous completion is provided by the rule due to "the inadequacy of repair work when delayed to a later point in the trial." (Rule 106 Advisory Committee Note). Defendant's testifying in the defense case-in-chief is in no sense contemporaneous with the government's admission of the misleading portion.

3. Leaving completion to the defendant's testimony raises a tension with the defendant's constitutional right *not* to testify. The Seventh Circuit recognized the unfairness of the testimony alternative in *United States v. Walker,* 652 F.2d 708, 713 (7th Cir. 1981):

> In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no "repair work" which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand does bear similarity to "[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination." [quoting Weinstein's Evidence].

See also United States v. 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

[17] *See United States v. Holifield,* 2010 U.S. Dist. LEXIS 147815 (C.D.Cal.) ("The court orders that Defendant Jordan may not introduce any exculpatory statements, not previously introduced by the government, that constitute inadmissible hearsay" and that if the defendant wants to admit such statements "he must do so by taking the stand and testifying himself" because "Federal Rule of Evidence 106 does not influence the admissibility of such hearsay statements.").

recordings."); *United States v. Marin*, 669 F.2d 73, 85 n.6 (2d Cir. 1982) ("when the government offers in evidence a defendant's confession and in confessing the defendant has also made exculpatory statements that the government seeks to omit, the defendant's Fifth Amendment rights may be implicated").

4. In some cases the defendant is not seeking to complete his own statements, but rather offering the remainder of a statement by a *third party*, after the government selectively introduced a portion of the third party's statement. (Such as a statement made by a witness to a police officer). In those cases, it is hard to see how the defendant can testify his way out of a third party's statement that is redacted to be misleading.

5. Probably most importantly, even if the defendant testifies, he will most likely *not even be able* to testify to his prior statement. Thus, the Grimm defendant would not be able to testify that "I told the officer that I sold the gun." That is because that testimony would constitute a prior consistent statement, which would only be admissible if the defendant's credibility is attacked and the statement is relevant to rehabilitation. See Rule 801(d)(1)(B). In this case, the statement would not be probative to rehabilitate the defendant's credibility --- the attack would be that the defendant has a motive to falsify, but the statement (pursuant to an arrest) was not made before the motive to falsify arose. Therefore, completion is necessary to correct the misleading portions of the defendant's statements *even if the defendant does testify.* See, e.g., *United States v. Vargas*, 2018 WL 6061207, at *2 (S.D.N.Y.) (completion with exculpatory statements was necessary because even though the defendant was going to testify, the admission of the prior inculpatory portions of the statements could lead the jury to conclude that he made no exculpatory statements; and without completion, the defendant's exculpatory testimony at trial could be thought by the jury to be "a recent fabrication, inaccurately undercutting defendant's credibility.").

In sum, the testimony alternative does not appear to be a good answer to the argument that it is unfair for the government to admit a misleading portion of a statement and then lodge a hearsay objection to the necessary remainder.

And of course, the testimony alternative is not a solution when it is the *government* that wants to complete. The government may not be able to find or call the witness whose statement it wishes to complete. The same goes for civil cases if the statement that needs to be completed is from a third party.

2. Argument Against Amendment: Parties Wouldn't Risk Being Rebutted by Completing Evidence

At a previous Committee meeting, the thought was raised that the problem of admitting misleading portions of a statement would be self-regulating --- meaning it wouldn't happen --- because the party would be worried that the remainder would be admitted somewhere down the

line. Let's call that the "deterrence" argument --- you don't need an amendment because the party making the initial offer will be deterred from introducing a misleading portion.

There are two reasons to think that the deterrent effect of later rectification will not be sufficient to protect against the use of misleading portions. The first reason is recognized in the Advisory Committee Note and was previously discussed. A major reason for the rule is to permit contemporaneous completion because of "the inadequacy of repair work when delayed to a point later in the trial." Thus, the *very premise* of the rule is that the risk of correction "somewhere down the line" is not a sufficient deterrent.

Second and more importantly, if the "repair" would come from a hearsay statement, then *there will be no rectification down the line* in the courts that hold that Rule 106 does not allow admission of hearsay. That is the consequence of those cases --- the misleading statement is admitted, without ever being rebutted because the misleading party raises a hearsay objection to the remainder.

Is it really possible that a court would allow a party to admit a misleading portion of the statement, but then prevent a completion on hearsay grounds even though fairness would require it? The answer is yes. There are, in fact, decided cases in which the court recognizes that the initial portion is misleading, yet admissible --- and unrebuttable because the completing party seeks to complete with hearsay. The leading example of this troubling result is *United States v. Adams,* 722 F.3d 788, 827 (6th Cir. 2013). Defendant Maricle, a state court judge, was accused of conspiring to buy votes and to help appoint corrupt members of the Clay County Board of Elections. The government was allowed to present portions of a phone recording in which a cooperating witness (White) told Maricle about questions she had been asked during her grand jury testimony. White told Maricle that she had been asked whether Maricle had appointed her as an election officer. Maricle responded, "Did I appoint you? (Laugh)," and White said "Yeah." Maricle then said, "But I don't really have any authority to appoint anybody." That last statement was redacted from the government's presentation. That meant that the portion indicated that Maricle had essentially adopted the accusation that he had appointed White. When Maricle sought to complete with his statement that he didn't even have authority to make the appointment, the court excluded it as hearsay.

Remarkably, the Sixth Circuit found that the government had unfairly presented the evidence, but that nothing could be done about it:

> Defendants claim that "by severely cropping the transcripts, the government significantly altered the meaning of what [defendants] actually said." Maricle Br. at 35. *Although we agree that these examples highlight the government's unfair presentation of the evidence, this court's bar against admitting hearsay under Rule 106 leaves defendants without redress.* (emphasis added).

In a footnote in *Adams,* the court stated that "should this court sitting en banc address whether Rule 106 requires that the other evidence be otherwise admissible, it might consider" all the

authorities that have criticized the rule that allows the government to admit a misleading portion and then object on hearsay grounds to a necessary completion.[18]

It should be noted that *Adams* was written eight years ago; the Sixth Circuit has not sat en banc on the Rule 106 question. And it continues to apply the rule as it did in *Adams. See, e.g., United States v. McQuarrie*, 2020 WL 2732226 (6th Cir.) ("Although we have sometimes been critical of the rule, [citing *Adams*] we have repeatedly held that exculpatory hearsay may not come in solely on the basis of completeness.").

For these reasons, the possibility that parties will be deterred from misleading presentations by the risk of rebuttal is not a ground for rejecting an amendment to Rule 106 that would allow the opponent to admit completing hearsay to remedy a misleading presentation.

3. Argument: What About the Constitution as a Remedy?

It might be argued that any unfairness resulting from the fact that a criminal defendant cannot rebut a misleading presentation with completing hearsay could be rectified by the Constitution. Couldn't the defendant in *Adams* argue that his constitutional right to an effective defense was violated by the exclusion of his completing hearsay? For example, in *Chambers v. Mississippi,* 410 U.S. 284 (1973), the Court found that the defendant's constitutional right to an effective defense was violated when a confluence of state evidence rules barred the admissibility of hearsay evidence strongly indicating that a third party committed the crime. A response to this argument, however, is that the *Chambers* Court, and subsequent decisions, emphasize that the constitutional right to overcome evidentiary rules of exclusion is extremely narrow. The accused must show that the evidence rule infringes upon a "weighty interest" and that the exclusion is "arbitrary or disproportionate to the purposes[] [it is] designed to serve." *United States v. Scheffer,* 523 U.S. 303, 308 (1998) (finding that exclusion of exculpatory polygraph evidence does not violate the right to an effective defense). So whether an accused will be protected by the

[18] The authorities cited by the *Adams* court are:

> Stephen A. Saltzburg et al., 1–106 Federal Rules of Evidence Manual § 106.02 ("We believe that these rulings are misguided and contrary to the completeness principle embodied in Rule 106. A party should not be able to admit an incomplete statement that gives an unfair impression, and then object on hearsay grounds to completing statements that would rectify the unfairness."); Charles Alan Wright et al., 21A Federal Practice and Procedure § 5078.1 (2d ed.2012) ("Even were Rule 106 ambiguous on this point, Rule 102 requires that it 'be construed to secure fairness in administration ... to the end that the truth be ascertained and proceedings justly determined.' 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, then assert an exclusionary rule to keep the other side from exposing his deception."); Dale A. Nance, *A Theory of Verbal Completeness*, 80 Iowa L.Rev. 825 (1995); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) ("The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof.... 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.").

Constitution in *Adams*-like situations is a matter of debate --- and leaving it to the constitution would lead to a case-by-case approach rather than a rule.

The federal case law that exists on the subject has denied *Chambers*-based claims where defendants argue unfairness because their inculpatory statements are admitted and their exculpatory statements are not. The leading case is *Gacy v. Welborn*, 994 F.2d 305, 325 (7th Cir. 1993). Gacy filed a petition for federal habeas corpus relief from his murder conviction. The government offered Gacy's inculpatory statements under Rule 801(d)(2)(A), and then, according to the court, "used the hearsay objections to prevent Gacy from getting the more favorable portions of his story before the jury indirectly." Nevertheless, the appellate court found no error in the trial court's exclusion of Gacy's statements. As the court explained:

> Beyond explicit rules such as the privilege against self-incrimination and the confrontation clause, none of which applies here, the Constitution has little to say about rules of evidence. The hearsay rule and its exception for admissions of a party opponent are venerable doctrines; no serious constitutional challenge can be raised to them.
>
> A challenge would lie if a state used its evidentiary rules to blot out a substantial defense. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979). These cases hold that states must permit defendants to introduce reliable third-party confessions when direct evidence is unavailable. *No court has extended them to require a state to admit defendants' own out of court words.*

But even if the Constitution could be a solution for allowing completing hearsay from a defendant, there are at least two reasons to prefer a rule change to cover such situations:

> 1. It is never a good idea to have evidence rules that are susceptible to unconstitutional application. That is not only a bad outcome in terms of the integrity of rulemaking. It is also a trap for the unwary. Lawyers who assume (reasonably) that evidence rules are controlling may not be aware of the line of cases establishing a constitutional right to an effective defense that overcomes certain evidentiary exclusions. And even lawyers that know about these cases may rightly think that they are too narrow to cover every instance of unfairness when the government introduces a misleading portion of a statement. It is notable that the *Adams* court itself, in holding that Adams had "no redress" to the unfairness, did not reference the constitutional right to an effective defense --- meaning at a minimum that Adams's counsel probably did not raise the point.
>
> 2. The constitutional right to an effective defense has no applicability where the misleading portion is offered *by the criminal defendant,* or by a party in a civil case. In those situations, the remedy against unfairness must come from the Evidence Rules, or not at all.

For these reasons, the unfairness resulting from an unrebutted misleading presentation should be a matter for Rule 106, not the constitutional right to an effective defense.

4. Argument Against Amendment: Completion Would Allow Unreliable Hearsay to be Admitted.

At a previous meeting, a Committee member complained that an amendment to Rule 106 would allow "unreliable" hearsay to be admitted. The specific argument was that the defendant's statement in the Grimm hypothetical that he gave the gun away should not be admissible for its truth because it is unreliable.

But there is a strong argument to be made that a concern about unreliability of a completing statement misses the point. To start with, in the classic case of an adversary's statement, *the initial portion of the statement, offered by the government, is not admitted because it is reliable*. The rationale for admitting a party-opponent statement is described in the Advisory Committee Note to Rule 801:

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility as evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. *No guarantee of trustworthiness is required in the case of an admission.*

Thus, a party-opponent statement is not admitted because it is reliable, but rather because it is consistent with the rationale of the adversary system, that you can use an opponent's own statements against them.

Following along with the adversarial premise, it is *not* consistent with the adversary system to allow an adversary to present the opponent's statement in such a way as to mislead the factfinder. Rule 801(d)(2) allows for *fair* adversarial use (you said it, you live with it) but there must be some protection against foul use (for when that is not what you really said). That is where Rule 106 comes in.

The argument that allowing Rule 106 to admit hearsay would result in unreliable evidence being introduced misunderstands the point of the completion --- the completion is necessary to provide an *accurate indication of what the defendant actually said*, regardless of whether the statement is in whole or in part reliable. Under these circumstances, if the first statement need not be reliable, why should the second statement have to be, when admission is necessary to protect against unfairness and to provide the jury more accurate information of *what was actually said*?

It should be noted, as to reliability, that proponents retain complete control over the admissibility of "unreliable" remainders --- they are free to forego the initial misleading statement instead of seeking to admit it. They are also free to argue to the factfinder that the completing remainder is a lie. What they should not be able to do is introduce misleading (and often unreliable) statements and then object that a statement correcting the misrepresentation is "unreliable."

5. Legislative History and Textual Arguments

Providing language in Rule 106 that would allow completing statements to be admissible over a hearsay objection appears to be consistent with legislative intent. This argument is based on two separate points about the drafting of the rule:

1. The rule was patterned after (though admittedly not the same as) the California rule, which has always been held to allow for completion with hearsay evidence.

2. When the rule was being considered in Congress, the DOJ sought to add language that completing evidence had to be independently admissible. During hearings on the Federal Rules of Evidence, Assistant Attorney General W. Vincent Rakestraw specifically requested that the Senate Judiciary Committee amend Rule 106 to permit the introduction of "any other part or any other writing or recorded statement *which is otherwise admissible.*" But Congress did not add that language.[19]

There is a contrary textual argument, however --- that Rule 106 cannot and should not operate as a hearsay exception because it is not placed with the other hearsay exceptions in Article 8. If the drafters had wanted a "rule of completeness hearsay exception" why wouldn't they put it with the rest of the hearsay exceptions?

There are three pretty good responses to the location argument, however. First, Rule 802, which is the operative rule against hearsay[20], provides that hearsay is inadmissible "unless any of the following provides otherwise:

- a federal statute;
- *these rules*; or
- other rules prescribed by the Supreme Court.

The reference is to *these* rules, meaning *all* of the Evidence Rules. If the drafters had wanted to limit hearsay exceptions to those in Article 8, Rule 802 would have referred to "the rules in this article" rather than "these rules."

Second, courts have actually found other rules outside of Article 8 to be grounds for admitting hearsay. For example, Civil Rule 32(a)(4)(B) allows admission of hearsay from a deposition even though the declarant is not unavailable under the terms of the Evidence Rules. In effect the Civil Rule creates an independent hearsay exception. And courts have upheld that exception, referring to Rule 802's list of sources for an exception outside of Article 8. *See, e.g., Fletcher v. Tomlinson,* 895 F.3d 1010, 1013 (8th Cir. 2018) (holding that Rule 32 authorizes admissibility of deposition hearsay even though it is not admissible under the Article 8 exceptions;

[19] Letter from Rakestraw to Senate Jud. Comm., 93rd Congress, 121-23.

[20] Rule 801 provides the definition of hearsay; Rule 802 is the source of exclusion of hearsay.

relying on Rule 802 and noting that "[d]ecisions from around the country have concluded that Rule 32(a)(4)(B) operates as an independent exception to the hearsay rule."). If a hearsay exception can be found completely outside the Evidence Rules, there is no reason why an exception cannot be found within those rules outside Article 8.[21]

The third responsive argument regarding placement of Rule 106 is set forth by the D.C. Circuit in *United States v. Sutton,* 801 F.2d 1346, 1368 (D.C. Cir. 1986). The court found the placement of Rule 106 to be a point *in favor* of finding a hearsay exception:

> The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof. Rule 106 is found not in Rule 611, which governs the "Mode and Order of Interrogation and Presentation," but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. See C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5078, at 376 (1977 & 1986 Supp.).
>
> Moreover, every major rule of exclusion in the Federal Rules of Evidence contains the proviso, "except as otherwise provided by these rules," which indicates that the draftsmen knew of the need to provide for relationships between rules and were familiar with a technique for doing this. There is no such proviso in Rule 106, which indicates that Rule 106 should not be so restrictively construed.

In sum, it would appear that legislative history, a fair reading of the Evidence Rules, and the placement and language of Rule 106 support the conclusion that Rule 106 can operate as a hearsay exception for completing evidence.

6. Justifying a Rule 106 Hearsay Exception as a Matter of Forfeiture or "Opening the Door"

When a party makes a misleading presentation, it has been held in many circumstances that the party forfeits the right to complain about the consequences. This is one aspect of "opening the door" --- a well-established doctrine in evidence. *See, e.g., United States v. Spotted Bear,* 920 F.3d 1199, 1201 (8th Cir. 2019) ("When a criminal defendant creates a false or misleading impression on an issue, . . . the government may clarify, rebut, or complete the issue with what would otherwise be inadmissible evidence, *including hearsay statements*.").

[21] Also, recently enacted Rules 902(13) and (14) effectively provide hearsay exceptions for testimony that authenticates electronic information --- a certificate is allowed as a substitute for trial testimony. And these exceptions are, of course, outside Article 8.

It has been held, for example, that a defendant who selectively reveals only the helpful parts of a testimonial statement forfeits the right to complain that the remainder is testimonial hearsay that violates the right to confrontation. The New York Court of Appeals, in *People v. Reid,* 19 N.Y.3d 382, 948 N.Y.S.2d 223, 227 (2012), put it this way:

> If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury by selectively treating only those details of a testimonial statement that are potentially helpful to the defense * * *. A defendant could do so with the secure knowledge that the concealed parts would not be admissible under the Confrontation Clause. To avoid such unfairness and to secure the truth-seeking goals of our courts, we hold that the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission.

If forfeiture-by-misleading is sufficient to overcome a *constitutional* objection, it certainly should be sufficient to overcome a hearsay objection.

Notably, the California Supreme Court has applied the *rule of completeness* to operate as a forfeiture provision where the proponent offers a misleading portion of a statement and objects to the admissibility of the remainder--- and in so doing it specifically rejected any concerns about admitting unreliable statements for completion purposes. In *People v. Vines,* 251 P.3d 943, 968–69 (Cal. 2011), the court stated that "like forfeiture by wrongdoing, [the rule of completeness] *is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting . . . to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood*."

It is also notable that Evidence Rule 502(a), governing subject matter waiver of privilege, lifted the language from Rule 106 as the "fairness" standard for determining subject matter waiver. See Advisory Committee Note to Rule 502(a) (noting that the animating principle of Rule 106 and 502(a) are the same). Under Rule 502(a), a party that makes a "selective, misleading presentation [of privileged communications] that is unfair to the adversary opens itself to a more complete and accurate presentation" through undisclosed privileged communications on the same subject matter. Id. If a selective, misleading presentation results in a *subject matter waiver of privilege,* it is hard to see how it cannot result in a forfeiture of a hearsay objection under Rule 106.

Indeed, in the circuits that exclude completing evidence on hearsay grounds, there is an objectionable inconsistency between Rules 106 and 502(a), contrary to the legislative intent behind Rule 502(a) --- *which was directly enacted by Congress*. Congress concluded that the two rules addressed the same type of problem and should be applied in the same way.[22] So it would appear

[22] Other rules with similar results are Rule 410(b)(1) (allowing admission of protected plea statements in which a selective and misleading impression can be corrected by those statements --- again using the "ought in fairness" standard); and Rule 804(b)(6)(hearsay objection forfeited for wrongdoing that did and was intended to keep the declarant from testifying). It makes no sense that a forfeiture of evidentiary protections is found in these rules but not in Rule 106.

that an amendment that corrects the courts that ignore the relationship between Rule 106 and 502(a) would be consistent with congressional intent and the fabric of the rules. *See, e.g., Jokich v. Rush Univ. Med. Ctr.,* 2020 WL 1548955, at *2 (N.D. Ill.) (noting, in the context of an argument over the scope of attorney-client privilege, that "[t]he language concerning subject matter waiver —'ought in fairness'— is taken from Rule 106 because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation").

B. The Context Alternative

One argument against adding a hearsay exception to Rule 106 is that it is not needed to remedy the unfairness, because the statement, if necessary to complete, is admissible as non-hearsay. That would mean that the courts that do exclude completing evidence on hearsay grounds are simply wrong about the hearsay question itself (as the Second Circuit noted in the recent *Williams* case, discussed above). The foundation of the argument is that when the proponent offers evidence out of its necessary context, any out-of-court statement that is clearly necessary to place the evidence in proper context is not hearsay at all; rather it is admissible for the not-for-truth purpose of providing context.

If this analysis is right, then technically there would be no need to amend the rule, because the rule itself does not need to operate as a hearsay exception --- it already allows the completing statement to be admissible because that statement, offered only for context, does not offend the hearsay rule. But if a large number of courts are getting the hearsay question wrong, and have been doing so for years, a possible response short of a hearsay "exception" is to amend the rule to state that if the narrow conditions for completion are met, the completing statement may be admitted for the non-hearsay purpose of context. The amendment would be justified as sending a needed signal to many courts that they should be doing what they haven't been doing. There are precedents for such an amendment --- i.e., telling the courts that they have been misapplying the rule and to stop it --- including: 1) the 2003 amendment to Rule 608(b), which corrected the courts that had been holding, incorrectly, that the Rule's bar on extrinsic evidence was applicable to all forms of impeachment, not just impeachment for untruthful character; and 2) The 2006 amendment to Rule 404(a), which corrected courts that had been holding, incorrectly, that character evidence could be offered to prove conduct in some civil cases.[23]

Consequently, if the Committee determines that the completeness-hearsay problem is correctly resolved by admitting the completing portion for context, a rule amendment should be proposed to make that explicit. The question is whether that amendment goes far enough --- or whether it is necessary to provide that the completing portion can be offered as proof of a fact.

[23] The Rule 702 amendment that would add a preponderance of the evidence standard to the text, included in this agenda book, is another example.

There are some pretty serious problems with a rule that allows completing statements to be admitted *only* for "context":

1. If the completing statement can be used by the jury only for context and never as proof of a fact, the result will be an *evidentiary imbalance* --- the party that created the whole problem by offering a misleading portion is entitled to have that portion considered as proof of a fact, while the party simply seeking fairness is not allowed to argue that the completing portion can be used as proof of a fact. So the "wrongdoer" ends up with a comparative advantage.

2. The "context" solution can result in a *confusing limiting instruc*tion and a complicated situation for the jury to figure out. Take the Grimm hypo, for example, where the defendant says "I bought the gun, but I sold it before the crime." The government can argue that the defendant's possession of the gun before the crime has been proved by the defendant's own statement "I bought the gun"--- and of course the jury will be allowed to draw the inference that because he bought the gun, he still had it at the time of the crime. The defendant, for his part, can't argue that the evidence indicates that he no longer had the gun. He is limited to the argument that the completing statement may be considered, but only for "context." If the jury follows that instruction --- a big if --- it would probably mean that the inferences that the jury would otherwise draw from the misleading portion should not be drawn because of the context of the statement. Apparently, that would mean that they should assume there is no evidence one way or the other about the defendant's possession of the gun at the time of the crime – when in fact it should mean that there is affirmative evidence that the defendant did *not* have the gun at the time of the crime. That all seems a very complicated resolution, and one that is unfair to the defendant. And there is good reason to think that the jury will not be able to follow a context instruction in this instance. That is because the evidence of the gun purchase was offered precisely for the inference that the defendant continued to have the gun at the time of the crime.

3. The "context" solution is ***artificial*** in those cases where, in order to provide context, the statement will have to be true. Again consider Judge Grimm's example of "I owned the murder weapon, but I sold it before the murder." When "I sold it before the murder" is admitted for "context," how is it actually relevant to context unless it is true? If it is false, it doesn't correct any misimpression at all. The completing statement doesn't change the meaning of the original portion regardless of the completing statement's content. The only way it changes the meaning is if it is true. And if that is the case --- as it seems to be in many of the cases --- then it makes little sense to take the difficult, instruction-laden context route. An amendment that puts forth an artifice is not doing the job of making Evidence Rules more just and easier to apply.

4. If a rule is written that *only* allows completing statements to be admissible for context, then it changes the law in those circuits that currently allow completing statements to be admitted as proof of a fact. These cases were discussed earlier, but for a quick recap, see *United States v. Sutton,* D.C. Circuit, where the court held that the completing statements should have been admitted to prove that the defendant actually did not have a guilty state of mind; and *United States v. Haddad,* 7th Circuit, where the court held that the completing statement should have been admitted to prove that the defendant actually did not know about the gun in the house.

It would be ironic if an amendment purportedly intended to promote fairness under Rule 106 would actually operate to truncate the rule in the circuits that have applied it to allow hearsay statements to be admitted to prove a fact --- on fairness grounds.

Fundamentally the context alternative confuses the reason for allowing completion in the first place (to provide context) with the use to which the evidence should be put upon admission.

In the end, there is much to be said for a solution that would allow the completing portion to be admissible *to prove a fact.* It puts the parties on an even playing field; it avoids a confusing limiting instruction; and it would appear to be the just result --- because the party who introduced the misleading portion should have lost any right to complain.

Professor Dan Blinka, an important evidence scholar, explains the proper approach to completion this way:

> The better practice . . . is to introduce the remaining parts on the same footing as those originally offered. . . Juries, like all people (even lawyers), are ill-equipped to draw tortured distinctions between statements offered for their "truth" and those admitted solely to provide "context." Nor does it seem necessary to carve out a unique rule for statements by party opponents. The real protection is [the] reminder that the rule of completeness is not an "unbridled opportunity" to waft inadmissible evidence before the jury: the trial judge should admit only those statements "which are necessary to provide context and prevent distortion." This standard suffices without resort to a meaningless limiting instruction. When applying the rule of completeness, the judge is, in effect, ruling that a balanced, fair presentation of the evidence includes those parts requested by objecting counsel. Doctrinal messiness dissipates by conceptualizing the evidence as a single admissible unit.[24]

Perhaps the best of all possible solutions is to give the court discretion to determine whether the completing statement should be admissible for context or as proof of a fact. The draft proposal that was subject to a straw vote at the last meeting in fact gives the court that discretion. It allows admission of the remainder "over a hearsay objection." That means that the completing statement could be potentially used as proof of a fact, or merely for context.

[24] 7 Wisconsin Practice, Evidence § 107.2 (4th ed. August 2019 update).

In either case, it is admissible over a hearsay objection. Note that the proposal does not say, for example, that the completing statement is admissible "despite the fact it is hearsay." So the draft that was voted on by the Committee at the last meeting is flexible enough for the court to determine how the completing evidence can be used.

C. The Alternative of Including Unrecorded Oral Statements in the Text of Rule 106

1. Legislative History

The Advisory Committee Note to Rule 106 states that unrecorded oral statements are not covered due to "practical considerations." While that is opaque, there is some history on the Advisory Committee's decision to exclude unrecorded statements from the coverage of Rule 106. A brief discussion of that history follows:

> The Reporter's First Draft of Rule 106 allowed completion with another part of a "writing, statement, or conversation." Thus, unrecorded oral statements would be allowed under that draft. The tentative final draft changed the language to "writing or recorded statement." The minutes of a 1968 Advisory Committee meeting indicate that a member moved to strike the term "conversation" with the intent to "limit the scope of the rule to concrete factors." Then there was "a lengthy and indecisive discussion on whether the word 'conversations' belonged in the rule." The deletion of the term "conversation" was eventually voted on and approved by a vote of 10 to 3.
>
> The original Reporter, Professor Cleary, stated that the term "conversations" was deleted because "the general outline of a conversation is less definite than documentary evidence and exploration of what in fairness ought to be considered with respect to a conversation is likely to involve a "more discursive and time-consuming inquiry" than what would be required for writings.[25]

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[25] The Florida Advisory Committee, commenting on the Florida counterpart to Federal Rule 106, explains the exclusion of oral statements this way:

> 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.

Note, though, that the Florida explanation assumes that the remainder will be *admissible* at a later point. If it is inadmissible hearsay, that is not the case. In essence, Rule 106's coverage of oral unrecorded statements is not very important (just a question of timing), unless Rule 106 can be used to overcome a hearsay exception. If it can, then excluding unrecorded oral statements from its coverage results in a major difference between recorded and unrecorded statements that is difficult to justify as a bright line rule.

One conclusion from all this is that if the completing statement is unrecorded, disputes might arise about the content of the statement --- disputes that are less likely to arise if the statement was written or recorded. Another possibility is that the drafters had it most prominently in mind to draft a rule requiring contemporaneous completion, and might have thought that contemporaneous completion for every conversation would be unduly disruptive.[26] But any concern about disruption hasn't played out, because the vast majority of courts *are in fact allowing oral statements for completion* --- under Rule 611(a).

So whatever the rationale for excluding oral conversations from Rule 106, the fact is that most courts *are* admitting oral statements if the strict grounds for completion under Rule 106 are met. Therefore the discussion the Committee has had over the past few meetings about "including" oral statements, and the concern about that inclusion, is akin to closing the barn door after the cows have left; or unringing a bell; or uncracking an egg. Courts are generally (albeit with some apparent outliers) admitting oral statements to complete. *Thus the question is not about the merits of including oral statements but only about whether it should be done under a single rule rather than a hodgepodge of rules and common law.*

2. Difficulties in Proof as a Bar on Oral Unrecorded Statements?

Let's assume, arguendo, that the merits of including oral statements within the rule of completeness still needs to be discussed. Is there a reason to be concerned about oral statements because they might be harder to prove than written and recorded ones? The answer would seem to be that even if there is concern about disputes over unrecorded oral statements, complete exclusion of such statements is overkill. While there might be a dispute about the content or existence of some unrecorded statements in some cases, surely the difficulty of proof is a matter that could be handled on a case-by-case basis under Rule 403 --- as Judge Grimm has argued. Under this view, the fairness rationale of Rule 106 would apply to completing unrecorded statements, unless the court finds that the probative value of the completion is substantially outweighed by the difficulties and uncertainties of proving whether and what was said.

When it comes down to it, the problem raised by unrecorded statements offered to complete --- were they ever made, or are they being misreported --- is the problem raised by *every single unrecorded statement reported in a court*---such as an oral unrecorded declaration against interest or excited utterance. So why should completing unrecorded statements be treated differently from any other unrecorded statement? Moreover, when an unrecorded statement is being offered for completion, the statement that it is completing is very likely a part of a broader unrecorded statement, a portion of which is *offered initially by the adversary*. So in the Grimm hypothetical, the police officer takes the stand and testifies that the defendant told him he purchased the gun. The defendant wants completion with his oral statement that he sold the gun. Why is there any less

[26] For example, you might need to complete an oral conversation with a different witness who was also present and could testify to the remainder. It could be disruptive to interrupt the opponent's case and present a witness. In contrast, the writing or recording has already been admitted, at least in part.

uncertainty and difficulty in rendering the first statement, about the purchase? The officer is rightly allowed to testify to that first part even if there is a dispute about what was said. What was said becomes a question of credibility. So why should it be any different with the completing statement? That distinction does not make sense.

Moreover, the failure to cover an oral statement under the rule of completeness gives rise to the possibility of sharp practices and abuse. An example is *United States v. Ramirez-Perez,* 166 F.3d 1106 (11th Cir. 1999), discussed above. The defendant made a written confession, and the government offered a misleading portion. But the rule of completeness was held not to apply because the officer was only asked about what the defendant *said*, not about what he wrote down --- even though there was no showing that the two renditions were different. The prosecutor was careful to ask the witness "what did the defendant say?" Such a baldfaced attempt to avoid the Rule 106 fairness rule was made possible by the circuit case law providing that the rule of completeness does not apply to oral unrecorded statements.

In the end, there is an argument that including unrecorded oral statements in Rule 106 will serve these separate purposes:

1) In those many circuits that cover unrecorded statements under Rule 611(a) or the common law, everything will now be collected under one rule. One advantage of good codification is that an unseasoned litigator can just look at the written rule and figure out what to do. But that is not now possible with unrecorded oral completing statements, because looking at Rule 106, one would think that there would be no way to admit the completing statement. It is unlikely that Rule 611(a), or the common-law rule of completeness, would come readily to mind. So adding coverage of unrecorded statements to Rule 106 would be part of the good housekeeping and user-friendliness that is an important part of rulemaking. And, as stated above, it would assure that oral and written statements are treated the same way in terms of overcoming a hearsay objection.

2) In those courts that provide no protection at all for misleading portions of unrecorded statements, a rule amendment would bring an important substantive change grounded in fairness; and it would prevent bad faith attempts to avoid the rule of completeness in cases where oral statements are subsequently rendered into writing.

3. Reviewing the Practice in Courts Allowing Completion with Unrecorded Oral Statements.

As discussed above, most circuits allow completion of misleading statements with unrecorded statements. And Professor Richter's extensive memo on state practice, previously

submitted to the Committee, analyzes the states that permit oral statements to complete. Given the concern about disputes over the content of an unrecorded statement, one might wonder whether these courts have had difficulties, e.g., extensive hearings to determine what was said.

At the federal level, I have not found a reported case on Rule 106 in which a court expressed a concern about an unrecorded statement offered for completion, in terms of difficulty of determining what, if anything, was said. Nor has there been any concern that I could find in the reported case law about the possibility of a presentation being problematically interrupted by the need to complete a conversation.

I have not found any case even discussing a dispute between the parties about an unrecorded statement. This is of course not dispositive, as I don't claim perfection, and anyway such disputes may not be reported. But it is some indication that there is not a state of discontent over admission of oral unrecorded statements to complete in those many federal jurisdictions that allow it. Part of the reason may well be that the grounds for being able to offer completing evidence --- whether recorded or not --- are so narrow that it rarely if ever comes down to the form of the statement. That is, given the fact that the first portion must be misleading, and the completing portion must actually correct the misleading impression, by the time those requirements are met, the court would be reluctant to exclude the completing statement merely because it is unrecorded.

As to the possibility of disruption with completing oral statements, to the extent there has been any concern at all, it appears to be remedied by allowing the trial court to have discretion regarding the timing of the completion. Because most courts have held that timing is within the discretion of the court, the courts appear to ameliorate the possibility of disruption by allowing the completing party to present the completing statements at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly.").

IV. Draft of a Possible Amendment to Rule 106

Based on the straw vote at the last meeting, the draft for consideration allows completing statements to be admissible over a hearsay objection, and includes oral unrecorded statements within the coverage of the rule.

Rule 106. Remainder of or Related ~~Writings or~~ ~~Recorded~~ Written or Oral Statements

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

Draft Committee Note[27]

Rule 106 has been amended in two respects. First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds to evidence that would correct the misimpression. *See United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir.1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime -- when that is not what he said. In this example the prosecution, which has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct a misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

[27] Note that the second paragraph of the Committee Note seeks to address the point that sometimes the completing statement should be admissible only for context and sometimes for its truth. In either case the statement would be admissible "over a hearsay objection."

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its nonhearsay value in showing context. Under the amended Rule, the use to which a completing statement can be put will be dependent on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

Second, Rule 106 has been amended to cover oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial --- where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, brings all rule of completeness questions under one rule.

The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. *See United States v. Bailey,* 2017 WL 5126163, at *7 (D.Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized . . ., or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). Fundamentally, any question about the content of an oral unrecorded statement is no different under Rule 106 than it is in any other case in which an oral unrecorded statement is proffered. Disputes over what a declarant said are generally for the factfinder.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. See, e.g., *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2nd Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to

proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly."). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The amendment does not give a green light of admissibility to all excised portions of written or oral statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party introduces a statement that creates a misimpression, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106.

In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988), the Court in dictum referred to Rule 106 as a "partial codification" of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule operating with a common-law supplement is apparent, especially when that rule arises most often at trial. Accordingly, the intent of the amendment is to completely displace the common law on questions of completeness.

Tab 4

Draft of URE 404 with a Doctrine of Chances provision (2/9/2021).

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. **Evidence of rare events shown to occur with unusual frequency may also be admitted under the doctrine of chances.** 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.

(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.

Effective April 1, 2008

2020 Advisory Committee Note. The 2020 amendment reflects the Utah Supreme Court precedent recognizing the doctrine of chances as a means to admit evidence of a crime, wrong, or other act under this rule. The doctrine "is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over." *State v. Verde*, 2012 UT 60, ¶ 47, *overruled on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. The doctrine's relevance rests on the notion that a distinction exists between permissible probability evidence and impermissible propensity evidence. *See id.* Given the difference between a permissible probability inference and an impermissible propensity inference, the Utah Supreme Court has developed, and continues to clarify, the doctrine's analytical framework. *See e.g., State v. Argueta*, 2020 UT 41, ¶¶ 33-35. Evidence may not be admitted under the doctrine unless the proponent of the evidence can articulate the rare misfortune that triggers the rule, and unless the evidence satisfies each of the doctrine's four foundational requirements: (1) materiality; (2) similarity; (3) independence; and (4) frequency. *See id*. If all of the doctrine's foundational requirements are satisfied, the district court must still assess the evidence's admissibility under rules 402 and 403. *See id*. The following non-exhaustive list of cases provide helpful discussion of the doctrine: *State v. Verde*, 2012 UT 60, ¶¶ 47–61; *State v. Lowther*, 2017 UT 34, ¶¶ 35–38; *State v. Lopez*, 2018 UT 5, ¶ 57; *State v. Argueta*, 2020 UT 41, ¶ 39; *State v. Lane*, 2019 UT App 86, ¶¶ 18-25; *State v. Murphy*, 2019 UT App 64, ¶¶ 27-33.

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).

2020 Update to Original Note. Though courts in the past were required to consider the *Shickles* factors in deciding admissibility under rules 404(b) and 403, the focus now is on the language of the rule itself. *State v. Lucero*, 2014 UT 15, ¶¶30-32, 328 P.3d 841, *overruled on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. Trial courts should consider any relevant factor in deciding these questions—including relevant *Shickles* factors—but should not in any case consider whether the evidence tends to rouse the jury to "overmastering hostility." *State v. Cuttler*, 2015 UT 95, ¶¶16-21 & n.5, 367 P.3d 981.

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).

Introduction

On January 2, 2020, the Utah Supreme Court directed the Advisory Committee on the Utah Rules of Evidence (Committee) to consider the possibility of proposed amendments to rule 404(b) that may help advance the law regarding the application of the Doctrine of Chances (the Doctrine) and possible adoption of Rule 413 of the Federal Rules of Evidence. *See* Judge Derek Pullan's 1/14/2020 materials. The Committee formed a Subcommittee to research all pertinent materials, and the Subcommittee reported their work and findings to the Committee. Over the course of many months, the Committee discussed relevant Federal and Utah rules, law review articles, a 50-state survey, and proposed draft rules. On February 9, 2021, a majority of the Committee members voted to send a proposed draft rule and draft note regarding the Doctrine to the Justices (*see* Addendum, 2/9/2021 Draft Rule & Note). The Committee also voted to send a proposal regarding a Doctrine of Chances jury instruction issue to the Justices. This Memorandum explains the draft rule, draft note, and jury instruction proposal regarding the Doctrine of Chances. This Memorandum also addresses areas of continuing disagreement between Committee members on Doctrine of Chances issues.[1]

Draft Doctrine of Chances Rule

The proposed draft rule incorporates the Doctrine of Chances into rule 404(b)(2) of the Utah Rules of Evidence. *See* Utah R. Evid 404(b)(2) (listing various "Permitted Uses" for evidence of a crime, wrong, or other act.). The proposed inserted language is as follows:

> Evidence of rare events shown to occur with unusual frequency may also be admitted under the doctrine of chances.
>
> 2/9/2021 Proposed Draft Rule.

Importantly, the proposed additional language would make it so that the Doctrine of Chances is specifically addressed in a Utah rule. Currently, the Doctrine is not found in the text of the Utah Rules of Evidence or in any other Utah rule. Instead, Utah case law establishes the Doctrine, its application under rules 404(b), 402, and 403, and its four foundational requirements: (1) materiality, (2) similarity, (3) independence, and (4) frequency. *See* Utah R.

[1] A prior Memorandum addressed the Committee's views on whether the Utah Rules of Evidence should adopt a provision akin to Rule 413 of the Utah Rules of Evidence.

Evid. 404(a)&(b),402,403; *see also e.g., State v. Lowther*, 2017 UT 34; *State v. Verde*, 2012 UT 60, ¶¶47-63; *State v. Argueta*, 2020 UT 41, ¶¶35-43.

Draft Doctrine of Chances Note

The proposed note that accompanies the proposed draft rule fleshes out how evidence may be admitted under the Doctrine of Chances (as indicated by Utah Case law). For example, the note indicates that the proponent of doctrine of chances evidence must initially and sufficiently articulate the 'rare misfortune' that triggers the Doctrine's application. *See* 2/9/2021 Proposed Draft Note; *see also Argueta*, 2020 UT 41, ¶34. The note also lists the four foundational requirements that must be met for the admission of evidence under the Doctrine. *See* 2/9/2021 Proposed Draft Note; *see also Verde*, 2012 UT 60, ¶¶47-63. Importantly, the proposed note directs practitioners to pertinent Utah case law that outlines (in detail) the requirements, philosophical underpinnings, and controversies regarding the Doctrine of Chances. *See* 2/9/2021 Proposed Draft Note; *see also e.g., State v. Lowther*, 2017 UT 34; *State v. Verde*, 2012 UT 60, ¶¶47-63; *State v. Argueta*, 2020 UT 41, ¶¶33-45; *State v. Murphy*, 2019 UT App 64, ¶¶45-65, 441 P.3d 787; *State v. Lane*, 2019 UT App 86, ¶¶36-50, 444 P.3d 553.[2]

Proposal Regarding a Doctrine of Chances Jury Instruction

To advance the proper application of the Doctrine of Chances in Utah, the Committee recommends that the Justices ask the pertinent Advisory Committee for Jury Instructions to explore whether a Model Jury Instruction regarding the application of the Doctrine would be

[2] The Proposed 2020 Note also contains a section that addresses recent Utah case law regarding the *Shickles* factors. Specifically, the 2020 Update to the Original Note indicates the following: "Though courts in the past were required to consider the *Shickles* factors in deciding admissibility under rules 404(b) and 403, the focus now is on the language of the rule itself. *State v. Lucero*, 2014 UT 15, ¶¶30-32, 328 P.3d 841, *overruled on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. Trial courts should consider any relevant factor in deciding these questions—including relevant *Shickles* factors—but should not in any case consider whether the evidence tends to rouse the jury to "overmastering hostility." *State v. Cuttler*, 2015 UT 95, ¶¶16-21 & n.5, 367 P.3d 981."

helpful to address some of the problems that have arisen in Doctrine of Chances cases. This proposal is supported by what Judge Harris and Professor Imwinkelried have written on this issue. For example, in *Lane*, Judge Harris expressed "reservation about the manner in which the doctrine of chances [] is being used in Utah[,]" and that the jury was given an inadequate limiting jury instruction because it did not adequately articulate the purposes for which the doctrine of chances evidence "could and could not be used." *State v. Lane,* 2019 UT App 86 ¶¶36,48 (J. Harris concurring opinion).

In addition, Professor Imwinkelried published a 2017 article wherein he expressed a concern that trial courts are shirking their responsibilities in admitting evidence under the Doctrine of Chances. *See* Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L. Rev. 851 (2017). Imwinkelried chastises appellate courts for not mandating "that trial judges read the jury limiting instructions specifically tailored to the doctrine of chances." Imwinkelried, Hofstra L. Rev. (2017) at 857. Specifically, because of the "intolerable" and "lax practices [that are] currently followed in many, if not most jurisdictions," trial judges that admit doctrine of chances evidence "ought to give the jury a limiting instruction sharply differentiating between character reasoning and the use of evidence according to the doctrine." *Id*. According to Imwinkelried, "[a] complete, properly worded limiting instruction [would contain] two prongs." *Id*. at 873. "The negative prong forbids the jury from using the evidence for the verboten purpose. In contrast, the affirmative prong explains how the jury is permitted to reason about this evidence." *Id*. Specifically, when doctrine of chances evidence is admitted, the jury should be instructed that they are to determine whether the prior acts were unlikely to happen in unusual frequency given

the circumstances. *See id*. at 878. For example, if prior acts are admitted under the Doctrine in a drug possession case, the jury should be instructed that "[y]ou may not reason: [Defendant] intended to possess cocaine once before, that shows that he is a bad man, and that therefore he had that intent again in the [currently charged] incident." *Id*. In addition, the jury should be instructed to use their "common sense and decide whether it is likely that [having cocaine in one's trunk] would happen to an innocent person twice." *Id*.

Areas of Disagreement Regarding the Doctrine of Chances

In discussing Doctrine of Chances issues, the Committee members disagree on various issues regarding the Doctrine (e.g., whether the Doctrine should be incorporated into a rule, the scope of rule, etc.). A brief summary of the points of disagreement are as follows:

1.a. The view that the Doctrine of Chances should not be incorporated into the rule: Some Committee members believe that the Doctrine should not be incorporated into the rule. According to their view, there is a logical problem with the argument that jurors are not making a propensity inference when evidence of a past act is admitted pursuant to the doctrine of chances. This can be illustrated by the famous "Brides" case. Because the wives could not simultaneously have accidentally died and also have been intentionally murdered, proving that three of the defendant's ex-wives had died in a bathtub suggests the following inference: these were not accidents, they were intentionally killed. The two potential mental states in this case are mutually exclusive—to prove intent is to disprove accident, and to prove accident is to disprove intent. By proving this was not an accident, the prosecution is necessarily revealing defendant's propensity to have intentionally killed his wives. Further, some members are concerned about the imperceptible distinction between impermissible propensity evidence and "objective improbability" evidence. It seems the latter is just really good propensity evidence. Further, if rare events may be used for their "objective improbability" of occurring accidentally, then this

could lead to many other classic types of character evidence being admitted. For example, if objective, off-the-shelf recidivism data indicate that someone with diagnosed substance use disorder is much more likely to steal to obtain drugs, then is this the sort of "objective" data that would be allowed? Because rule 404(a) no longer requires that the character inference be bad, recasting propensity evidence as probability evidence does not dodge the prohibition of 404(a). According to this view, to avoid further confusion in the application of 404(b), which already generates more acquittals and appeals than any other rule of evidence, the Court should consider explicitly adopting the doctrine of chances as an exception to rule 404(a), rather than as an example of a permitted 404(b) use. Psychiatric diagnoses and statistical risk data are can also provide "objective" evidence of probabilities. That they may offer reliable, objective, proxies for behavior makes them no less prohibited by rule 404(a).

In other words, inherent tension exists between the rule 404(b)'s general prohibition against propensity evidence and the kind of evidence the doctrine of chances allows. The tensions between two causes analytical difficulties both for the trial court and for the jury. In general, the difficulty in analyzing the admissibility of other-acts evidence under rule 404(b) exists because it "often presents a jury with both a proper and an improper inference, and it won't always be easy for the court to differentiate the two inferences[.]" *State v. Verde*, 2012 UT 60, ¶ 16, 296 P.3d 673. While analyzing other-acts evidence under rule 404(b) may be challenging, engaging the proper analysis ensures evidence properly admitted under the rule will have a predominant non-propensity purpose and the accompanying improper purpose will be somewhat askew of a true propensity inference. Parsing the permissible from the impermissible when it comes to other-acts evidence is indispensable because "[i]t is axiomatic that the jurors may not reason that the other act shows the accused's bad character and that 'if he did it once, he

did it again.'" Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851, 856 (2017).

The above analytical difficulty is made worse under the doctrine because "it collapses the slim barrier separating" the impermissible propensity inference from the theoretically permissible probability inference. Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. REV. 1547, 1567 (1998). For example, in cases where the doctrine is used to rebut a claim of fabrication through the accounts of multiple accusers the "only genuine[] explanation of the persuasive influence of the multiple-accusers situation is that we credit precisely the character inference that is supposedly barred by the character evidence rule." *Id.* at 1568. In other words, the doctrine of chances, when used to rebut a claim of fabrication, finds its probative worth not in probability-based reasoning but in propensity-based reasoning. *See id.* Why? Because "[e]ach separate accusation would have no bearing upon the accuracy of another allegation but for the conclusion that the multiple accusations demonstrate a cross-situational pattern of behavior, which is but a variation on the taboo inference of a general propensity or character trait." *Id.* Thus, evidence admitted under the doctrine of chances risks running headlong into 404(b)'s general propensity ban—it risks becoming the exception that swallows the rule.

Finally, even if evidence admitted under the doctrine of chances truly only gives rise to a proper probability inference, that very inference is one long-held to be impermissible: —"courts have routinely excluded [statistically valid probability evidence] when [it] invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where the truth lies." *State v. Rammel*, 721 P.2d 498, 501 (Utah 1986). The

issue is that even if the relied upon probabilities are statistically valid, they "cannot conclusively establish that a single event did or did not occur." *Id.* While the line of cases holding probability evidence inadmissible are rule 403 cases, allowing evidence under the doctrine of chances when it risks squarely conflicting with this precedent causes confusion and risks uneven application.

1.b. The view that the doctrine of chances should be incorporated into the rule.

As this Court explained in *State v. Verde*, 2012 UT 60, ¶¶47-55, 296 P.3d 673, the focus of doctrine of chances evidence is not on the defendant, but on the victim. For example, the relevance in sex assault cases is to consider the odds that multiple people would independently fabricate a rape charge against the defendant—not the odds that the defendant would disregard that lack of consent. *Id.* at ¶53.

Granted, the flip side of likely having a non-consenting victim is showing that the defendant likely disregarded that lack of consent. This evidence (as is true of other acts evidence generally) also reflects on the defendant's character—his lust and/or desire to exercise power over another. But the mere fact that a character or propensity inference is possible "does not pollute this type of probability reasoning." *Id.* at ¶50. For example, consider this Court's decision in *State v. Widdison*, 2001 UT 60, 28 P.3d 1278. Widdison was convicted of killing her child, and the trial court admitted evidence that she mistreated her other children. This court affirmed that decision, explaining that while the evidence no doubt showed the jury that she was a bad mother—a character inference—it also shed important light on her identity as the abuser of her murdered child and the lack of accident in the child's death. *Id.* at ¶¶40-49.

All other acts evidence has this sort of "dual inference," *Verde,* 2012 UT 60, ¶16, yet that is not enough standing alone to exclude the evidence. If it were, then there would be very little other acts evidence. And the text of rule 404(b) makes plain that so long as the purpose of the evidence is something other than to show character, it is admissible (subject to rule 403, of course). Because doctrine of chances reasoning is separate from character, it is a proper purpose for other acts evidence and should be included in rule 404(b), particularly given its increasing importance in Utah case law and its established use in cases nationwide.

As for statistical data, we believe that it will not often be necessary. The rarity of many occurrences will be proper candidates for judicial notice under rule 201. And to the extent the

other members are concerned about the over-use of the rule by importing all manner of statistics showing the rarity of occurrence, the similarity and independence requirements ensure that not just any series of accusations or occurrences will come in—only similar instances arising independently from each other.

Tab 5

Rule 504. Lawyer - Client.

(a) Definitions.

(a)(1) "Client" means a person, public officer, corporation, association, or other organization or entity, either public or private, who is rendered legal services by a lawyer or who consults a lawyer ~~or a lawyer referral service~~ to obtain legal services.

(a)(2) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation. For purposes of this Rule, "lawyer" shall also mean a licensed paralegal practitioner, a lawyer referral service, or any other person or entity authorized by the State of Utah to provide legal services.

(a)(3) "Licensed paralegal practitioner" means a person authorized by the Utah Supreme Court to provide legal services under Rule 15-701 of the Supreme Court Rules of Professional Practice.

(a)(~~4~~3) "Lawyer referral service" means an organization, either non-profit or for-profit, that is providing intake or screening services to clients or prospective clients for the purpose of referring them to legal services.

(a)(~~5~~4) "Legal services" means the provision by a lawyer ~~or lawyer referral service~~ of:

(a)(~~5~~4)(A) professional counsel, advice, direction or guidance on a legal matter or question;

(a)(~~5~~4)(B) professional representation on the client's behalf on a legal matter; or

(a)(~~5~~4)(C) referral to a lawyer.

(a)(~~6~~5) "Lawyer's representative" means a person or entity employed to assist the lawyer in the rendition of legal services.

(a)(~~7~~6) "Client's representative" means a person or entity authorized by the client to:

(a)(~~7~~6)(A) obtain legal services for or on behalf of the client;

(a)(~~8~~7)(B) act on advice rendered pursuant to legal services for or on behalf of the client;

(a)(~~8~~7)(C) provide assistance to the client that is reasonably necessary to facilitate the client's confidential communications; or

(a)(~~8~~7)(D) disclose, as an employee or agent of the client, confidential information concerning a legal matter to the lawyer.

(a)(8~~7~~) "Communication" includes:

(a)(7~~8~~)(A) advice, direction or guidance given by the lawyer~~,~~ or the lawyer's representative ~~or a lawyer referral service~~ in the course of providing legal services; and

(a)(8~~7~~)(B) disclosures of the client and the client's representative to the lawyer~~,~~ or the lawyer's representative ~~or a lawyer referral service~~ incidental to the client's legal services.

(a)(9~~8~~) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of rendition of legal services to the client or to those reasonably necessary for the transmission of the communication.

(b) Statement of the Privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications if:

(b)(1) the communications were made for the purpose or in the course of obtaining or facilitating the rendition of legal services to the client; and

(b)(2) the communications were:

(b)(2)(A) between (i) the client or the client's representative and (ii) the lawyer, the lawyer's representatives, or a lawyer representing others in matters of common interest; or

(b)(2)(B) between clients or clients' representatives as to matters of common interest but only if each clients' lawyer or lawyer's representatives was also present or included in the communications~~;~~.
~~**(b)(2)(C)** between (i) the client or the client's representatives and (ii) a lawyer referral service; or **(b)(2)(D)** between (i) the client's lawyer or lawyer's representatives and (ii) the client's lawyer referral service.~~

(c) Who May Claim the Privilege. The privilege may be claimed by:

(c)(1) the client;

(c)(2) the client's guardian or conservator;

(c)(3) the personal representative of a client who is deceased;

(c)(4) the successor, trustee, or similar representative of a client that was a corporation, association, or other organization, whether or not in existence; and

(c)(5) the lawyer ~~or the lawyer referral service~~ on behalf of the client.

(d) Exceptions to the Privilege. Privilege does not apply in the following circumstances:

(d)(1) Furtherance of the Crime or Fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(d)(2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(d)(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client;

(d)(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a document to which the lawyer was an attesting witness; or

(d)(5) Joint Clients. As to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Effective May/November 1, 20__ ~~18~~

2018 Advisory Committee Note. These amendments are limited to the scope of the attorney-client privilege. Nothing in the amendments is intended to suggest that for other purposes, such as application of the Utah Rules of Professional Conduct or principles of attorney liability, an attorney forms an attorney-client relationship with a person merely by making a referral to another lawyer, even if privileged confidential communications are made in the process of that referral.

Tab 6

This opinion is subject to revision before final publication in the Pacific Reporter

2020 UT 38

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Respondent,

v.

CALVIN ROGER BELL,
Petitioner.

No. 20190043
Heard December 11, 2019
Filed June 23, 2020

On Certiorari to the Utah Court of Appeals

Third District, Salt Lake
The Honorable Richard D. McKelvie
No. 141905701

Attorneys:

Sean D. Reyes, Att'y Gen., Jonathan S. Bauer, Asst. Solic. Gen., Salt Lake City, for respondent

Herschel Bullen, Salt Lake City, for petitioner

CHIEF JUSTICE DURRANT authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, JUSTICE PEARCE, and JUSTICE PETERSEN joined.

CHIEF JUSTICE DURRANT, opinion of the Court:

Introduction

¶1 This case concerns a criminal defendant's request to view a sexual abuse victim's privileged mental health therapy records. Mr. Calvin Roger Bell was accused of sexually abusing his girlfriend's three-year-old child (Child). Before trial, he requested

limited access to Child's privileged mental health therapy records, which request the district court denied.[1] We affirm because Mr. Bell fails to demonstrate that an exception to the mental health therapist-patient privilege exists under Utah Rule of Evidence 506. But even though we affirm the denial of Mr. Bell's request, we do note that Mr. Bell raises important constitutional and policy concerns regarding a criminal defendant's access to records that may contain exculpatory evidence, and so we refer rule 506 to our rules committee for review.

Background

¶2 When Child was three years old, Mr. Bell dated Child's mother (Mother). Mr. Bell moved in with Mother and Child in November 2011, and the three lived together intermittently until January 2013, when Child was placed in a foster home. At that time, Mother entered a residential substance abuse treatment center at House of Hope. Child joined Mother there in May 2013.

¶3 While living at House of Hope, Child disclosed to a staff member that Mr. Bell, whom she referred to as "dad," "was playing sexy" with her. The director reported this to Mother, and together they contacted Child Protective Services (CPS) to report the alleged abuse. After Mother reported the alleged abuse, in August 2013, a detective interviewed Child about her statement to the House of Hope staff member. As part of interview protocol, a detective asked Child if she would "promise to tell [him] the truth today?" Child told the detective that "no, she didn't want to talk." The detective then ended the interview and informed Mother it was not uncommon for children to refuse to talk. He encouraged Mother to have Child continue therapy. And he told Mother that

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[1] Mr. Bell specifically requested that the district court review Child's records in camera and disclose all material information that would support his defense. In camera review is a process by which a judge reviews privileged documents privately and decides what, if any, information may be disclosed to the criminal defendant. The limited disclosure of privileged records to a judge for review "represents the most effective and sensitive balance between" a patient's privacy and a "defendant's trial rights." *State v. Cramer*, 2002 UT 9, ¶ 22, 44 P.3d 690 (quoting *State v. Slimskey*, 779 A.2d 723, 732 n.9 (Conn. 2001)). We refer to Mr. Bell's request as a limited review of Child's records throughout this opinion.

he would schedule another interview with Child if Child became more comfortable and wanted to talk about the alleged sexual abuse.

¶4 Mother arranged sexual abuse counseling for Child at House of Hope. About five months after the initial interview with the detective, Child informed Mother that Mr. Bell had shown her a pornographic video. Mother contacted CPS again, and Child agreed to talk to the detective in January 2014. During the second interview, Child told the detective about details of the pornographic video, and described two incidents of sexual abuse—first, she stated that Mr. Bell put his "weenie" on her "no-no" where "pee" comes out, and second, she stated that, while on Mr. Bell's lap, he pulled down Child's pants and put his finger "under [her] bum."

¶5 Based on Child's allegations, the State charged Mr. Bell with (1) rape of a child;[2] (2) aggravated sexual abuse of a child;[3] and (3) dealing in materials harmful to a minor by an adult.[4] Before trial, Mr. Bell filed a motion to produce Child's mental health therapy records under Utah Rule of Criminal Procedure 14(b)(1). He specifically asked the district court to "order the [S]tate to produce for [in] camera review the therapy records of [Child] from the House of Hope or any collateral agencies addressing therapy related to neglect and/or abuse of [Child] from January 1, 2010 to May 8, 2014." He sought documentation of "therapeutic techniques and strategies used in treating [Child], names and contact information of all therapist[s] and case manager[]s working with [Child from January 1, 2010 to May 8, 2014] and all progress notes and statements regarding abuse."

¶6 Mr. Bell made two arguments in support of his assertion that he was entitled to Child's mental health therapy records under the Due Process Clause of the Fourteenth Amendment. First, he argued that the "records sought cont[ain] exculpatory evidence which would be favorable to the defense." Second, he argued the records are "material" because the case turns on Child's "credibility" due to her "age" and "suggestibility."

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[2] UTAH CODE § 76-5-402.1.

[3] *Id.* § 76-5-404.1(4).

[4] *Id.* § 76-10-1206.

Mr. Bell alleged that he needed the records to determine if the "therapeutic intervention" between her initial interview with Detective (when Child would not discuss the sexual abuse), and her second interview (when Child discussed the sexual abuse that resulted in charges against Mr. Bell), "tainted [Child's] testimony."

¶7 The State opposed Mr. Bell's motion for production of Child's mental health therapy records. It argued that not only did the State not possess the records, but that the mental health therapy records sought by Mr. Bell were privileged under Utah Rule of Evidence 506. In addition, the State argued that Mr. Bell failed to provide sufficient evidence that the exception under rule 506(d)(1)(A) applied to the facts of his case. To establish an exception to the mental health therapist-patient privilege, the State argued Mr. Bell needed to convince the district court that Child had (1) a "physical, mental or emotional condition" that was (2) "an element of any claim or defense."[5] And, the State argued, even if Mr. Bell had shown the exception applied, he still failed to establish Child's mental health therapy records "contain exculpatory evidence to a reasonable certainty" as required by our case law.

¶8 The district court denied Mr. Bell's motion for production of Child's mental health therapy records. It concluded he failed to make the "particular showings regarding relevance," or that the records were "reasonably certain to contain exculpatory information." The court of appeals affirmed. It held that even if Mr. Bell had established that Child suffers from a physical, mental, or emotional condition and that the condition is an element of a claim or defense,[6] dismissal was proper because he failed to meet the "'reasonable certainty' requirement" under our case law.[7]

¶9 We granted Mr. Bell's petition for certiorari. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(a).

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[5] UTAH R. EVID. 506(d)(1).

[6] *State v. Bell*, 2018 UT App 230, ¶ 13, 438 P.3d 104.

[7] *Id.* ¶ 13–14.

Standard of Review

¶10 Mr. Bell asks us to determine whether the court of appeals erred in affirming the district court's denial of his request for limited review of Child's privileged mental health therapy records. "When the existence of a privilege [(or an exception to a privilege)] turns on a question of law, we review for correctness."[8] If "the existence of a privilege [(or exception)] turns on questions of fact, we give deference to the district court's underlying fact finding and do not set those findings aside unless they are clearly erroneous."[9] "On certiorari, we review the decision of the court of appeals . . . for correctness[,] and give its conclusions of law no deference."[10]

Analysis

¶11 Mr. Bell argues that the court of appeals erred in affirming the district court's denial of his request for limited review of Child's privileged therapy records. The crux of his argument is that the "reasonable certainty" test we use to determine whether privileged therapy records should be reviewed violates his due process rights under the rule established in the United States Supreme Court decision in *Pennsylvania v. Ritchie*.[11] But Mr. Bell fails to demonstrate that the therapy records in question are subject to an exception under Utah Rule of Evidence 506(d)(1)(A).[12] And because establishing an

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[8] *State v. Vallejo*, 2019 UT 38, ¶ 34, 449 P.3d 39.

[9] *Id.*

[10] *Bluemel v. State*, 2007 UT 90, ¶ 9, 173 P.3d 842 (quoting *Bear River Mut. Ins. Co. v. Wall*, 1999 UT 33, ¶ 4, 978 P.2d 460).

[11] 480 U.S. 39 (1987).

[12] The State points out that Mr. Bell, for the first time on certiorari, alleges some of the requested records were not privileged because Child's therapist did not qualify as a "mental health therapist" under the rule. We decline to address this issue because it "is beyond the scope of the question on which we granted certiorari" and "was not addressed by the court of appeals." *State v. Loveless*, 2010 UT 24, ¶ 1 n.1, 232 P.3d 510 (citations omitted). Additionally, Mr. Bell does not address why we should reach this issue despite his failure to raise the issue below.

exception under the evidentiary rule is a threshold determination, we need not decide whether Mr. Bell has satisfied our "reasonable certainty" test or whether that test is unconstitutional.[13] As a result, we affirm the court of appeals.

¶12 But even though we affirm the court of appeals without addressing Mr. Bell's constitutional argument, we note that he raises significant constitutional and policy concerns. As a result, we refer rule 506 to our rules committee for review.

I. Mr. Bell Failed to Establish an Exception to the Mental Health Therapist-Patient Privilege

¶13 Mr. Bell argues that the district court's refusal to allow limited review of Child's privileged mental health therapy records violated his right to due process. His primary argument is that the "reasonable certainty" test, which requires a criminal defendant to make an independent showing that the requested records will contain exculpatory evidence, is overly stringent and should be repudiated. But our "reasonable certainty" test applies only after a criminal defendant has established that an exception to the privilege under rule 506 of the Utah Rules of Evidence applies. Because Mr. Bell has failed to show that an exception to the privilege under rule 506 applies, his request for limited review of Child's mental health therapy records fails even if he were able to satisfy the "reasonable certainty" test.[14] As a result, we affirm the court of appeals on this alternative basis.[15]

¶14 Under Utah Rule of Evidence 506(b), a patient has the privilege "to refuse to disclose . . . information that is communicated in confidence to a physician or mental health

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[13] *State v. Worthen*, 2009 UT 79, ¶ 39 n.8, 222 P.3d 1144 ("We emphasize that a defendant must meet the plain language of rule 506(d)(1) independently of meeting the reasonable certainty test.").

[14] *See* UTAH R. EVID. 506(d)(1).

[15] *See Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225 (stating that an appellate court can affirm "on any legal ground or theory apparent on the record, even though . . . [it] was not considered or passed on by the lower court" (citation omitted)).

therapist for the purpose of diagnosing or treating the patient."[16] This privilege has three enumerated exceptions, one of which is at issue in this appeal.[17] Rule 506(d)(1)(A) provides that a patient cannot assert the privilege "[f]or communications relevant to an issue of the physical, mental, or emotional condition of the patient . . . in any proceeding in which that condition is an element of any claim or defense."

¶15 In other words, rule 506(d)(1)(A) creates an exception to the general rule that a patient's therapy records are privileged when the criminal defendant can show (1) that the patient has a "physical, mental, or emotional condition" and (2) that this condition "is an element" of his or her defense. Additionally, in our previous cases, we have explained that after a criminal defendant satisfies the first two threshold requirements, the defendant must also demonstrate that, with reasonable certainty, "exculpatory evidence exists [in the mental health therapy record] which would be favorable to [the] defense."[18] This third requirement is referred to as the "reasonable certainty" test under our case law.[19]

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[16] UTAH R. EVID. 506(b). The rule further defines the scope of the privilege by defining "[p]atient" and "[m]ental health therapist." *Id*. 506(a)(1), (3). Additionally, it extends the privilege to the entire diagnostic process by the provider, including patient examinations, communications with third parties in furthering the patient's interest, and appropriate treatment plans following diagnosis. *Id*. 506(b)(1)–(3).

[17] *Id.* 506(d).

[18] *State v. Blake*, 2002 UT 113, ¶ 19, 63 P.3d 56 (second alteration in original) (quoting *State v. Cardall*, 1999 UT 51, ¶ 30, 982 P.2d 79).

[19] *State v. J.A.L.*, 2011 UT 27, ¶ 48, 262 P.3d 1. Even though the Utah Rules of Evidence apply equally in both civil and criminal cases, we have never required a party in a civil case to meet the "reasonable certainty" test and have only applied the test to criminal defendants seeking limited review of privileged records. Generally, when we are applying a rule of evidence, we refer to a party's request for privileged records. But because we have limited the "reasonable certainty" test to criminal defendants, we refer only to a criminal defendant's request for limited review of privileged records throughout this opinion.

¶16 This three-part showing is a sequential test.[20] In other words, a court must not proceed to the next step in the analysis if it determines the criminal defendant failed to meet his or her burden of proof at a previous point.[21] So the first step in a criminal defendant's efforts to obtain a patient's privileged mental health therapy records is to show that the patient has a condition under rule 506(d)(1)(A). But Mr. Bell fails to satisfy this requirement.

¶17 A condition under rule 506(d)(1)(A) is a state that persists over time that "significantly affects a person's perceptions, behavior, or decision[-]making in a way that is relevant to the reliability of the person's testimony."[22] It must be more than "mere expressions of emotion" but "is not limited to diagnosable disorders or illnesses."[23]

¶18 For example, in *State v. Worthen*, this court found that a patient had an emotional condition when a criminal defendant provided extrinsic evidence of the patient's significant "frustration" and "hatred" toward her parents that may have led to false accusations of sexual abuse.[24] In that case, Mr. Worthen was charged with aggravated sexual abuse based on allegations his adopted daughter made to her counselor.[25] Mr. Worthen

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[20] *Id.*

[21] *Id.* In Mr. Bell's case, the court of appeals "assum[ed], without deciding," that Mr. Bell met "the first two requirements" under the three-part showing. *State v. Bell*, 2018 UT App 230, ¶ 13, 438 P.3d 104. But it determined Mr. Bell's request failed because he "provide[d] nothing close to the amount of extrinsic evidence required to meet the 'reasonable certainty' standard." *Id.* ¶ 15. Because the court of appeals should have determined whether Mr. Bell established a condition under rule 506(d)(1) as a threshold matter, we affirm on this alternative basis. *See State v. Worthen*, 2009 UT 79, ¶ 19, 222 P.3d 1144. ("Only after this first question is answered may a reviewing court evaluate whether the person seeking access to the exception has shown that the records contain exculpatory evidence to a reasonable certainty.").

[22] *Id.* ¶ 21.

[23] *Id.*

[24] *Id.* ¶¶ 28, 36.

[25] *Id.* ¶¶ 1, 5.

sought his daughter's privileged counseling records to "support[] his defense that [his daughter] had extreme hatred and frustration toward the Worthens and therefore had a motive to fabricate the [sexual abuse] allegations in order to be removed from the Worthen home."[26]

¶19 We determined that Mr. Worthen made a sufficient showing that his daughter had "an emotional condition contemplated by the rule" based on her "frustration with, and hatred toward, her parents."[27] To establish this condition, he provided thirteen different journal entries, written by his daughter, which "demonstrated persistent hostility" and a "desire to leave the home."[28] Mr. Worthen also provided a discharge summary from his daughter's inpatient admission following her suicide attempt.[29] The discharge summary specifically stated that his daughter "looked for ways to interpret statements and behavior in a way to mesh with her negative thinking . . . [and] was very prone to major misinterpretations."[30] Because the daughter's "'frustration with, and hatred toward' her parents"[31] was something that "persist[ed] over time" and "affected [her] perceptions, behavior, [and] decision[-]making in a way that [was] relevant to the reliability of [her] testimony,"[32] we held that "it [was] an emotional condition contemplated by the rule."[33]

¶20 In this case, Mr. Bell fails to allege that Child has *any* condition under the rule. In fact, at oral argument, Mr. Bell conceded that he could not identify a specific condition. And even when we consider other evidence that he provided to support other requirements of rule 506's three-part test, we do not find that any of these arguments or supporting evidence demonstrate that Child had a condition contemplated by the rule.

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[26] *Id.* ¶ 1.

[27] *Id.* ¶ 28 (internal quotation marks omitted).

[28] *Id.* ¶ 28.

[29] *Id.* ¶¶ 3, 7.

[30] *Id.* ¶ 3 (second alteration in original).

[31] *Id.* ¶ 28.

[32] *Id.* ¶ 21.

[33] *Id.* ¶ 28.

¶21 For instance, in his motion requesting limited review of Child's records, Mr. Bell points to two facts to support his assertion that he is entitled to limited review of Child's therapy records.[34] First, Mr. Bell states that Child's refusal to talk to the detective in the initial interview and her decision to disclose the abuse to the detective only after she had received months of therapy shows a reasonable probability that she was coached during the intervening therapy. And second, he argues that, due to Child's age and suggestibility, therapy could have "tainted her testimony."

¶22 But a child who refuses to talk to a detective, who then later changes her mind, does not have a "condition" under the rule. And Mr. Bell provides no factual support that Child was particularly suggestible, such that she may have been more prone to improper coaching during therapy. He fails to allege any facts that the counseling methods were inappropriate based on Child's age, and as a result, suggest that she was coached. In other words, we do not view Mr. Bell's mere speculation, without any factual support, that Child was coached during therapy to constitute a "physical, mental, or emotional condition" under rule 506(d)(1)(A). Because Mr. Bell does not establish a "condition" under rule 506(d)(1)(A), we affirm the court of appeals.

II. Although We Do Not Reach Mr. Bell's Argument That His Right to Due Process Was Violated, We Note That Mr. Bell Raises Important Concerns and Refer Rule 506 to Our Rules Committee

¶23 Mr. Bell's main argument on appeal is that our "reasonable certainty" test violates his due process rights under

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[34] On appeal, Mr. Bell argues for the first time he sought records because they "may pertain to the alleged victim's animus toward [Mr. Bell] and/or motive to fabricate allegations of abuse," much like the daughter in *Worthen*. But this court does "not consider issues raised 'for the first time on appeal unless the [district] court committed plain error or exceptional circumstances exist.'" *State v. Bozung*, 2011 UT 2, ¶ 7 n.4, 245 P.3d 739 (alteration in original) (citation omitted). In his motion to the district court, Mr. Bell did not include any allegation that Child held animus towards him or that Child had some other motive to fabricate an allegation of abuse. Because Mr. Bell raises this for the first time in his brief, we decline to address it.

the United States Supreme Court decision in *Pennsylvania v. Ritchie*.[35] While he acknowledges that protecting patient privacy is important, he asserts that the "reasonable certainty" test sets the bar too high for criminal defendants seeking limited review of privileged records. Although we do not reach this issue because Mr. Bell failed to establish a condition under rule 506(d)(1)(A), we briefly address his concerns regarding the "reasonable certainty" test and refer them to our rules committee for consideration.

¶24 The "reasonable certainty" test is the third and final showing a criminal defendant must make to obtain limited review of privileged mental health therapy records.[36] Under this test, a criminal defendant has the burden of convincing the district court that the requested records contain exculpatory evidence favorable to the defense.[37] Generally, this requires that a criminal defendant identify his or her "specific and narrow defense,"[38] and then offer extrinsic evidence that ties the patient's condition to the specific records requested.[39] By establishing an evidentiary threshold, this test seeks to narrow the scope of the criminal defendant's request, and thereby prevent criminal defendants from unnecessarily engaging in a "fishing expedition" through a patient's mental health therapy records.[40]

¶25 Mr. Bell argues that the evidentiary threshold created by the "reasonable certainty" test is too high and, as a result, violates his due process rights under *Ritchie*.[41] In *Ritchie*, Mr. Ritchie sought the protected records of the state agency that investigated sexual abuse allegations against him.[42] The records were protected under a Pennsylvania statute which provided eleven exceptions.[43]

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[35] 480 U.S. 39 (1987).

[36] *State v. J.A.L.*, 2011 UT 27, ¶ 48, 262 P.3d 1.

[37] *State v. Worthen*, 2009 UT 79, ¶ 39, 222 P.3d 1144.

[38] *Id.* ¶ 40.

[39] *Id.* ¶¶ 41–42.

[40] *State v. Gomez*, 2002 UT 120, ¶ 6, 63 P.3d 72; *see also Worthen*, 2009 UT 79, ¶ 38.

[41] 480 U.S. 39 (1987).

[42] *Id.* at 43.

[43] *Id.*

One of the exceptions allowed disclosure by any "court of competent jurisdiction pursuant to a court order."[44] Although the records Mr. Ritchie sought were already in the trial court's possession, the court did not review the records in their entirety, and as a result, did not know whether they contained material and exculpatory evidence.[45]

¶26 Because it could not determine, without knowledge that the unviewed portions of the records contained material evidence, whether Mr. Ritchie's right to due process was violated, the Supreme Court remanded the case to the trial court for a review of the entire record.[46] The Court provided two reasons for its decision to remand. First, it explained that the protected records were in the State's possession, and that "the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment."[47] Second, the Court noted that the state statute permitted disclosure pursuant to a court's order in any judicial proceeding.[48] So the statute that protected the records provided an exception for "criminal prosecutions," without any additional showing from the defendant.[49]

¶27 Following the Supreme Court's decision in *Ritchie*, we were presented with a similar question in *State v. Cardall*.[50] And, in our attempt to apply *Ritchie*, we created what we now refer to as our "reasonable certainty" test. After determining that the defendant had satisfied the first two requirements of the privilege exception under rule 506(d)(1)(A), we interpreted *Ritchie* as requiring the defendant to also "show with reasonable certainty

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[44] *Id.* at 44 (internal quotation marks omitted). This exception appears to be a broad exception because it provides a court of "competent jurisdiction" discretion to allow disclosure in any judicial proceeding. *Id.*

[45] *Id.*

[46] *Id.* at 58.

[47] *Id.* at 57.

[48] *Id.* at 57–58.

[49] *Id.*

[50] 1999 UT 51, 982 P.2d 97.

that exculpatory evidence exists which would be favorable to his defense."[51] So following our decision in *Cardall*, criminal defendants were required to independently demonstrate, with reasonable certainty, that the privileged records contain evidence that is material to a claim or defense.[52]

¶28 In this case, Mr. Bell argues that, under the Supreme Court's decision in *Ritchie*, the district court violated his due process rights by failing to review Child's mental health therapy records. And in so arguing, he criticizes our decision in *Cardall* as imposing too stringent a standard.

¶29 But Mr. Bell's *Ritchie* argument may be misplaced for two reasons. First, in *Ritchie*, the Supreme Court based its decision on the fact that a criminal defendant's right to due process is implicated when the privileged records are in the State's possession, not when the privileged records are in the possession of a private party.[53] In this case, it does not appear that Child's records are in the State's possession. Second, the *Ritchie* Court's decision was also based on the language of the Pennsylvania statute—a statute that differs substantially from our rules of evidence. For this reason, the Supreme Court's decision in *Ritchie* did not address whether a state could create an absolute privilege, forbidding a defendant to access privileged records under any circumstance.[54] In other words, the *Ritchie* decision does not provide guidance on whether our rules of evidence have set the evidentiary burden too high for a criminal defendant.[55]

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[51] *Id.* ¶ 30.

[52] *Id.*

[53] The Court did not decide whether Mr. Ritchie was entitled to access the protected records under the Sixth Amendment's Compulsory Process Clause, which might compel a private party to disclose protected records. *Ritchie*, 480 U.S. at 56 ("[W]e need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment['s Due Process Clause].").

[54] *See Gomez*, 2002 UT 120, ¶ 16 (holding that the statutory privilege created by the Confidential Communications for Sexual Assault Act is absolute, and as a result, *Ritchie* did not control).

[55] *Id.*

¶30 We acknowledge, however, that our interpretation of *Ritchie* in *Cardall* may suffer from the same defects as Mr. Bell's *Ritchie* argument. In *Cardall*, we suggested that the holding in *Ritchie* required us to adopt the "reasonable certainty" test without acknowledging any distinction between the statute at issue in that case and our rules of evidence or between privileged documents held by the State and documents held by private parties. So our adoption of the "reasonable certainty" test may have stemmed from a misreading of the opinion in *Ritchie*.

¶31 But even though our adoption of the "reasonable certainty" test in *Cardall* and Mr. Bell's arguments in this case may rely on a misreading of *Ritchie*, we note that both *Cardall* and Mr. Bell raise important concerns regarding the current state of the privilege exception under rule 506(d)(1)(A). For example, our adoption of the "reasonable certainty" test in *Cardall* seems to have helped address some uncertainty about what is required under the rule's "condition" and "element to the defense" requirements.[56] For instance, in *Cardall*, we determined that a "condition" included a child's "mental[] and emotional[]" instability that "led her to lie about an attempted rape" on a different occasion.[57] And we held that this condition was an element of the criminal defendant's defense because she was "a habitual liar."[58] Later, in *State v. Worthen*, we determined that the alleged victim's extreme and persistent hatred toward her parents

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[56] *See State v. Worthen*, 2009 UT 79, ¶ 21, 222 P.3d 1144 (holding that a condition under rule 506(d)(1) "is not limited to diagnosable disorders or illnesses" but "does not include mere expressions of emotion" and must be a "state that persists over time" while "significantly affect[ing] a person's perceptions, behavior, or decision[-]making"); *see also State v. Blake*, 2002 UT 113, ¶¶ 18, 24, 63 P.3d 56 (declining to grant the defendant's request for in camera review under the rule 506(d)(1)(A) exception, and instead rejecting his request because he failed to show, with reasonable certainty, that the requested records contained exculpatory evidence); *Cardall*, 1999 UT 51, ¶ 30 (failing to define the rule 506(d)(1)(A) exception and summarily determining the defendant made an adequate showing).

[57] *Cardall*, 1999 UT 51, ¶ 29.

[58] *Id.*

was a condition under the rule, and that this condition was an element to Mr. Worthen's defense because it "caused her to fabricate abuse allegations" in order to be removed from the home.[59] These decisions may not provide a clear definition of what is required for criminal defendants seeking limited review of privileged documents, and, as a result, they may lead to a significant number of meritless requests. But, by raising the evidentiary burden imposed on criminal defendants before they may obtain limited review of privileged documents, our "reasonable certainty" test operates to more clearly identify, and limit, the situations in which criminal defendants can access privileged records.[60]

¶32 Mr. Bell, on the other hand, raises the possibility that the stringent evidentiary burden imposed by our "reasonable certainty" test may violate criminal defendants' due process rights by preventing them from mounting a full and fair defense. This too is an important concern. And even though we do not address the merits of Mr. Bell's *Ritchie* arguments in this case, we refer this issue to our rules committee. In considering this issue, we direct our rules committee to consider the importance of maintaining a strong privilege rule,[61] of more clearly defining what is required to qualify for exceptions to privilege, and of respecting a criminal defendant's constitutional rights.[62]

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[59] *Worthen*, 2009 UT 79, ¶ 37.

[60] *See Blake*, 2002 UT 113, ¶ 19 (noting that the "reasonable certainty" test is a "stringent test," which is "deliberate and prudent in light of the sensitivity of these types of records").

[61] We have previously noted that victims of sexual abuse have constitutional and statutory rights, and that these "rights . . . support considerable policy-based arguments for supporting evidentiary privileges." *Worthen*, 2009 UT 79, ¶ 55 (citing similar discussions in *State v. Gonzales*, 2005 UT 72, ¶ 33, 125 P.3d 878 and *Blake*, 2002 UT 113, ¶ 16).

[62] While Mr. Bell argues only that his right to due process is implicated, we note there are other constitutional rights at issue. For example, both the federal and Utah constitutions include "the right to confrontation and compulsory process." *State v. Cramer*, 2002 UT 9, ¶ 19, 44 P.3d 690.

Conclusion

¶33 In his request for limited review of Child's privileged mental health therapy records, Mr. Bell failed to establish that Child had a "condition" under rule 506(d)(1)(A). As a result, we affirm the court of appeals without considering the merits of Mr. Bell's challenge to our "reasonable certainty" test. But we note that he raises significant concerns about this test, and as a result, we ask the rules committee to review rule 506 to ensure that it appropriately balances patients' privacy with criminal defendants' constitutional rights.

Rule 506. Physician and Mental Health Therapist-Patient.

(a) Definitions.

(a)(1) "Patient" means a person who consults or is examined or interviewed by a physician or mental health therapist.

(a)(2) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(a)(3) "Mental health therapist" means a person who

(a)(3)(A) is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and

(a)(3)(B) is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) Statement of the Privilege. A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:

(b)(1) diagnoses made, treatment provided, or advice given by a physician or mental health therapist;

(b)(2) information obtained by examination of the patient; and

(b)(3) information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist. Such other persons include guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) Exceptions. No privilege exists under paragraph (b) in the following circumstances:

(d)(1) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:

(d)(1)(A) in any proceeding in which that condition is an element of any claim or defense, or

(d)(1)(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;

(d)(2) Hospitalization for Mental Illness. For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; and

(d)(3) Court Ordered Examination. For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

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 506 is modeled after Rule 503 of the Uniform Rules of Evidence, and is intended to supersede Utah Code §§ 78-24-8(4) and 58-25a-8. There is no corresponding federal rule. By virtue of Rule 501, marriage and family therapists are not covered by this Rule.

The differences between existing Utah Code § 78-24-8 and Rule 506 are as follows:

(1) Rule 506 specifically applies to psychotherapists and licensed psychologists, it being the opinion of the Committee that full disclosure of information by a patient in those settings is as critical as and as much to be encouraged as in the "physician" patient setting. The Utah Supreme Court requested that Rule 506 further apply to licensed clinical social workers. To meet this request, the Committee included such individuals within the definition of psychotherapists. Under Utah Code § 58-35-2(5), the practice of clinical social work "means the application of an established body of knowledge and professional skills in the practice of psychotherapy. . . ." Section 58-35-6 provides that "[n]o person may engage in the practice of clinical social work unless that person: (1) is licensed under this chapter as a certified social worker," has the requisite experience, and has passed an examination. Section 58-35-8(4) refers to licenses and certificates for "clinical social worker[s]." As a result of including clinical social workers, Rule 506 is intended to supplant Utah Code § 58-35-10 in total for all social workers.

(2) Rule 506 applies to both civil and criminal cases, whereas Utah Code § 78-24-8 applies only to civil cases. The Committee was of the opinion that the considerations supporting the privilege apply in both.

(3) In the Committee's original recommendation to the Utah Supreme Court, the proposed Rule 506 granted protection only to confidential communications, but did not extend the privilege to observations made, diagnosis or treatment by the physician/psychotherapist. The

Committee was of the opinion that while the traditional protection of the privilege should extend to confidential communications, as is the case in other traditional privileges, the interests of society in discovering the truth during the trial process outweigh any countervailing interests in extending the protection to observations made, diagnosis or treatment. However, the Supreme Court requested that the scope of the privilege be broadened to include information obtained by the physician or psychotherapist in the course of diagnosis or treatment, whether obtained verbally from the patient or through the physician's or psychotherapist's observation or examination of the patient. The Court further requested that the privilege extend to diagnosis, treatment, and advice. To meet these requests, the Committee relied in part on language from the California evidentiary privileges involving physicians and psychotherapists. See Cal. Evid. Code §§ 992 and 1012. These features of the rule appear in subparagraphs (a)(4) and (b). The Committee also relied on language from Uniform Rule of Evidence 503.

Upon the death of the patient, the privilege ceases to exist.

The privilege extends to communications to the physician or psychotherapist from other persons who are acting in the interest of the patient, such as family members or others who may be consulted for information needed to help the patient.

The privilege includes those who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist. For example, a certified social worker practicing under the supervision of a clinical social worker would be included. See Utah Code § 58-35-6.

The patient is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the physician or psychotherapist or others who were properly involved or others who overheard, without the knowledge of the patient, the confidential communication. Problems of waiver are dealt with by Rule 507.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."

The Committee did not intend this rule to limit or conflict with the health care data statutes listed in the Committee Note to Rule 501.

Rule 506 is not intended to override the child abuse reporting requirements contained in Utah Code § 62A-4-501 et seq.

The 1994 amendment to Rule 506 was primarily in response to legislation enacted during the 1994 Legislative General Session that changed the licensure requirements for certain mental health professionals. The rule now covers communications with additional licensed professionals who are engaged in treatment and diagnosis of mental or emotional conditions, specifically certified social workers, marriage and family therapists, specially designated advanced practice registered nurses and professional counselors.

Some mental health therapists use the term "client" rather than "patient," but for simplicity this rule uses only "patient."

The committee also combined the definition of confidential communication and the general rule section, but no particular substantive change was intended by the reorganization.