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Evidence Circuit Splits, and What to Do About Them

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The Federal Rules of Evidence are designed to be simple and user-friendly — able to be deployed quickly and nimbly in the heat of trial. Despite this laudable goal, some of the rules present interpretive challenges. This Article explores approximately a dozen of the most deeply entrenched and troubling circuit splits involving Rules 407, 611, 702, 801, 803, 804, 806, and 1006.

More specifically, the circuit splits addressed are: (1) Whether the rule excluding subsequent remedial measures requires a showing that the defendant's change was in response to the plaintiff's injury, and also whether the rule is applicable in actions for breach of contract; (2) Whether demonstrative evidence is distinguishable from presentations used to illustrate other evidence; (3) Whether expert testimony on the unreliability of eyewitness identifications should be admissible; (4) Whether hearsay statements made by a declarant are admissible against the declarant's successor-in-interest; (5) Whether a statement offered under the state of mind exception to the hearsay rule must be shown to have been made spontaneously; (6) Whether the requirement of establishing "corroborating circumstances" for declarations against interest allows proof of corroborating evidence extrinsic to the statement itself, and whether that corroborating circumstances requirement applies in civil cases; (7) Whether a hearsay declarant may be impeached with prior bad acts; and (8) Whether summaries of voluminous evidence are themselves admissible as evidence, whether the underlying evidence must or may be

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admitted, and whether oral summaries of voluminous evidence may be admitted.

For each of these circuit splits, we determine whether resolution through amendment is necessary, and propose language for amending the rules when an amendment is the appropriate solution.

TABLE OF CONTENTS

INTRODUCTION

The Federal Rules of Evidence are nearly 50 years old.[1] As the decades have passed, more and more case law has built up regarding the proper interpretation of the rules. Although it is unsurprising that judges' opinions differ regarding the text and policy of the Rules of Evidence, it nonetheless is problematic that judges are interpreting the Federal Rules of Evidence inconsistently, threatening the value of the rules in providing consistent guidance on evidentiary issues, and raising the issue of the need to amend some rules to impose uniformity.

Despite the work of the federal Advisory Committee on Evidence Rules to advance the laudable goal of uniformity, currently about two dozen circuit splits exist regarding interpretation and application of the Federal Rules of Evidence. Many of these splits have been percolating for years.[2] This Article analyzes a representative sample of these splits, selected because they involve entrenched disagreement on important matters of evidentiary policy and rule construction.

Even though uniformity is a laudable goal, there are drawbacks to curing splits by amending the Federal Rules of Evidence. *First*, the Rules of Evidence are written for general application, and some circuit splits involve nuanced or rarely occurring issues. In those instances, it may be better to leave the general rule untouched rather than try to amend it to resolve a niche issue. *Second*, there can be significant transaction costs as lawyers and judges learn the new language;[3] and transaction costs can multiply because fixing one weak spot may put pressure on other parts of the rule — or on other rules — creating new fissures that need to be sealed. *Third*, circuit splits can be hard to pinpoint. Most appellate evidentiary rulings employ deferential standards of review, so the circuit court may not actually "agree" with the trial court, but may

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[1] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. The original Committee ran from 1965 to 1975. *See Judicial Conference of the United States: Committees (Chronological)*, FED. JUD. CTR. https://www.fjc.gov/history/administration/judicial-conference-united-states-committees-chronological (last visited Sept. 13, 2022) [https://perma.cc/Z972-W2U2] [hereinafter *Judicial Conference: Committees*]. The Committee was reconstituted in 1992. *Id.* A major reason for reconstituting the Committee in 1992 was to help resolve differences in interpretation that had arisen. *See* Daniel Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1886-87 (2019).

[2] *E.g.*, Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years — The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 911 (1992) ("Because the Supreme Court rarely grants certiorari, a Committee will play an important role in resolving conflicts.").

[3] Capra & Richter, *supra* note 1, at 1877 ("disruptive dislocation costs").

uphold the trial court's decision because it is not an abuse of discretion or "manifestly erroneous."[4] In addition, factual variations among the cases may lead to different results, but may not always signify a disagreement over the interpretation of the rules. *Finally*, the amendment process itself is riddled with transaction costs, taking years of study, debate, and notice and comment before an amendment — if adopted — becomes effective.[5]

This Article does not propose that whenever there is any disagreement among the courts regarding the interpretation of a rule, the Advisory Committee should jump into action and resolve the matter. That is too much work for too little payoff. However, "when a conflict is long-standing, shows no signs of being resolved, and creates divergent standards for litigants operating within the same court system, it is a drafting committee's responsibility to resolve the impasse."[6] At that point, modifications to the rules may be necessary to bring the country back into uniformity — back into a land of *Federal* Rules of Evidence rather than *Circuit* Rules of Evidence.

This Article analyzes about half of the approximately two dozen entrenched circuit splits on the Federal Rules of Evidence. We chose these circuit splits because they have percolated sufficiently in the courts, have fairly defined reasons for the split, and arise with some regularity. For each split, the Article sets forth the language of the current rule, its policy goals, and the divergent paths the circuits have taken. The Article then assesses the merits of the debate and proposes amendments to the rules — or proposes no action be undertaken — based essentially on a cost-benefit analysis. Sometimes, when the merits of the circuit split are closely divided, this Article proposes alternative possible amendments. This Article also suggests areas for further exploration in the Advisory Committee Notes to a proposed amendment.[7]

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[4] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141-42 (1997) ("We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings . . . . [T]he appellate court will not reverse . . . unless the ruling is manifestly erroneous.") (internal quotation marks omitted) (citations omitted).

[5] *Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Sept. 13, 2022) [https://perma.cc/PV27-8626]; *see also* Rules Enabling Act of 1934, 28 U.S.C. §§ 2071-2077 (2018).

[6] Capra & Richter, *supra* note 1, at 1886.

[7] Other circuit splits not analyzed in this Article include the following:

- Whether theft offenses are automatically admissible as *crimen falsi* under Rule 609(a)(2). *Compare* U.S. Xpress Enters. v. J.B. Hunt Transp., Inc., 320 F.3d 809,

816-17 (8th Cir. 2003) (yes), *with* United States v. Estrada, 430 F.3d 606, 614 (2d Cir. 2005) (no).

- How to calculate the endpoint for the 10-year lapse governing old convictions in Rule 609(b). *Compare* United States v. Hans, 738 F.2d 88, 93 (3d Cir. 1984) (when trial begins), *with* United States v. Cathey, 591 F.2d 268, 274 n.13 (5th Cir. 1979) (when the witness first testifies), *and* United States v. Foley, 683 F.2d 273, 277 n.5 (8th Cir. 1982) (when the second offense is committed).
- Whether foundation must be laid before a witness is confronted with an inconsistent statement, notwithstanding the plain language of Rule 613(b). *Compare* United States v. Harvey, 547 F.2d 720, 722 (2d Cir. 1976) (yes), *with* Wammock v. Celotex Corp., 793 F.2d 1518, 1522 (11th Cir. 1986) (foundation first preferred, but not required).
- How to differentiate lay opinion testimony under Rule 701 from expert opinion testimony under Rule 702 in contexts such as when law enforcement agents testify as to matters like code words, gang structure, surveillance techniques, and conspiracy operations. *Compare* United States v. Rollins, 544 F.3d 820, 832-33 (7th Cir. 2008) (permitting law enforcement witness to testify as lay witness regarding the meaning of codewords because he "listened to every intercepted conversation"), *with* United States v. Kilpatrick, 798 F.3d 365, 379 (6th Cir. 2015) (admitting an officer's lay opinion "only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred").
- Whether statements by a party's expert constitute party-opponent statements under Rule 801(d)(2)(C) or (D). *Compare* Glendale Fed. Bank, FSB v. United States, 39 Fed. Cl. 422, 424-25 (Fed. Cl. 1997) (yes), *with* Kirk v. Raymark Indus., 61 F.3d 147, 164 (3d Cir. 1995) (no).
- Whether a government official's statements constitute statements admissible against the government under Rule 801(d)(2)(D). *Compare* United States v. Morgan, 581 F.2d 933, 937-38 (D.C. Cir. 1978) (yes), *with* United States v. Zizzo, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997) (no).
- Whether a declarant's statements are admissible to prove a non-declarant's intentions under Rule 803(3). *Compare* United States v. Pheaster, 544 F.2d 353, 379-80 (9th Cir. 1976) (yes), *with* United States v. Joe, 8 F.3d 1488, 1493 n.4 (10th Cir. 1993) (no).
- The foundation necessary under Rule 803(4) to admit blame statements by children in child abuse cases. *Compare* United States v. Renville, 779 F.2d 430, 438 (8th Cir. 1985) (requiring the physician to "make[] clear to the victim that the inquiry to the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding"), *with* Danaipour v. McLarey, 386 F.3d 289, 296 n.1 (1st Cir. 2004) (rejecting the Eighth Circuit's foundation requirements).
- Whether exculpatory grand jury testimony may be offered against the government under Rule 804(b)(1). *Compare* United States v. Foster, 128 F.3d 949, 955-56 (6th Cir. 1997) (yes), *with* United States v. DiNapoli, 8 F.3d 909, 912 (2d Cir. 1993) (en banc) (no).
- Whether foreign-language recordings must be admitted into evidence under Rule 1002. *Compare* United States v. Chavez, 976 F.3d 1178, 1195 (10th Cir. 2020) (yes), *with* United States v. Grajales-Montoya, 117 F.3d 356, 367 (8th Cir. 1997) (no).

So that this Article may be as user-friendly as possible, we have arranged the circuit splits in numerical order of the rule involved, rather than by our subjective beliefs about the importance of the issues involved, the length the split has been percolating, or some other metric. Thus, this Article begins with two circuit splits regarding Rule 407 and ends with four circuit splits surrounding Rule 1006.

We have several audiences in mind for this Article. Of course we hope this Article helps academics. But we are also mindful that practicing lawyers, Advisory Committee members themselves — including members on state committees who may be facing similar interpretive issues in their rules sets — and judges may all benefit from this discussion.

CURRENT CIRCUIT SPLITS REGARDING THE INTERPRETATION AND APPLICATION OF THE FEDERAL RULES OF EVIDENCE

I. RULE 407: SUBSEQUENT REMEDIAL MEASURES

Rule 407 excludes evidence of subsequent remedial measures to prove "negligence[,] culpable conduct[,] a defect in a product or its design[,] or a need for a warning or instruction."[8] Rule 407 is intended to remove the disincentive to fix something out of fear that the fix will

- Whether, under Rule 1002, English transcripts of foreign-language recordings are admissible as substantive evidence. *Compare* United States v. Cano-Flores, 796 F.3d 83, 89 (D.C. Cir. 2015) (yes), *with Chavez*, 976 F.3d at 1196 (no).

The above circuit splits are reserved for the sequel we hope to publish: Evidence Circuit Splits II.

In addition, this Article does not discuss circuit splits related to Federal Rules of Evidence 106, 615, or 702 because amendments to those rules have been approved by the Advisory Committee on Evidence Rules and the Judicial Conference Committee on Rules of Practice and Procedure (often referred to as the Standing Committee) and are being submitted to the Judicial Conference. *See* MINUTES OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUNE 7, 2022, 14 (Rule 106), 16 (Rule 615), & 19 (Rule 702) (2022), [hereinafter JUNE 7 STANDING COMMITTEE MINUTES] [on file]. The proposed amendment to Rule 106 would allow a completing statement to be admitted despite a hearsay objection and would expand coverage to include oral, unrecorded, and even nonverbal statements. The proposed amendment to Rule 615 authorizes the court to prohibit witnesses from accessing testimony outside the courtroom and restricts a party that is not a natural person to "one officer or employee" who may remain in the courtroom. Finally, a proposal to amend Rule 702 reminds trial judges that they must find all the requirements of the rule satisfied by a standard of "more likely than not," including that the "expert's opinion reflects a reliable application of the principles and methods to the facts of the case." *See id.* at 13-19.

[8] FED. R. EVID. 407.

be used to prove that the prior state of affairs was liability-creating.[9] Two circuit splits have arisen regarding Rule 407. *First*, the language of Rule 407, by its terms, includes all types of tort cases, including products liability actions.[10] But it is less clear whether the rule encompasses breach of contract cases. *Second*, the rule protects measures taken subsequent to the injury, but the rule is silent on whether the measure must be taken in response to the injury.

A. Rule 407 and Its Applicability to Contract Cases

The circuits are divided over whether Rule 407's exclusion of subsequent remedial measures protects changes in contract or policy language in contract cases.[11] Changes in contract language are "measures" within the meaning of the rule.[12] And it is at least possible to argue that a particular change to a contract would have made the existing cause of action for breach less likely to have occurred. The Third, Seventh, and Tenth Circuits have extended Rule 407 to contract cases, holding that Rule 407 applies to altered contract or policy language in breach of contract or warranty cases.[13] But the Fifth and Eighth Circuits have refused to apply Rule 407 to contract actions.[14]

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[9] FED. R. EVID. 407 advisory committee's note to proposed rule.

[10] In 1997, Rule 407 was amended to exclude evidence of subsequent remedial measures to prove "a defect in a product or its design[,] or a need for a warning or instruction" after a majority of the circuits had already interpreted Rule 407 to cover those cases. FED. R. EVID. 407 advisory committee's note to 1997 amendment.

[11] Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n, No. CIV-08-1125-C, 2011 WL 1303949, at *4 (W.D. Okla. Apr. 1, 2011) ("The circuit courts are split as to whether the rule against admitting evidence of subsequent remedial measures applies in contract cases . . . .").

[12] 2 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 407.02[1] (12th ed. 2022) ("The expansion beyond evidence of subsequent repairs covers such evidence as subsequent installation of safety devices, a change in company rules, and discharge of employees.").

[13] Reynolds v. Univ. of Pa., No. 10-4405, 483 F. App'x 726, 733 (3d Cir. 2012) (holding the district court did not err in applying Rule 407 in a breach of contract action); Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1045 (7th Cir. 2007) ("[T]o use at a trial a revision in a contract to argue the meaning of the original version would violate Rule 407 of the Federal Rules of Evidence."); Hickman v. Gem Ins. Co., 299 F.3d 1208, 1214 (10th Cir. 2002) (holding that evidence of a policy change in a breach of insurance contract action was excluded by Rule 407).

[14] Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 428 (5th Cir. 2006); R.W. Murray, Co. v. Shatterproof Glass Corp., 758 F.2d 266, 274 (8th Cir. 1985); *see also* Smith v. Miller Brewing Co. Health Benefits Program, 860 F. Supp. 855, 857 n.1 (M.D. Ga. 1994) ("[W]hen the dispute concerns the terms of a contract, changes in the language that make the intent of the drafter clearer, the court should consider that change in evaluating the disputed term.").

The reason for the difference of opinion likely stems from ambiguities in both the language and policy of Rule 407. On the language side, Rule 407 applies when a party is trying to prove "negligence[,] culpable conduct[,] a defect in a product or its design[,] or a need for a warning or instruction."[15] These words are principally, though not exclusively, tort-based. No language explicitly covers breach of contract or warranty cases. However, the phrase "culpable conduct" provides some support for a more expansive interpretation of the rule. That phrase is broader than a phrase such as "tortious conduct," and so may indicate that non-tort actions fall within the ambit of the rule.[16] After all, breaching an agreement constitutes culpable (bad) conduct. Further complicating matters regarding the rule's text, the lead-in to Rule 407 says it applies "[w]hen measures are taken that would have made an earlier *injury or harm* less likely to occur."[17] Once again, the rule as currently written seems focused on tort cases, though it is possible to say that a plaintiff in a breach of contract case suffered harm.

On the policy side, the Advisory Committee noted two reasons for the rule: first, a subsequent remedial measure "is equally consistent with injury by mere accident or through contributory negligence"; second, and more important, excluding this evidence "encourag[es] people to take, or at least [does] not discourag[e] them from taking, steps in furtherance of added safety."[18] Both of these policies appear principally tort-based. Tort actions, not contract actions, involve accidents, contributory negligence, and concerns about safety. On the other hand, the more general policy underlying Rule 407 — the concept of not discouraging people from changing things for the better — supports application of the rule in contract cases. After all, contracts too require refinement and improvement that may not occur if the change can be admitted against the maker in court. In sum, Rule 407's current text and its policy could support either position.

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[15] FED. R. EVID. 407.

[16] *Reynolds*, 483 F. App'x at 731 ("The District Court relied on the 'plain text' of Rule 407, noting that the Rule used 'culpable conduct' rather than a more narrow phrase such as 'tortious conduct,' and therefore the Rule applied in contract cases in addition to tort cases."). *But see Wells Fargo Bank, N.A.*, 2011 WL 1303949, at *4 ("Plaintiff is not offering such evidence to establish negligence or culpable conduct, because no such showing is required to succeed in this contract action."); Mowbray v. Waste Mgmt. Holdings, Inc., 45 F. Supp. 2d 132, 141 (D. Mass. 1999) ("Mowbray's cause of action does not require proof of any culpability or other mental state on the part of Waste Management. Instead, Mowbray need only show the fact of breach. Thus, the policy considerations which underlie Rule 407 are simply not raised by the instant case.").

[17] FED. R. EVID. 407 (emphasis added).

[18] FED. R. EVID. 407 advisory committee's note to proposed rule.

The three circuits that apply Rule 407 to contract actions tend to rely on this broader view of the policy.[19] Consider a breach of contract example without the protections of Rule 407. Person A signs a contract with Person B, and a dispute later arises. Person A believes that a certain clause in the contract supports her claim, and Person B later changes that clause in a way that would negate or support Person A's interpretation. Without Rule 407, Person A could use that change to prove that her position is meritorious. So defendants in contract actions theoretically might be deterred from improving or clarifying contracts out of fear that the changes will be used against them.[20] Therefore, these circuits reason, the broad policy underlying Rule 407 supports application of the rule to contract actions: "To use at a trial a revision in a contract to argue the meaning of the original version would violate Rule 407 of the Federal Rules of Evidence, the subsequent-repairs rule, by discouraging efforts to clarify contractual obligations, thus perpetuating any confusion caused by unclarified language in the contract."[21]

Two circuits — the Fifth and Eighth — do not apply Rule 407 to contract actions. The Fifth Circuit noted that breach of warranty cases may not involve an "injury or harm," and thus the "primary rationale underlying rule 407 does not apply."[22] Another argument in favor of this position is that the cost of the subsequent remedial measures rule is justified to promote safety. Promoting precision in contracts is not nearly as compelling.

On the merits, it makes sense to alter Rule 407 so that it explicitly disallows evidence of subsequent remedial measures in breach of contract and warranty cases. This change would align with the prevailing rule in the majority of the circuits that have considered the issue. "[A] drafter should ordinarily give greater weight to the majority rule on an issue. First, the fact that most federal courts follow one path is certainly an indication that it is likely the better result. Furthermore, adopting the majority rule results in less disruption to the evidentiary system countrywide because fewer jurisdictions will be forced to reverse

[19] *Reynolds*, 483 F. App'x at 732 ("[I]n our case, admitting the Town Hall meeting and website revisions would discourage those in [the defendant's] situation from clarifying contractual obligations and thus would perpetuate confusion.").

[20] Or not deterred. Defendants would probably fix contract language anyway because leaving the language as is might lead to additional conflicts, more lawsuits, and even greater liability.

[21] Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1045 (7th Cir. 2007).

[22] Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 428 (5th Cir. 2006).

course."[23] Indeed, the Advisory Committee previously amended Rule 407 to conform to the majority view when it added products liability cases to the rule.[24]

Another reason for amending Rule 407 to explicitly apply to contract actions is that many actions sound in both tort and contract. So for one thing, the application of Rule 407 should not turn on the plaintiff's strategic decision to evade the Rule 407 bar by categorizing the action as contractual in nature, rather than tort.[25] As one court put it, "[T]he application of the Rule cannot depend on whether a plaintiff chooses, potentially years later, to bring a lawsuit sounding in tort or one sounding in contract."[26] Moreover, if a case raises both tort and contract claims, applying Rule 407 to both avoids a confusing limiting instruction to use the subsequent measure only on the breach of contract or warranty claims.[27] Or, more difficult still, there may be situations where a plaintiff begins the case as a contract action (where the evidence may potentially come in) but later amends to add — or substitute — a tort claim (where the evidence is inadmissible). The jury is unlikely to separate the two in a single case.

Some might argue that Rule 407's application should be limited to tort actions because the policy assumption supporting Rule 407 is somewhat weak even in the tort context and thus should not be expanded beyond those cases. The rule assumes that without its protection, defendants will refuse to fix dangerous conditions or instrumentalities or to warn of them, out of fear that the measure will be used in a subsequent lawsuit. As a practical matter, defendants likely would fix problems even without the rule's protections. Some defendants may not know about Rule 407's protections; this is even more likely if, at the time the defendant is considering fixing the problem, the defendant has not yet been sued or hired a lawyer. But even assuming the defendant's knowledge of Rule 407, many defendants are likely to make changes because if they do not, more people may be harmed and more lawsuits may follow. So why extend weak policy to a new area? But on the other hand, the policy rationale, such as it is, does apply to contracts too. A contract drafter arguably may be deterred from

[23] Capra & Richter, *supra* note 1, at 1891.

[24] FED. R. EVID. 407 advisory committee's note to 1997 Amendment ("This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions.").

[25] Don Zupanec, 25 No. 12 *Federal Litigator* 13 (Dec. 2010).

[26] Reynolds v. Univ. of Pa., 747 F. Supp. 2d 522, 536 (E.D. Pa. 2010), *aff'd*, 483 F. App'x 726 (3d Cir. 2012).

[27] *See* FED. R. EVID. 105 (limiting instructions).

bettering the contract out of fear that any improvement will be used against the drafter at trial. Ultimately the problems discussed above, particularly those of distinguishing tort and contract causes of action, calls for one rule to apply to both types of actions. So, short of abrogating 407 entirely, the proper result is to extend it to contract cases. (And abrogating Rule 407 would be a very heavy lift given the interests of defendants, and the defense bar, in preserving the rule.)

An amendment to Rule 407 specifically making the rule applicable to contract cases would read as follows:[28]

> When measures are taken that would have made an earlier injury or harm[29] less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; ~~or~~
> - a need for a warning or instruction~~.~~<u>; or</u>
> - <u>a breach of contract or warranty.</u>
>
> But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

This revised language clearly states that Rule 407 applies not only in tort cases, but also breach of contract and warranty cases as well.

Because the issue is close, we also offer an amendment that explicitly limits Rule 407 to tort cases:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures in not admissible to prove:
>
> - negligence;
> - ~~culpable~~ <u>tortious</u> conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.

[28] As is customary with proposed amendments, deletions are shown by strikethrough and new language by underlining. This convention is followed throughout the Article.

[29] Perhaps a noun like "disagreement" or "dispute" might further clarify that there does not need to be a physical or psychological injury to trigger the rule.

> But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures. The court may also admit this evidence as proof of breach of contract or warranty.

This option narrows Rule 407 to tort cases only.

Of course, if either amendatory option is pursued, the Advisory Committee will need to draft a Committee Note, which should explain the basis of the circuit split and the resolution.

B. Rule 407 and Remedial Measures Subsequent to, but Not in Response to, an Injury

Another conflict over the meaning of Rule 407 is whether the rule's protections apply when a measure occurs after an injury and would make an injury less likely to occur, but the motivation for the change is unconnected to the injury.[30] The classic Rule 407 issue arises when an event harms the plaintiff and the defendant responds to the event by changing conditions in a way that will lessen the likelihood of a similar harm occurring in the future. For example, a person slips on an icy walkway just outside a grocery store, and thereafter — in response to that injury and to prevent future similar injuries — the store's manager salts the walkway every snowy or icy morning. This fact pattern raises no interpretive challenge because the store undertook the measure in direct response to the harm. But what if the manager does not begin to salt the walkway for five years, and does so not in response to the specific earlier harm, but rather as part of a new regime to prevent accidents in general? Or what if the manager had planned to start salting the walkway even before the plaintiff's fall — but the salt had not arrived until after the plaintiff's injury? In these instances, the measure still occurs subsequent to the earlier injury and would have reduced the likelihood of the earlier injury; but now the link between the measure and the injury is missing.

Some courts apply the plain language of the rule, which does not require a defendant to be motived by a desire to remediate the specific

[30] Polypropylene Hernia Mesh Prods. Liab. Litig. v. Bard (*In re* Davol, Inc.), 518 F. Supp. 3d 1028, 1035 (S.D. Ohio 2021) ("A number of courts have considered and are split on whether Rule 407 applies where a measure has the effect of making an injury or harm less likely to occur even if the motivation for the measure is unconnected to that injury or harm or even to improving safety or when there is no causal connection between the measure and the injury or harm.") (quotation marks omitted) (citation omitted).

plaintiff's injury in order to exclude the evidence.[31] But other courts, principally relying on the social policy supporting the rule, exclude evidence of a measure only if it is taken in response to the plaintiff's injury.[32] To answer the earlier question: if the manager of the grocery store began salting the walkway five years later because the price of salt substantially decreased, the former courts would nonetheless exclude evidence of this subsequent measure simply because it occurred subsequent to the injury and would have made the injury less likely to occur, while the latter courts would admit that evidence (assuming compliance with the other rules).[33]

The Seventh Circuit's decision in *Chlopek v. Federal Insurance Co.* is the leading example of the plain language approach concluding that no nexus between the plaintiff's injury and the measure taken by the defendant is required.[34] The court found that the language of the rule renders the defendant's "motive for making the change . . . irrelevant."[35] The Seventh Circuit posited that this reading of Rule 407 also comports with policy: "Regardless of [the defendant's] stated reason for the change, the plaintiffs undoubtedly wanted the jury to conclude that [the defendant] added the warning because the product was unsafe without it. That is precisely the type of inference that Rule 407 forecloses, in order to avoid discouraging defendants from taking remedial measures."[36]

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[31] Chlopek v. Fed. Ins. Co., 499 F.3d 692, 700 (7th Cir. 2007) ("[The defendant's] *motive* for making the change is irrelevant."); *see also* Hill v. Novartis Pharms. Corp., 944 F. Supp. 2d 943, 961 (E.D. Cal. 2013) (relying on *Chlopek* to reject an argument that a plaintiff can "avoid the effect of Rule 407 simply by arguing [the measure] was not prompted by safety concerns"); *In re* Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., Nos. 3:07-cv-00101, 3:07-cv-00102, 3:07-cv-00130, 2010 WL 2015146, at *1 (M.D. Ga. May 20, 2010) ("[S]ubjective intent or motive in taking a remedial measure is not a dispositive prerequisite for exclusion under Rule 407.").

[32] Causey v. Zinke (*In re* Aircrash in Bali, Indonesia), 871 F.2d 812, 816 (9th Cir. 1989) ("The purpose of Rule 407 is to ensure that prospective defendants will not forego safety improvements because they fear that these improvements will be used against them as evidence of their liability."); *see also In re Davol, Inc.*, 518 F. Supp. 3d at 1036 ("The better interpretation of Rule 407 is that there must be some sort of causal connection or nexus between the injury-causing event and the subsequent measure.").

[33] *In re Davol, Inc.*, 518 F. Supp. 3d at 1036 ("Under the literal interpretation of the rule, there is no logical limit to the Rule's application; a measure taken ten years after the injury-causing event could be considered a subsequent remedial measure because it is actually subsequent and may have reduced the likelihood that the harm would have occurred had the measure been in place earlier.").

[34] *Chlopek*, 499 F.3d at 700.

[35] *Id.* ("All the rule requires is that the measure 'would have made the injury or harm less likely to occur.'") (citing FED. R. EVID. 407).

[36] *Id.* (emphasis omitted) (citations omitted).

Courts allowing the evidence principally rely on the policy of Rule 407. Because admitting this evidence is unlikely to discourage safety improvements when the harm did not precipitate the measure, these measures fall outside the ambit of Rule 407's prohibitions. As District Judge Edmund Sargus explained:

> The . . . policy [promoted by the rule] is that people should be encouraged to take steps to improve safety, which they would be deterred from doing if such acts would be counted against them in court.[37] When a supposed remedial measure has no connection to the harm at issue in the case, it is difficult to imagine why any deterrence would result. If defendants do not view the measures taken as connected to a harm-causing event, then it is unlikely that they would be disincentivized from taking these actions and in anticipation of litigation of the injury-causing event.[38]

If the rule remains unchanged, the split will likely persist.[39] Thus, the Advisory Committee should consider amending the rule. But how it does so is a subject worthy of debate because, on the merits, this is a close question.

Rule 407 could be amended to require a nexus between the harmful event and the subsequent remedial measure. One way to achieve this result would be to amend the first sentence of the rule as follows:

> When <u>remedial</u> measures are taken <u>in response to an earlier injury or harm</u> that would have made ~~an earlier~~ <u>that</u> injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
>
> - negligence;
> - culpable conduct;
> - a defect in a product or its design; or
> - a need for a warning or instruction.

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[37] The Advisory Committee called this the "more impressive" policy justification. FED. R. EVID. 407 advisory committee's note to proposed rule.

[38] *In re Davol, Inc.*, 518 F. Supp. 3d at 1037 (citations omitted) (footnote omitted); *see also* 23 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5283 (2d ed. Apr. 2022).

[39] *See generally* Mark G. Boyko & Ryan G. Vacca, *Who Knew? The Admissibility of Subsequent Remedial Measures when Defendants Are Without Knowledge of the Injuries*, 38 MCGEORGE L. REV. 653, 658 (2007) (discussing the divergence in interpretation over Rule 407).

This unambiguously requires causation because the measure must be "in response to an earlier injury or harm." In addition, using the word "remedial" in the text of the rule, and not relegating it to the title only, should further reinforce the need for a link between the harm and the (remedial) measure.

A drawback to requiring causation is that the amendment will probably invite litigation over whether a measure was "remedial" and "in response to" the plaintiff's injury or harm. This adds yet another factual inquiry into the rule, with concomitant discovery obligations. But a fact question like this is the type of preliminary inquiry courts regularly address. The debate in the courts will shift from one of law to one of fact; that is, from debating whether the rule does or does not permit this sort of evidence in general to whether the particular facts support the plaintiff's position that the defendant's measures were taken because of the injury or harm.

Conversely, Rule 407 could be amended to disallow evidence of subsequent remedial measures whether or not they were triggered by the injury. This fix would provide as follows:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures — regardless of the party's motivation for taking the measures — is not admissible to prove . . .

A rule like this, which covers all subsequent measures — whether responsive to the plaintiff's injury or not — has the virtue of simplicity. Not only does the amendment resolve the current split, but it also avoids mini trials on whether a measure is responsive to an injury.

The downside to this second proposal is that, as explored earlier in Part I.A, Rule 407 rests on rather weak policy,[40] so extending its protections to shield defendants even when the measures did not respond to the harm is unwarranted. In the end, the fact that Rule 407 becomes a windfall for the defendant, when applied to cases in which there is no causative connection between the change and the injury, weighs heavily in the analysis.

[40] WRIGHT & MILLER, *supra* note 38, at § 5282 ("[B]oth the logic of this rationale as well as its wisdom as social policy have been roundly criticized. There is only skimpy evidence that tort defendants behave in the way that this argument supposes. Many if not most of them are unaware of the rule, and those that are aware would surely regard it as weak protection in view of the many exceptions that would admit the evidence. Moreover, the fear of further tort liability or other sanctions itself provides a substantial incentive for defendants to make repairs.").

The proper conclusion is to require such a connection, and thereby limit the application of the rule, even if it raises some challenges of proof in some cases. Moreover, requiring a causative connection is more consistent with existing law that holds Rule 407 inapplicable to measures undertaken by third parties, and to measures required by the government. Both of these case-law carveouts are based on the premise that the rule should not apply where the measure taken is not done by the defendant in response to the plaintiff's injury.[41]

Ultimately, though, either amendment seems preferable to leaving the rule as is, which lets the current conflict to continue to manifest, allowing the resulting exclusion of evidence to turn on the fortuity of jurisdiction.

II. RULE 611: DEMONSTRATIVE EVIDENCE AND ILLUSTRATIVE OR PEDAGOGICAL AIDS

The federal courts have also shown confusion when dealing with so-called demonstrative evidence and pedagogical or illustrative aids. The confusion likely stems from the fact that the Federal Rules of Evidence do not define these terms, though the Advisory Committee Note to Rule 611 does contemplate the use of demonstrative evidence.[42] Rule 611 authorizes district judges to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence."[43]

But beyond this one minor reference to the existence of demonstrative evidence in the Notes, courts are left to their own devices. This has led to a circuit split on whether there is a distinction between demonstrative evidence to prove a fact, and illustrative aids that are not offered as evidence but only to assist the factfinder's understanding of evidence or argument.[44] As the Seventh Circuit bemoaned:

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[41] *See, e.g.*, Mehojah v. Drummond, 56 F.3d 1213, 1215 (10th Cir. 1995) ("Rule 407 only applies to a *defendant*'s voluntary actions; it does not apply to subsequent remedial measures by non-defendants.") (quotation marks omitted) (citations omitted); WRIGHT & MILLER, *supra* note 38, at § 5283 n.68 (noting that Rule 407 does not apply to government-mandated changes because the change is not caused by the plaintiff's injury).

[42] FED. R. EVID. 611(a) advisory committee's note to proposed rules (noting the rule "covers such concerns as . . . the use of demonstrative evidence").

[43] FED. R. EVID. 611(a).

[44] *E.g.*, WASH. STATE SUP. CT. COMM. ON JURY INSTRUCTIONS, WASH. PATTERN JURY INSTRUCTIONS — CIVIL 6.06 (2019) (An illustrative exhibit "is not itself evidence," but is "offered to assist you in understanding and evaluating the evidence in the case. Keep in mind that actual evidence is the testimony of witnesses and the exhibits that are admitted into evidence. Because it is not itself evidence, this exhibit will not go with you to the jury room when you deliberate.").

> The term "demonstrative" has been used in different ways that can be confusing . . . . In its broadest and least helpful use, the term "demonstrative" is used to describe any physical evidence. . . .
>
> [One treatise] identif[ied] at least three different uses and definitions of the term "demonstrative" evidence, ranging from all types of evidence, to evidence that leaves firsthand sensory impressions, to illustrative charts and summaries used to explain or interpret substantive evidence.[45]

Because of these conflicting uses and definitions of demonstrative evidence, "[t]he law is unclear as to whether it is within a district court's discretion to provide a deliberating jury with demonstrative aids that have not been admitted into evidence."[46]

Cases in the Second, Fourth, and Sixth Circuits permit Rule 611 illustrative aids to be admitted into evidence and sent to the jury room during deliberations — even as they call the presentation illustrative or pedagogical.[47] Cases in the Fourth, Fifth, and Sixth Circuits say otherwise.[48] These latter cases posit that "[s]uch pedagogical devices are

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[45] Baugh v. Cuprum S.A. de C.V., 730 F.3d 701, 706 (7th Cir. 2013) (citations omitted).

[46] United States v. Robinson, 872 F.3d 760, 779-80 (6th Cir. 2017) (citations omitted). The confusion over demonstrative evidence has also seeped over into Rule 1006 summaries — with courts sometimes refusing to admit Rule 1006 summaries because they mistakenly conflate that evidence with illustrative aids. *See infra* Part VIII (cataloging four circuit splits regarding Rule 1006). Amending Rule 611 to define and regulate the use of illustrative aids should help lessen the confusion or overlap with Rule 1006, which defines and regulates the use of substantive summaries of evidence that is too voluminous to present.

[47] *E.g.*, United States v. Bray, 139 F.3d 1104, 1111-12 (6th Cir. 1998) ("[I]n appropriate circumstances not only may such pedagogical-device summaries be used as illustrative aids in the presentation of the evidence, but they may also be admitted into evidence even though not within the specific scope of Rule 1006."); United States v. Pinto, 850 F.2d 927, 935 (2d Cir. 1988) ("[W]e find no error in the court's decision to allow the properly admitted summary charts into the jury room during deliberations."); United States v. Johnson, 54 F.3d 1150, 1159 (4th Cir. 1995).

[48] *E.g.*, United States v. Harms, 442 F.3d 367, 375 (5th Cir. 2006) ("Allowing the use of charts as 'pedagogical' devices . . . is within the bounds of the trial court's discretion to control the presentation of evidence under Rule 611(a). Such charts are not admitted into evidence and should not go to the jury room absent consent of the parties. If a summary or chart is introduced solely as a pedagogical device, the court should instruct the jury that the chart or summary is not to be considered as evidence, but only as an aid in evaluating evidence.") (alterations accepted) (quotation marks omitted) (citations omitted); United States v. Janati, 374 F.3d 263, 273 (4th Cir. 2004) ("[D]isplaying such charts is always under the supervision of the district court under Rule 611(a), and in the end they are not admitted as evidence."); Gomez v. Great Lakes

more akin to argument than evidence. . . . Generally, such a summary is, and should be, accompanied by a limiting instruction which informs the jury of the summary's purpose and that it does not itself constitute evidence."[49]

The principal problem here may be nothing more than imprecise language — what exactly is demonstrative evidence? If it is a broad umbrella term, then some demonstrative evidence is substantive evidence, while other demonstrative evidence is illustrative or summative. At least part of the solution, then, should be an amendment that separates demonstrative, substantive evidence from nonsubstantive illustrative evidence.

Maine Rule of Evidence 616 offers a solution to regulate the use of illustrative (nonsubstantive) evidence that assists a jury in understanding a witness's testimony or a party's argument. Maine Evidence Rule 616, titled Illustrative Aids, provides as follows:

> (a) Otherwise inadmissible objects or depictions may be used to illustrate witness testimony or counsel's arguments.
>
> (b) The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time.
>
> (c) Opposing counsel must be given reasonable opportunity to object to the use of any illustrative aid prepared before trial.
>
> (d) The jury may use illustrative aids during deliberations only if all parties consent, or if the court so orders after a party has shown good cause. Illustrative aids remain the property of the party that prepared them. They may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.[50]

Adding something like this in the Federal Rules of Evidence would help clarify several matters. *First*, subsection (a) clarifies that there is a

Steel Div. Nat'l Steel Corp., 803 F.2d 250, 257 (6th Cir. 1986) (distinguishing "summaries or charts admitted *as evidence* under Rule 1006 . . . from summaries or charts used as pedagogical devices which organize or aid the jury's examination of testimony or documents which are themselves admitted into evidence") (citations omitted). The Fourth Circuit has conflicting precedent. One panel recently noted that *United States v. Johnson*, *supra* note 47, holds that "summary charts may be admitted into evidence under Rule 611(a)," and that *Johnson*, as the earlier circuit precedent, controls. United States v. Simmons, 11 F.4th 239, 262 n.12 (4th Cir. 2021).

[49] *Gomez*, 803 F.2d at 257-58.

[50] ME. R. EVID. 616.

type of evidence that is not substantive evidence. Separating demonstrative substantive evidence from illustrative aids intended only to help the factfinder understand testimony or arguments is itself a step forward. This language could probably be further refined, as explored below in the draft for the Federal Rules of Evidence. *Second*, subsection (b) reminds everyone that, like other evidence, illustrative aids too come within the court's control. This subsection could also be improved by more closely tracking the balancing in Federal Rule of Evidence 403, which excludes evidence "if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[51] *Third*, although not an issue currently dividing the federal courts, subsection (c) provides for notice — something the Federal Rules do at times as well.[52] Because pedagogical aids allow for argument, it makes sense to require the proponent to give advance notice to the opponent, who may want to object that the aid is not sufficiently grounded in trial evidence, or that it cherry-picks the evidence, among other objections. *Finally*, subsection (d) is a bit of a hodgepodge. The first sentence usefully clarifies a matter that currently divides the circuits — whether illustrative aids may go to the jury room during deliberations — and answers that in the negative. The remainder of that subsection, however, delves into procedural matters not generally found in the Federal Rules. These sorts of issues should more properly be addressed in the accompanying Advisory Committee Note.

There seem to be few if any downsides to clarifying the distinction between demonstrative substantive evidence and illustrative or pedagogical aids.[53] Although some courts — those that currently treat even illustrative aids as substantive and permit the jury to inspect them during deliberations — will need to change their practice, the clarification still allows the use of illustrative aids, albeit excluding them from jury deliberations. Weighed against that relatively minor

[51] FED. R. EVID. 403.

[52] *See, e.g.*, FED. R. EVID. 404(b), 412(c), 413(b), 414(b), 415(b), 609(b)(2).

[53] Indeed, the Advisory Committee has been considering just such an amendment. *See* MINUTES OF THE MEETING, ADVISORY COMM. ON EVIDENCE RULES 7-9 (Nov. 5, 2021), https://www.uscourts.gov/sites/default/files/2021-11-05_evidence_meeting_minutes_final_0.pdf [https://perma.cc/J4X5-T5T8]. At its June meeting, the Standing Committee approved a draft amendment for release for public comment. *See* JUNE 7 STANDING COMMITTEE AGENDA, *supra* note 7, at 1010-11; JUNE 7 STANDING COMMITTEE MINUTES, *supra* note 7, at 19-22.

drawback is the upside that courts will have a coherent terminology and clearer classification system.

Because Rule 611's Advisory Committee Note provides the only current mention of demonstrative evidence, and because Rule 611 generally provides a trial judge control over the proceedings, any rule related to demonstrative evidence and illustrative aids should be in or near Rule 611. A new subsection (d) could be added to Rule 611, such as the following:

> **(d) Illustrative Aids.** The court may allow a party to use an illustrative aid to assist the factfinder in understanding a witness's testimony or the proponent's presentation if:
>
> (1) its utility in helping the jury to understand the testimony or presentation is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence;
>
> (2) all other parties are notified in advance of its intended use and are provided a reasonable opportunity to object to its content or use;
>
> (3) it is not provided to the jury during deliberations unless all parties consent or the court orders for good cause; and
>
> (4) the illustrative aid is made part of the record.[54]

This proposed amendment begins by naming this sort of evidence. We propose, as does the Maine Evidence Rule, the term "illustrative aid." The amendment contrasts material designed to aid the factfinder from evidence offered substantively to demonstrate how an event occurred. Note also the word "use," rather than words like "offer in evidence." That is another reminder that illustrative aids are not substantive evidence. Because an illustrative aid should be helpful to the factfinder, if the helpfulness is so overwhelmed by the confusion, delay, or prejudice it creates, then the aid is no aid at all, and the judge should exclude its use under the balancing test provided in the rule. The

[54] The Standing Committee released a similar version of proposed Rule 611(d) for public comment. *See* JUNE 7 STANDING COMMITTEE AGENDA, *supra* note 7, at 1010-11; JUNE 7 STANDING COMMITTEE MINUTES, *supra* note 7, at 19-22. The Standing Committee proposal expresses ambivalence regarding whether the benefits in assisting comprehension may be outweighed, or must instead be substantially outweighed, by the dangers the aid presents before the judge may exclude the aid. We chose the familiar substantially outweighed standard from Rule 403. *See* FED. R. EVID. 403.

proposed amendment to Rule 611 also settles the debate on whether illustrative aids routinely go to the jury room during deliberations. The answer: generally, no, because this is an aid, and not substantive evidence, and the jury should not be confused during the deliberations as to the status of an illustrative aid. But the proposal also allows the trial court, upon a showing of good cause, to submit the aid to the jury. If the court does so, it must instruct the jury that the illustrative aid is not evidence. Finally, the proposed amendment, like Maine's rule, has a notice requirement; but this proposal does not tackle some of the procedural issues raised by the Maine amendment. Those matters could be addressed in an Advisory Committee Note.

III. RULE 702: EXPERT TESTIMONY IN CRIMINAL CASES ON THE UNRELIABILITY OF EYEWITNESS IDENTIFICATIONS

Many criminal cases turn on identifications by eyewitnesses who often express great confidence that they have accurately identified the perpetrator.[55] Yet as early as the 1960s, it was known that "the annals of criminal law are rife with instances of mistaken identification."[56] Extensive research shows that identifications are fraught with problems.[57] The Innocence Project has concluded that nearly 70% of 375 exonerations studied resulted from faulty eyewitness identification.[58]

Some of the problems with eyewitness identification include the "forgetting curve," the "assimilation factor," the "feedback factor," and the fact that stress causes inaccuracy and distortions.[59] Studies also

[55] Greg Hurley, *The Trouble with Eyewitness-Identification Testimony in Criminal Cases*, NAT'L CTR. FOR STATE CTS. (Mar. 2017), https://ncsc.contentdm.oclc.org/digital/collection/criminal/id/280/ [https://perma.cc/B6E8-TW83] ("Although witnesses can often be very confident that their memory is accurate when identifying a suspect, the malleable nature of human memory and visual perception makes eyewitness testimony one of the most unreliable forms of evidence.").

[56] United States v. Wade, 388 U.S. 218, 228 (1967).

[57] Sara Conway, Note, *A New Era of Eyewitness Identification Law: Putting Eyewitness Testimony on Trial*, 50 NEW ENG. L. REV. 81, 81 (2015) ("Erroneous eyewitness identifications are the leading cause of wrongful convictions.").

[58] *Eyewitness Identification Reform: Mistaken Identifications Are the Leading Factor in Wrongful Convictions*, INNOCENCE PROJECT, https://innocenceproject.org/eyewitness-identification-reform/ (last visited Sept. 6, 2022) [https://perma.cc/Q2P3-4Y93]; *see also* Hurley, *supra* note 55 ("Courts took very little notice of the problems associated with eyewitness identification until DNA evidence began to be used to exonerate criminal defendants, in some cases decades after they were convicted.").

[59] State v. Chapple, 660 P.2d 1208, 1220-21 (Ariz. 1983), *superseded by statute on other grounds as stated in* State v. Benson, 307 P.3d 19, 34 (Ariz. 2013) (applying

demonstrate little or no relationship between the witness's confidence in the identification and the accuracy of the identification.[60]

Given the fallibility of eyewitness identification — particularly when pitted against an eyewitness's strong and unrelenting insistence that the witness saw the defendant commit the crime — criminal defense attorneys sometimes wish to offer expert testimony to explain to the factfinder why the eyewitness may be sincere and confident, but nonetheless mistaken.

The principal rule at issue in evaluating the admissibility of expert testimony on the fallibility of eyewitness identifications is Rule 702.[61] That Rule gives trial courts discretion to admit expert testimony if the expert has specialized knowledge, bases opinions on sufficient facts or data, and uses reliable principles and methods that have been reliably applied to the facts of the case.[62] Because jurors tend to rely on experts[63] — deferring to their expertise that, by definition, exceeds that of most lay jurors — courts must also ensure that the expert testimony will be

Arizona's version of the Federal Rules of Evidence). The Arizona Supreme Court held that the expert's testimony on the unreliability of eyewitness identification would have been helpful to the jury even if jurors generally understand problems with eyewitness identification. The court described the more nuanced and specific testimony that could have aided the jury. First, "the 'forgetting curve' is not uniform. Forgetting occurs very rapidly and then tends to level out; immediate identification is much more trustworthy than long-delayed identification." *Id.* at 1220. Second, the assimilation factor "confirms that witnesses frequently incorporate into their identifications inaccurate information gained subsequent to the event and confused with the event." *Id.* at 1221. Third, the feedback factor means that eyewitnesses may continue to repeat the same mistake. *Id.*; *see also* George Vallas, *A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses*, 39 AM. J. CRIM. L. 97, 102 (2011) (citing several factors contributing to unreliability, including "own-race bias; stress and weapon focus; exposure duration and retention interval; the lack of correlation between eyewitness confidence and accurate identifications; and problematic post-event information, such as suggestive identification procedures").

[60] *Chapple*, 660 P.2d at 1221 ("[T]here is no relationship between the confidence which a witness has in his or her identification and the actual accuracy of that identification.").

[61] Relatedly, Rule 403 allows courts to exclude otherwise relevant and helpful expert testimony if the probative value is "substantially outweighed by a danger of . . . unfair prejudice, . . . misleading the jury, [or] . . . wasting time." FED. R. EVID. 403. Thus, some courts may exclude expert opinion testimony because the opinion only marginally aids the jurors, and so that low probative value is substantially outweighed by delay and confusion. Because Rule 403 is a general rule that backstops most of the other Rules of Evidence, we do not recommend tinkering with Rule 403 in order to clarify this one area of expert opinion testimony.

[62] FED. R. EVID. 702.

[63] United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) (noting the "added aura of reliability that necessarily surrounds expert testimony").

helpful to the trier of fact. "[I]f jurors without assistance are as capable of answering a question as an expert, then the expert's testimony on that point would not be helpful and should be excluded under Rule 702. In such a case, the expert is adding nothing that could not be supplied by attorneys in the way of argument."[64]

The issue plaguing the courts is whether to allow expert testimony on the unreliability of eyewitness identification testimony. In other words, is this an issue on which jurors need expert guidance? Courts routinely assert that juries assess the credibility of witnesses.[65] And today some circuits exclude this sort of testimony under Rule 702 as unhelpful on the asserted ground that jurors are generally aware of problems with identifications and can assess witness credibility for themselves.[66] But other circuits permit this expert testimony on the ground that jurors are not familiar with the particular factors that might render an identification unreliable.[67]

Some of these different conclusions result, of course, from the differing facts, and the differing experts, in the cases before the courts.[68] The Federal Rules of Evidence generally provide discretionary standards, so even small variations in the facts may result in different

[64] 3 SALTZBURG, MARTIN & CAPRA, *supra* note 12, at § 702.02[2].

[65] Hurley, *supra* note 55; *see also* 46 A.L.R. 4TH 1047 § 2[a] (originally published 1986) ("The courts . . . in some decisions have expressed or recognized, explicitly or implicitly, the view that such expert testimony is inadmissible as invading the jury's province, but the courts in other decisions have taken the opposite approach."); Vallas, *supra* note 59, at 99 ("Courts, however, have historically been reluctant to permit the use of eyewitness experts.").

[66] *See* United States v. Rodriguez-Berrios, 573 F.3d 55, 71 (1st Cir. 2009) (upholding district court's decision to exclude expert testimony on the unreliability of eyewitness identifications and explaining that "the admission of such testimony is a matter of case-by-case discretion"); United States v. Smith, 122 F.3d 1355, 1357 (11th Cir. 1997) ("This court has consistently looked unfavorably on such testimony [regarding eyewitness reliability]."); United States v. Curry, 977 F.2d 1042, 1051 (7th Cir. 1992); *see also* United States v. Jones, No. 17-13906, 786 F. App'x 907, 909 (11th Cir. 2019) (stating that the circuit has "long disfavored" this sort of expert testimony); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982) (noting that the opponent can address problems through cross-examination and "the jury can adequately weigh these problems through common-sense evaluation").

[67] United States v. Mathis, 264 F.3d 321, 339-40 (3d Cir. 2001) (permitting expert testimony on the unreliability of eyewitness identifications); United States v. Moore, 786 F.2d 1308, 1313 (5th Cir. 1986) ("We emphasize that in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged.").

[68] *E.g.*, United States v. Rincon, 28 F.3d 921, 926 (9th Cir. 1994) ("[T]he result we reach in this case [upholding the district court's exclusion of expert testimony] is based upon an individualized inquiry, rather than strict application of the past rule concerning expert testimony on the reliability of eyewitness identification.").

applications of the rules. For example, in *United States v. Smith*,[69] the Sixth Circuit strongly suggested that expert testimony on the fallibility of eyewitness identifications was proper because the defense expert "offered proof based upon the facts of this case."[70] The expert had "analyzed the reliability of eyewitness identification in a hypothetical factual situation identical to this case. . . . Such testimony might have been relevant to the exact facts before the court and not only might have assisted the jury, but might have refuted their otherwise common assumptions about the reliability of eyewitness identification."[71] The prosecution had relied on a First Circuit case, *United States v. Fosher*,[72] which had excluded expert testimony because the jurors had a sufficient "common understanding of the particular issue."[73] The Sixth Circuit distinguished *Fosher* because the expert in the *Smith* case provided a more specific analysis, tied to the facts of the case.[74] *Fosher* and *Smith* are not necessarily evidence of a circuit split; they could both be correctly decided because of the differences in the expert testimony presented in each.

But the core of the dispute over the admissibility of this sort of expert testimony goes beyond the facts of the cases and evidences a disagreement about its helpfulness as balanced against the cost of admitting expert testimony. On the one hand, courts generally permitting this sort of testimony focus on the liberal standard of helpfulness under Rule 702.[75] Although jurors may know something generic about eyewitness identification, the expert testimony "can assist the jury" by refining that understanding and showing, for example, that stress decreases accuracy.[76] Otherwise, jurors might incorrectly assume that stressful situations cause eyewitnesses to focus and thus increase

[69] 736 F.2d 1103 (6th Cir. 1984) (per curiam).

[70] *Id.* at 1106 (emphasis omitted).

[71] *Id.* (emphases omitted).

[72] 590 F.2d 381 (1st Cir. 1979).

[73] *Smith*, 736 F.2d at 1106 (quoting United States v. Fosher, 590 F.2d 391, 383 (1st Cir. 1979)).

[74] *Id. But see* United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996) (disallowing expert testimony because the expert "was not merely going to offer testimony about eyewitness identification in general but specific, to the point, testimony regarding the inherently untrustworthy manner with which [the witness] identified [one of the defendants] in Court").

[75] United States v. Downing, 753 F.2d 1224, 1230 (3d Cir. 1985) ("We have serious doubts about whether the conclusion reached by these courts [disallowing expert testimony] is consistent with the liberal standard of admissibility mandated by Rule 702.").

[76] *Id.* at 1231-32.

eyewitness accuracy. On the other hand, courts generally excluding this sort of testimony fear "trial delay spawned by the spectre of the creation of a cottage industry of forensic psychologists."[77] Thus, some courts have a more generous view of admissibility of expert testimony on the unreliability of eyewitness identifications than others.

This is not a difference of opinion likely to resolve of its own accord. The split is both entrenched and longstanding. The First, Second, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have all upheld the exclusion of expert testimony on the unreliability of identifications,[78] some in rather categorical terms.[79] But the Third and Sixth Circuits have permitted such testimony.[80] The Third Circuit has directly refuted the concept of usurpation of the jury's function and has articulated its position of the helpfulness of expert testimony:

> Similar to other types of expert witnesses, who might testify about the flaws of a computerized filing system or the proper interpretation of satellite photographs, experts who apply reliable scientific expertise to juridically pertinent aspects of the human mind and body should generally, absent explicable reasons to the contrary, be welcomed by federal courts, not turned away.[81]

On the merits, expert testimony on the unreliability of identifications is often helpful to the jury and so should generally be admissible. The

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[77] *Id.* at 1232.

[78] *See* United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999) ("Here, [the expert's] proposed testimony and explication of the scientific studies would have confused the jury's assessment of the officers' credibility . . . . As a result, we find [the expert's] proposed testimony intrudes too much on the traditional province of the jury to assess witness credibility."); *Kime*, 99 F.3d at 884; United States v. Rincon, 28 F.3d 921, 925 (9th Cir. 1994) (upholding the district court's decision to exclude expert testimony because "[t]he district court gave the jury in this case a comprehensive instruction on eyewitness identifications"); United States v. Curry, 977 F.2d 1042, 1051-52 (7th Cir. 1992) (holding that although "most persons do not understand the intricacies of perception, retention, and recall," the district court properly exercised its discretion in excluding the expert's testimony); United States v. Holloway, 971 F.2d 675, 679 (11th Cir. 1992); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982); United States v. Fosher, 590 F.2d 381, 383-84 (1st Cir. 1979).

[79] *Kime*, 99 F.3d at 884 ("The evaluation of eyewitness testimony is for the jury alone."); *Holloway*, 971 F.2d at 679 ("The established rule of this circuit is that such testimony is not admissible.").

[80] United States v. Mathis, 264 F.3d 321, 339-40 (3d Cir. 2001); United States v. Smith, 736 F.2d 1103, 1107 (6th Cir. 1984).

[81] *Mathis*, 264 F.3d at 340.

National Research Council and the Innocence Project agree.[82] Even if jurors intuit that eyewitness identifications may be problematic — and even if cross-examination can sharpen that intuition — an expert's testimony can further assist jurors by highlighting what *precisely* may be wrong with the identification in that case. Expert testimony is particularly necessary to help jurors accurately assess identifications from extremely confident, yet potentially mistaken, eyewitnesses. And this problem of mistaken identification compounds when the person making the identification is of a different race than the person identified. As Justice Blackmun noted in dissent in *Arizona v. Youngblood*, "Cross-racial identifications are much less likely to be accurate than same race identifications."[83] Cross-examination of the eyewitnesses alone, without the assistance of expert testimony, is unlikely to apprise jurors of a key problem: the eyewitnesses are telling the truth as they remember or understand it, but their memories and perceptions are flawed. Thus, excluding defense experts especially jeopardizes defendants of color. As the National Research Council explained in 2014: "Many scientifically established aspects of eyewitness memory are counterintuitive and may defy expectations, and jurors need assistance in understanding factors that may affect the accuracy of an identification. In many cases this information can be most effectively conveyed by expert testimony."[84]

The current language of Rule 702 can be read to permit this testimony, as at least the Third and Sixth Circuits are doing. The rule's requirement is that the expert's "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."[85]

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[82] *See* NAT'L RSCH. COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 37-43 (2014); *National Academy of Sciences Issues Landmark Report on Memory and Eyewitness Identification*, INNOCENCE PROJECT (Oct. 2, 2014), https://innocenceproject.org/national-academy-of-sciences-issues-landmark-report-on-memory-and-eyewitness-identification/ [https://perma.cc/V9FV-NX4V] ("[E]xpert witnesses who are capable of explaining the nuances of memory and identification are helpful in assisting juries in how to evaluate eyewitness testimony and should be permitted."); *see also Report Urges Caution in Handling and Relying upon Eyewitness Identifications in Criminal Cases, Recommends Best Practices for Law Enforcement and Courts*, NAT'L ACADS. OF SCIS., ENG'G, & MED. (Oct. 2, 2014), https://www.nationalacademies.org/news/2014/10/report-urges-caution-in-handling-and-relying-upon-eyewitness-identifications-in-criminal-cases-recommends-best-practices-for-law-enforcement-and-courts [https://perma.cc/H5US-5K25].

[83] Arizona v. Youngblood, 488 U.S. 51, 71 n.8 (1988) (Blackmun, J., dissenting) (citation omitted).

[84] *Report Urges Caution in Handling and Relying upon Eyewitness Identifications in Criminal Cases, Recommends Best Practices for Law Enforcement and Courts*, *supra* note 82.

[85] FED. R. EVID. 702(a).

The Advisory Committee Note further describes the "test for determining when experts may be used [as] the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the *best possible degree* the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."[86] Thus, the current version of Rule 702 does not require that jurors have a complete lack of understanding without the expert testimony, but rather that their understanding would be incomplete without such testimony. Even courts excluding this testimony admit that most persons do not "understand the intricacies of perception, retention, and recall."[87]

The fact that the current version of Rule 702 can be read to admit this testimony makes it difficult to draft an amendment that would further clarify this point.[88] A targeted amendment — one that says something to the effect of "expert testimony on the unreliability of eyewitness identifications is admissible" — seems out of step with the generality of the rules.[89] Another complication is that some courts exclude this type of expert evidence under Rule 403, rather than Rule 702, on the grounds that the testimony is confusing or a waste of time.[90]

If the Advisory Committee would like to resolve the dispute, it makes more sense to amend the more targeted Rule 702 than the more general Rule 403. Rule 702(a) may be amended as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge ~~will~~ has any tendency to help the trier of fact to understand the evidence or to determine a fact in issue.

[86] FED. R. EVID. 702 advisory committee's note to proposed rule (quotation marks and citation omitted) (emphasis added).

[87] United States v. Curry, 977 F.2d 1042, 1051 (7th Cir. 1992).

[88] All recommendations must include "a proposed rule" and "an explanatory note on the rule," 28 U.S.C. § 2073(d) (2018), which means the Advisory Committee cannot amend a note without also changing the rule. *See* Capra & Richter, *supra* note 1, at 1917.

[89] The Rules of Evidence "apply to [civil and criminal] proceedings in United States courts." FED. R. EVID. 101; *see also* FED. R. EVID. 1101.

[90] *Curry*, 977 F.2d at 1051 (noting that the district court's exclusion of the expert's testimony could be a decision under Rule 702 or under Rule 403).

The "any tendency" language is borrowed from Rule 401, which defines relevance.[91] Using familiar language like this can reduce transaction costs in learning the new rule, ensure proper interpretation, and minimize the risk that the new language will unsettle the meaning of existing terminology.[92]

It is also clear that Rule 401's "any tendency" standard is easy to meet,[93] so importing that language into Rule 702 should remind judges that, when they are acting in their gatekeeper roles, they should not be heavy-handed in excluding expert testimony that will help even a little. Of course the court retains the discretion to exclude any particular expert as insufficiently qualified, or as problematically relying on insufficient data or an unreliable methodology.[94]

The Advisory Committee must also add a Committee Note,[95] which should state that the primary purpose for the amendment is to allow the admission of well-founded expert testimony on the unreliability of identification evidence. The amendment should be used explain the circuit split that the new "any tendency" language resolves, specifically concluding that reliable expert testimony about the dangers of identification evidence should generally be permitted.[96] A more robust Committee Note could also set forth useful areas of inquiry with an expert on eyewitness fallibility, such as the following:[97]

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[91] FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

[92] Capra & Richter, *supra* note 1, at 1913 ("When it comes to amending the Federal Rules of Evidence, something borrowed is often better than something new. Terminology and tests that are new to an established body of rules create significant transaction costs.").

[93] *See* FED. R. EVID. 401 advisory committee's note to proposed rules ("[I]t is not to be supposed that every witness can make a home run.") (alteration in original) (citation omitted).

[94] FED. R. EVID. 702(b)-(d).

[95] Capra & Richter, *supra* note 1, at 1917.

[96] The Evidence Advisory Committee recently followed this same setup — proposing more generalized language in the rule, but adding commentary in the notes to indicate the specific problem addressed by the amendment (in that case, unreliable forensic evidence) — in its August 2021 proposed amendment to Rule 702 released for public comment. *See* U.S. CTS., COMM. ON RULES OF PRAC. AND PROC., JUD. CONF. OF THE U.S., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 296-98, 300-12 (Aug. 2021) [hereinafter PROPOSED AMENDMENTS TO THE FEDERAL RULES].

[97] These selected factors all come from Utah Rule of Evidence 617(b). Of course, another possible amendment to the Federal Rules of Evidence would be to adopt Utah's rule, or something similar to Utah's rule. We believe our amendment is preferable both because it involves a less drastic change, one that is not specific only to the reliability

- Whether the witness's level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;[98]
- Whether a difference in race or ethnicity between the witness and suspect affected the identification;[99]
- The length of time that passed between the witness's original observation and the time the witness identified the suspect;[100]
- Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;[101] [and]
- Whether the witness was exposed to opinions, photographs, or any other information or influences

of eyewitness testimony, and also because our amendment adopts language that has already been vetted and used by courts for decades; thus, there should be fewer unintended consequences.

Utah Rule 617(b) also includes these other factual areas that may best be explored by cross-examining the eyewitness:

- Whether the witness had an adequate opportunity to observe the suspect committing the crime; . . .
- Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;
- Whether the witness was aware a crime was taking place and whether that awareness affected the witness's ability to perceive, remember, and relate it correctly; . . . and
- Whether any other aspect of the identification was shown to affect reliability.

UTAH R. EVID. 617(b).

[98] *See* State v. Chapple, 660 P.2d 1208, 1221 (Ariz. 1983) ("[R]esearch shows that most laymen believe that stressful events cause people to remember 'better' so that what is seen in periods of stress is more accurately remembered later. However, experimental evidence indicates that stress causes inaccuracy of perception with subsequent distortion of recall."), *superseded by statute on other grounds as stated in* State v. Benson, 307 P.3d 19, 34 (Ariz. 2013).

[99] *See, e.g.*, Harvey Gee, *Eyewitness Testimony and Cross-Racial Identification*, 35 NEW ENG. L. REV. 835, 838-39 (2001) (reviewing ELIZABETH P. LOFTUS, EYEWITNESS TESTIMONY 136-37 (1996)) ("[I]t seems to be a fact — it has been observed so many times — that people are better at recognizing faces of persons of their own race than a different race." (quoting LOFTUS, *supra*, at 136-137)).

[100] *Chapple*, 660 P.2d at 1220-21 (forgetting curve).

[101] *Id.* at 1221 (feedback factor).

> that may have affected the independence of the witness in making the identification.[102]

Finally, the Advisory Committee should also amend Rule 701, regarding lay witness opinions, to include the "any tendency" language. Otherwise, if the proposal is adopted for Rule 702 but nothing changes in Rule 701, courts may come to the incorrect conclusion that the helpfulness requirement in Rule 702 is less stringent, and thus easier to meet, than the helpfulness requirement of Rule 701.

> An amendment to Rule 701 would read as follows:
>
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that ~~is~~:
>
> (a) is rationally based on the witness's perception;
>
> (b) ~~helpful~~ has any tendency to help the trier of fact in ~~to~~ clearly understanding the witness's testimony or ~~to~~ determining a fact in issue; and
>
> (c) is not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The Committee Note to the Rule 701 amendment should explain that Rule 701's language was changed to conform with a change in Rule 702, the expert counterpart.

IV. RULE 801(D)(2): STATEMENTS MADE BY A PREDECESSOR-IN-INTEREST

Federal Rule of Evidence 801 defines an opposing party's statement as "not hearsay."[103] That means that if A and B have a car accident, and A later tells a colleague, "I ran the red light," that statement is admissible against A at a subsequent trial to prove that A in fact ran the red light. The reason underlying the rule is one of estoppel: we must live with the sometimes improvident things we say.[104] The hearsay rule protects a

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[102] *Id.* (assimilation factor).

[103] FED. R. EVID. 801(d)(2). This really means hearsay subject to an exemption that the rule sets forth. *See* SALTZBURG, MARTIN & CAPRA, *supra* note 12, at § 801.02[2][b] ("[T]here is no practical difference between an exception to the hearsay rule and an exemption from that rule.").

[104] FED. R. EVID. 801 advisory committee's note to proposed rule ("Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in 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

party from the possibly unreliable statement of a declarant — but not if the statement is one of the party's own making.

Because the rule speaks only of a statement "offered against an opposing *party*,"[105] the circuits have split on whether a statement made by a declarant may be offered against a party who did not make the statement but whose claim or defense is derived directly from the declarant who did. For example, when a declarant makes a statement, but has died by the time of trial, the text of the rule neither clearly mandates nor prohibits the statement's admission against the declarant's estate. On the one hand, the statement is not made by the actual opposing party; but on the other hand, the declarant is effectively the party for purposes of the case. Nor is this issue limited to when an estate brings a claim in the shoes of the decedent. The issue also arises in the context of a beneficiary and a trustee, a constituent corporation and the new merged corporation, and an assignor and assignee, among others.

The Sixth and Seventh Circuits have held that a declarant's hearsay statements may not be admitted against the successor party under Rule 801(d)(2).[106] The Seventh Circuit explained that privity-based admissions were permitted at common-law, but that under Federal Rule 801(d)(2) they are "not among the specifically defined kinds of admissions that . . . are declared not to be hearsay."[107] Indeed, "the very explicitness of Rule 801(d)(2) suggests that the draftsmen did not intend to authorize the courts to add new categories of admissions to those stated in the rule."[108] The Seventh Circuit concluded: "Thus privity-based admissions are not admissible as such, if the rules are to be read literally."[109]

The Third, Fifth, and Tenth Circuits admit this sort of evidence, while the Sixth Circuit has some conflicting precedent on admissibility.[110] The

case of an admission."). Rule 801(d)(2) also requires parties to live with the imprudent statements uttered by their agents and employees. *See* FED. R. EVID. 801(d)(2)(C)-(D).

105 FED. R. EVID. 801(d)(2) (emphasis added).

106 Calhoun v. Baylor, 646 F.2d 1158, 1162 (6th Cir. 1981) ("Rule 801(d)(2) does not include statements by predecessors in interest among the types of statements the rule makes admissible."); *cf.* Huff v. White Motor Corp., 609 F.2d 286, 289 (7th Cir. 1979) (requiring the use of the residual exception, rather than Rule 801(d)(2)).

107 *Huff*, 609 F.2d at 291.

108 *Id.*

109 *Id.*

110 Phillips v. Grady Cnty. Bd. of Cnty. Comm'rs, No. 02–6306, 92 F. App'x 692, 696 (10th Cir. Mar. 2, 2004); Savarese v. Agriss, 883 F.2d 1194, 1200-01 (3d Cir. 1989); Estate of Shafer v. Comm'r, 749 F.2d 1216, 1218 (6th Cir. 1984); Mills v. Damson Oil Corp., 691 F.2d 715, 716 (5th Cir. 1982) (invoking Rule 801(d)(2)(D)).

Third Circuit "note[d] that the Advisory Committee called for generous treatment to this avenue [Rule 801(d)(2)] of admissibility."[111] Similarly, in concluding that a deceased declarant was a party for these purposes, the Sixth Circuit explained, "An executor of an estate was considered a 'party' to the action under the restrictive common law rule of representative admissions. Since the purpose of Rule 801(d)(2)(A) is to increase the admissibility of representative admissions, *a fortiori* an executor must be a 'party' within the Rule."[112] "These courts have concluded that a decedent's statements can be admitted as admissions by a party opponent under Rule 801(d)(2) based on the inference that a decedent and the estate of the decedent are essentially the same for purposes of the Rule."[113]

On the merits, the policy undergirding the rule supports admission against a successor-in-interest. When a party's claim or defense derives directly from the declarant, then the declarant is essentially the real party in interest. And if declarants say things that harm their own claims, it is consistent with the adversary system to declare that these statements harm the successor parties' claims as well. Just as the declarants could not complain about using their own words against them, neither should the succeeding parties be permitted to do so.[114] Notably, evidence rules in at least two states specifically permit these sorts of statements to be admitted.[115]

A brief thought experiment demonstrates why these statements should be admissible against successors. Take two cases involving allegations of police brutality, both happening on the same day, both tried on the same day, and the victim in each case made a statement that his injuries were not very severe. Victim 1 is alive at the time of trial, so his statement is admitted against him under Rule 801(d)(2)(A). But assume Victim 2 is run over by a car and killed a month before trial. Under the Sixth and Seventh Circuits' view, Victim 2's statement, identical in all respects to that of Victim 1's, is inadmissible under the same rule. This makes no sense.

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111 *Savarese*, 883 F.2d at 1201 (quotation marks omitted) (citation omitted).

112 *Estate of Shafer*, 749 F.2d at 1219 (footnotes omitted) (citations omitted).

113 Abelmann v. SmartLease USA, LLC, 437 F. Supp. 3d 736, 738 (D.N.D. 2020).

114 Some might worry that the witness will lie about what the declarant said, but that is not a hearsay problem and can be handled by effective cross-examination. *See* FED. R. EVID. 807 advisory committee's note to 2019 amendment ("In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question.").

115 CAL. EVID. CODE § 1224 (1967); HAW. REV. STAT. §§ 803(3)-(5) (2010).

Because the primary argument against admitting these statements is a hyper-textual reading of the word "party" in Rule 801(d)(2), the rule should be amended to provide that if a party's claim or defense is directly derived from a hearsay declarant's claim or defense, then the declarant's statements are admissible as statements of a party. The amendment should provide as follows:

> (d) ***An Opposing Party's Statement.*** The statement is offered against and opposing party and:
>
> (A) was made by the party in an individual or representative capacity;
>
> (B) is one the party manifested that it adopted or believed to be true;
>
> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
>
> (E) was made by the party's coconspirator during and in furtherance of the conspiracy.
>
> The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).
>
> <u>A statement that would be admissible under this rule if the declarant or the declarant's principal were a party is admissible when offered against a party whose claim or defense is directly derived from the rights or obligations of the declarant or the principal.</u>[116]

The revised rule leaves the term "party" undisturbed, but then describes the necessary relationship between the declarant and the party that permits the declarant's statement to be admitted against the party. This solution is more useful than trying to use legal labels, such as privity or assignor-assignee. Using more specific relationship labels may be underinclusive and lead to questions about whether relationships not specifically listed fall within the ambit of the rule. In addition, although the concept of "privity" is broad enough to cover the relationships

[116] On June 7, 2022, the Standing Committee approved a draft amendment for release for public comment. JUNE 7 STANDING COMMITTEE MINUTES, *supra* note 7, at 25.

considered in this section, the term itself is fuzzy and ill-defined.[117] It is problematic to tie a Rule of Evidence to this sort of shifting common-law concept. Thus, we offer the description of the relationship that must exist between the declarant and the party, leaving to a Committee Note the job of listing the types of relationships that will suffice, such as decedent-estate, assignor-assignee, bankruptcy trustee-debtor, beneficiary-trustee, and constituent corporation-merged corporation, among others.

The Committee Note should also clarify that that the policy of attribution applies only when the declarant makes the statement before the rights or obligations have been transferred to the party. If that statement instead were made *after* the transfer, then the statement is not properly attributable to the party.[118]

Finally, the text must, as it does above, include statements of the declarant's principal, because Rule 801(d)(2) covers not only personal party-opponent statements but also statements by agents within the scope of their authority — these statements should be admissible against a successor if they would be admissible against the principal.[119]

V. RULE 803(3): SPONTANEITY REQUIREMENT

Declarants' statements about their own then-existing states of mind are admissible to prove their states of mind.[120] For example, if a person says, "I plan to go out to lunch today," that is admissible to prove that, when spoken, the declarant actually intended to go out to lunch today — and thus also provides some evidence that the declarant followed through on those plans and went out to lunch. The policy for allowing this sort of out-of-court statement is that declarants know their own

[117] *E.g.*, 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4449 (3d ed. 2022) ("Older definitions of privity were very narrow. As the preclusive effects of judgments have expanded to include nonparties in more and more situations, however, it has come to be recognized that the privity label simply expresses a conclusion that preclusion is proper.").

[118] Using a moment in time to distinguish inadmissible from admissible hearsay is not unknown to the rules — and indeed not unknown to Rule 801(d). *See* FED. R. EVID. 801(d)(2)(E) (allowing a statement made by a coconspirator to be admitted against the party if made "during and in furtherance of the conspiracy").

[119] That is why amending only Rule 801(d)(2)(A) will not do. Attribution should apply if an agent of the predecessor party makes a statement that should be admissible against the successor under the agency provisions of Rule 801(d)(2) — or, for that matter, if the predecessor adopted the statement. Because all of the provisions of Rule 801(d)(2) need to be applicable to successors, the only way to amend the rule is to add a new hanging paragraph.

[120] FED. R. EVID. 803(3).

thoughts, feelings, and plans, and therefore these statements are more reliable than most other hearsay.[121] Because these declarants are asserting their own current states of mind, there are seemingly no problems with misperception or misremembering. Rule 803(3)'s exclusion of "a statement of memory or belief to prove the fact remembered or believed" reinforces this contemporaneousness requirement.[122] The declarant must be currently feeling this way, which alleviates any concerns about memory problems, and makes it more likely the declarant is reliably reporting that experience.[123]

A circuit split has developed over whether the rule also contains a spontaneity requirement to help ensure that the statement is not fabricated and self-serving — the question is whether the statement must appear to be spontaneous when made, rather than planned out. Some courts, emphasizing the reliability policy underpinning the rule, engraft a spontaneity requirement to the rule;[124] but other courts, noting that the "exception appears to be 'categorical,'"[125] do not impose an additional spontaneity requirement.[126] For example, if a declarant says, "I believe that what I am carrying in my suitcase is not drugs; I feel innocent right now," the courts focusing on reliability would probably exclude that statement as inadmissible hearsay.[127] Other courts, following the rule as written, would admit the statement because the declarant expressed a then-existing state of mind. These latter courts would leave it to the opposing party to show the factfinder why the statement is not worthy of belief. As this hypothetical indicates, this difference in interpretation of Rule 803(3) particularly matters when a criminal defendant makes an exculpatory state of mind statement after the alleged crime and then wants to admit that statement to help prove innocence.

Courts that follow the rule as written, and thus do not require an affirmative showing of spontaneity, include the Second and Seventh Circuits.[128] These courts admit self-serving statements of state of mind

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121 FED. R. EVID. 803(3) advisory committee's note to proposed rule.

122 FED. R. EVID. 803(3).

123 FED. R. EVID. 803(3) advisory committee's note to proposed rule.

124 *See infra* note 130 (listing courts requiring spontaneity).

125 Eleanor Swift, *Narrative Theory, FRE 803(3), and Criminal Defendants' Post-Crime State of Mind Hearsay*, 38 SETON HALL L. REV. 975, 976 (2008).

126 *See infra* note 128 (listing courts not requiring spontaneity).

127 Swift, *supra* note 125, at 975 ("[C]ourts are consistently re-interpreting FRE 803(3) to exclude defendants' own exculpatory state of mind statements that are 'post-crime,' made any time after the charged crime was committed.").

128 United States v. Peak, 856 F.2d 825, 833-34 (7th Cir. 1988) (holding an exculpatory statement admissible even though the declarant had time to fabricate his

as long as the statements relate to asserted "then-existing" feelings and conditions. As Judge Friendly described it, "False it may well have been but if it fell within Rule 803(3), as it clearly did if the words of that rule are read to mean what they say, its truth or falsity is for the jury to determine."[129] In other words, the statement was admissible under Rule 803(3); if it was self-serving, then the jury was free to weigh it accordingly.

But most other courts, emphasizing the policy underlying the rule, hold that state of mind statement must be shown to be spontaneous in order to be admissible.[130] The concern is that a declarant who has time to reflect might deliberately misrepresent a state of mind — even one that is stated as existing at the time the statement was made.

This split is longstanding[131] and unlikely to be resolved by the Supreme Court. Indeed, in 2005, the Supreme Court denied certiorari

state of mind); United States v. Lawal, 736 F.2d 5, 9 (2d Cir. 1984) (holding it was error to exclude the defendant's statements regarding his intent to cooperate and his feelings of anger at being set up by another person to transport heroin because these statements "reflecting [the defendant's] present state of mind at the time, would have been admissible under Rule 803(3)"). *But see* United States v. Jackson, 780 F.2d 1305, 1315 (7th Cir. 1986) (noting that Rule 803(3) requires the statements be "contemporaneous with the . . . event sought to be proven" and that the declarant "had no chance to reflect") (quotation marks omitted) (citations omitted).

129 United States v. DiMaria, 727 F.2d 265, 271 (2d Cir. 1984). The Second Circuit has characterized *DiMaria* this way: "*DiMaria* held that relevant declarations which fall within the parameters of Rule 803(3) are *categorically* admissible, even if they are self-serving and made under circumstances which undermine their trustworthiness. The truth or falsity of such declarations is for the jury to determine, and their 'self-serving nature' goes only to their weight." *Lawal*, 736 F.2d at 8 (citation omitted).

130 *See, e.g.*, United States v. Secor, Nos. 02-4066, 02-4069, 02-4195, 2003 WL 21906021, at *30 (4th Cir. Aug. 11, 2003) (holding a statement was inadmissible because at the time it was made, the declarant "was aware that he was under investigation by the IRS and that his employee had an appointment to meet with IRS agents later that day"); United States v. Reyes, 239 F.3d 722, 743 (5th Cir. 2001) (holding a statement inadmissible because the "remarks were more self-serving than they were candid, and therefore their probative value is greatly diminished"); United States v. Faust, 850 F.2d 575, 585 (9th Cir. 1988) (explaining that, to be admissible under the state of mind exception, "a court must examine three factors: contemporaneousness, chance for reflection, and relevance"); *see also* Swift, *supra* note 125, at 992 ("Since its first articulation in 1980, this [spontaneity] test has been adopted by a majority of Circuits in cases that have excluded criminal defendants' post-crime hearsay statements of state of mind.") (citing cases from the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits).

131 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 803.02[4][d] (Matthew Bender 12th ed. 2022).

in a case raising the issue whether Rule 803(3) authorizes the trial judge to exclude state-of-mind statements that are doubtful or insincere.[132]

On the merits, there are some drawbacks to adding an explicit textual spontaneity or trustworthiness requirement. *First*, any additional admissibility hurdle might invite "delay, prejudgment and encroachment on the province of the jury."[133]

Second and relatedly, adding a spontaneity requirement will sometimes require additional evidence and research regarding whether a particular statement was made spontaneously. But how can you tell what is going on inside the declarant's mind?

Third, the split has grown because of a very narrow set of facts regarding a criminal defendant's post-crime statements[134] — and yet the language used to resolve the split would likely more broadly encompass any state-of-mind statement not spontaneously made. A limited amendment focused solely on a defendant's post-crime statements seems too particularized and narrow for the otherwise general Federal Rules of Evidence. But the broad amendment would require a spontaneity analysis for every state-of-mind statement, even though areas other than a criminal defendant's post-crime statements are not causing the courts any heartburn. Neither the limited amendment nor the broad amendment is particularly appealing.

Fourth, if Rule 803(3) precludes the defense from admitting a defendant's nonspontaneous (and potentially calculated) statements of nonguilt, the only remaining way to admit such a statement would be for the defendant to forgo her privilege against self-incrimination and take the stand. This is risky business for a criminal defendant, who could then be impeached by prior criminal convictions, among other things.[135]

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[132] Cianci v. United States, 546 U.S. 935 (2005) (denying petition raising circuit split on Rule 803(3), 2005 WL 1596610).

[133] *DiMaria*, 727 F.2d at 272; *see also* Swift, *supra* note 125, at 993 ("[A]dding the timeliness test to FRE 803(3) is bad law and bad policy. It is bad law because it rejects the Federal Rules' general categorical approach to admitting hearsay. It is bad policy because it in effect adopts its own categorical rule excluding criminal defendants' post-crime statements.").

[134] *Cf.* Swift, *supra* note 125, at 993 ("The federal circuit court opinions first adopting the timeliness test involved no other type of hearsay declarant and no other type of statement. In the cases decided during the past ten years, courts assume without discussion that criminal defendants have compelling motives to fabricate and to make untrustworthy 'self-serving' statements both post-crime and even while the crime is ongoing.").

[135] FED. R. EVID. 609.

On the other hand, not requiring spontaneity in Rule 803(3) also poses challenges. Many courts seem uncomfortable admitting self-serving state of mind statements into evidence, so it may be wiser to simply conform the rule to the more widely accepted norm of requiring greater indicia of trustworthiness. Moreover, the courts not requiring spontaneity are not saying that their rule is better policy; they are simply saying that their rulings follow the literal language of the rule. That argument goes away if the rule is changed. It stands to reason that these courts could quickly and easily conform their caselaw to any new language requiring spontaneity.

If the Advisory Committee believes that the current rule does not provide an adequate guarantee of trustworthiness, there are two possible fixes. One fix would be to explicitly add a spontaneity requirement to the rule. The amended rule could admit the following state-of-mind statements:

> A spontaneous statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health) . . . .

A second possibility would borrow language from the business and public-records exceptions that the evidence may be excluded if the opponent shows that "the circumstances of the statement indicate a lack of trustworthiness."[136] This amendment would leave the current language in place, so that all of Rule 803(3) would read as follows:

> A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will. The evidence may be excluded if the opponent shows that the circumstances of the statement indicate a lack of trustworthiness.[137]

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[136] *See* FED. R. EVID. 803(6)(E) (disallowing business records if the opponent shows "that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness"); FED. R. EVID. 803(8)(B) (disallowing public records if the opponent shows "that the source of information or other circumstances indicate a lack of trustworthiness"); *see also* Liesa L. Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 WM. & MARY L. REV. 897, 930 (2018) (advocating using the trustworthiness clause in other Rule 803 exceptions).

[137] This trustworthiness amendment would allow the court to consider inconsistent statements or tone of voice, among other things.

The second option has the benefit of incorporating language from existing rules, which may help lawyers and judges understand and apply it when they face the language for the first time in Rule 803(3).

These proposals do not inform the reader that the primary issue motivating the amendment is specifically a criminal defendant's post-crime statements of innocence and instead focus more broadly on the reliability of the statements. The Advisory Committee Note could more clearly explain that a criminal defendant's post-crime statements are particularly concerning given a defendant's incentive to assert lack of guilt.[138] The Note could also fruitfully explore what factors might indicate a lack of spontaneity, such as time to prepare the statement or motive to falsify, among others. If the trustworthiness clause were added, the Advisory Committee Note should stress that it was added to solve the spontaneity problem, but that the clause could solve other potential unreliability issues as well.[139]

VI. RULE 804(B)(3): STATEMENTS AGAINST INTEREST

Rule 804(b)(3) provides a hearsay exception for various types of statements against interest, on the rationale that reasonable persons do not usually make statements that would harm their own interests unless they believe them to be true.[140] This exception has an additional admissibility requirement applicable in criminal cases: if a self-inculpatory statement that "tends to expose the declarant to criminal liability" is "offered in a criminal case," it must be "supported by corroborating circumstances that clearly indicate its trustworthiness."[141]

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[138] *See* PROPOSED AMENDMENTS TO THE FEDERAL RULES, *supra* note 96, at 299-302 (discussing the use of broad language in the rule paired with specifics in the Committee Note).

[139] For example, this language could help resolve whether a declarant's statement may prove a non-declarant's state of mind and subsequent conduct. *See supra* note 7 (regarding splits not analyzed in this Article, including this one over Rule 803(3)).

[140] FED. R. EVID. 804(b)(3) ("The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness: . . . A statement that: a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability."); FED. R. EVID. 804 advisory committee's note to proposed rules ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.") (citation omitted).

[141] FED. R. EVID. 804(b)(3)(B).

Although the exception is premised on the assumption that a person is unlikely to fabricate a statement that might subject the declarant to criminal charges, "corroborating circumstances" are deemed necessary for such statements offered in criminal cases in order to "circumvent[] fabrication."[142] While people may ordinarily not say things against their interests, people might do so in order to save friends or family members from criminal prosecution — particularly where, as required by Rule 804(b)(3), the declarant would merely make an out-of-court statement and then be unavailable.[143] Or they might, with nefarious purpose, accuse others of committing a crime with them. In 2010, the rule was "amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases"; that is, it applies bilaterally to statements offered by the prosecution as well as statements offered by the defense.[144]

Two circuit splits have matured regarding statements against penal interest. One division is over whether evidence extrinsic to the making of the statement may be used to corroborate the statement, or whether only intrinsic circumstantial guarantees of trustworthiness suffice. The second is whether the corroborating circumstances requirement applies to declarations against penal interest when offered in civil cases.

A. Rule 804(b)(3) and the Meaning of Corroborating Circumstances

A split has developed over what kinds of information may be provided to establish "corroborating circumstances" when a hearsay statement "is offered in a criminal case as one that tends to expose the declarant to criminal liability."[145] Three circuits — the First, Sixth, and Eighth — have cases that disallow the use of independent evidence to corroborate

[142] FED. R. EVID. 804(b)(3) advisory committee's note to proposed rule.

[143] *See* FED. R. EVID. 804(a) (defining unavailability); *see also* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 19, 2022, at 7 (2002), https://www.uscourts.gov/sites/default/files/fr_import/402EVMin.pdf [perma.cc/VS42-9FFS] [hereinafter MEETING MINUTES OF APR. 19, 2002] ("As Congress recognized, exculpatory statements are potentially unreliable because a declarant may simply be trying to get the defendant off from charges by confessing to the crime himself, perhaps secure in the knowledge that he will not himself be convicted because the evidence does not point to him.").

[144] *See* FED. R. EVID. 804(b)(3) advisory committee's note to 2010 amendment ("A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.").

[145] FED. R. EVID. 804(b)(3)(B).

the trustworthiness of such a statement.[146] These courts look only to whether the circumstances surrounding the making of the statement support trustworthiness, examining such indicators as the declarant's motive and whether the statement was spontaneous.[147] The Sixth Circuit explained its position this way: "To determine whether a statement is sufficiently trustworthy for admission under Rule 804(b)(3), the court is not to focus on whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself."[148]

Courts that focus only on intrinsic circumstances generally rely on *Idaho v. Wright*,[149] a 1990 U.S. Supreme Court case involving the Sixth Amendment's Confrontation Clause and holding that reliability for purposes of the Sixth Amendment focuses solely on circumstantial guarantees inherent in the statement, not on outside evidence.[150] Before

[146] United States v. Taylor, 848 F.3d 476, 486-87 (1st Cir. 2017) ("[T]here must be evidence that clearly indicates that the statements were worthy of belief, based upon the circumstances in which the statements were made.") (quotation marks omitted) (citation omitted); United States v. Franklin, 415 F.3d 537, 547 (6th Cir. 2005) ("[T]he court is not to focus on whether other evidence in the case corroborates what the statement asserts, but rather on whether there are corroborating circumstances which clearly indicate the trustworthiness of the statement itself.") (quotation marks omitted) (citation omitted); United States v. Bobo, 994 F.2d 524, 528 (8th Cir. 1993) (listing five factors intrinsic to the statement to determine the trustworthiness of a statement against penal interest: "(1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, (2) the general character of the speaker, (3) whether other people heard the out-of-court statement, (4) whether the statement was made spontaneously, (5) the timing of the declaration and the relationship between the speaker and the witness").

Some cases issuing out of both the Sixth and Eighth Circuits show a willingness to look at corroborating evidence as well. *See* United States v. Henley, 766 F.3d 893, 916 (8th Cir. 2014) (noting in *dicta* that a statement lacked trustworthiness in part because other witnesses testified that the defendant was the shooter); United States v. Ouedraogo, No. 11-2600, 531 F. App'x 731, 745-46 (6th Cir. Sept. 10, 2013) (noting that Rule 804(b)(3) statements must be "corroborated in some way," including by reviewing "background" information); United States v. Price, 134 F.3d 340, 347-48 (6th Cir. 1998) (considering independent evidence).

[147] *Taylor*, 848 F.3d at 487 ("So a statement may be corroborated by the circumstances in which the statement was made if it is directly against the declarant's penal interest, made to a close associate or family member, or there is no indication that the speaker had motive to lie.") (quotation marks omitted) (citations omitted).

[148] *Franklin*, 415 F.3d at 547 (quotation marks omitted) (citation omitted).

[149] 497 U.S. 805 (1990).

[150] The Confrontation Clause is part of the Sixth Amendment, which provides as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

the Supreme Court changed its approach to the Confrontation Clause in the 2004 case of *Crawford v. Washington*,[151] the Court held that if a hearsay statement did not fall within "a firmly rooted hearsay exception,"[152] then it had to be excluded unless the prosecution provided "a showing of particularized guarantees of trustworthiness."[153] In *Idaho v. Wright*, the Supreme Court concluded that these "particularized guarantees" included only the circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief."[154] Despite the government's argument to the contrary in that case, the Court refused to look at whether there was "other evidence at trial that corroborates the truth of the statement,"[155] believing that "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial."[156]

Most of the circuits other than the First, Sixth, and Eighth do not follow *Wright*, a Confrontation Clause case, in this non-Confrontation Clause context and thus also consider whether independent evidence corroborates the declarant's statement.[157] For example, an eyewitness's

[151] Crawford v. Washington, 541 U.S. 36, 59-60 (2004) (rejecting the reliability inquiry in favor of asking whether the out-of-court statement is testimonial); *see* Davis v. Washington, 547 U.S. 813, 822 (2006) (describing a statement as testimonial if its "primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution").

[152] *Wright*, 497 U.S. at 815 (citations omitted).

[153] *Id.*

[154] *Id.* at 819.

[155] *Id.*

[156] *Id.* at 823.

[157] *See, e.g.*, United States v. Vetri, No. 18-2372, 811 F. App'x 79, 84 (3d Cir. Apr. 23, 2020) (permitting corroboration "through additional evidence and testimony"); United States v. Olivera, Nos. 18-2024 & 18-2077, 797 F. App'x 40, 44 (2d Cir. Dec. 19, 2019) (permitting corroboration through other "testimony, surveillance video, and phone records"); United States v. Gama, No. 14-10042, 597 F. App'x 445, 446 (9th Cir. Mar. 16, 2015) ("[T]here was a paucity of corroborating evidence. Aside from [the defendant's] own trial testimony, the corroboration that [the defendant] offered for his brother's hearsay statements largely consisted of other hearsay statements."); United States v. Lozado, 776 F.3d 1119, 1132 (10th Cir. 2015) ("Corroboration of the trustworthiness of the statement could mean consideration of (1) the declarant's credibility, (2) whether evidence supports or contradicts the statements, or (3) both.") (citation omitted); United States v. Henderson, 736 F.3d 1128, 1131 (7th Cir. 2013) ("Corroboration may be supplied by independent evidence supporting the statement itself, or by the circumstances in which the statement was made suggesting that the statement is trustworthy, or both.") (citations omitted); United States v. Dargan, 738 F.3d 643, 650 (4th Cir. 2013) ("[T]he gist of the statements was confirmed by a wealth of independent evidence introduced by the government at trial, including the series of text messages."); United States v. Daniels, No. 11-10988, 465 F. App'x 896, 898 (11th

testimony might agree with some of the details offered by the declarant's statement. Or fingerprints might be found at the scene of the crime, thus making it more likely that the declarant's statement of guilt is truthful. Facts such as these help establish the truthfulness of the declarant's account; but they are not intrinsic guarantees of trustworthiness.

Several arguments militate against following *Idaho v. Wright* in an analysis under Rule 804(b)(3). One: *Idaho v. Wright* was interpreting the Constitution's Sixth Amendment, not a Rule of Evidence containing an express corroborating circumstances requirement — one that the Committee Note to Rule 804(b)(3) specifically refers to as a "corroboration" requirement.[158] There is no reason that Rule 804(b)(3) must or should be interpreted in lockstep with the Sixth Amendment. Even though the Supreme Court in *Wright* was assessing what makes hearsay reliable — and concluded that intrinsic and not extrinsic factors satisfy this inquiry — it may be that the Sixth Amendment, as a constitutional protection for defendants, is narrower than Rule 804(b)(3). Two: *Idaho v. Wright*'s insistence that only intrinsic guarantees matter is questionable when expanded to the Federal Rules of Evidence, particularly in light of the recent amendment to Rule 807, which endorses the view that all corroborating evidence should be considered when analyzing trustworthiness under the residual hearsay exception.[159] Finally: *Wright*'s trustworthiness analysis has been displaced by *Crawford*'s focus on whether an out-of-court statement is testimonial. Even within the context of Sixth Amendment cases, the *Wright* doctrine has fallen into disuse. Thus, in 1990 there was little reason to import the Court's restrictive vision of corroboration from the Confrontation Clause to Rule 804(b)(3); and in 2022, there are even fewer reasons to do so.

As briefly noted above, the question of what constitutes corroborating circumstances in Rule 804(b)(3)(B) parallels a similar issue that arose — and has since been resolved — regarding evidence offered under Rule 807's residual hearsay exception. Previously, the residual hearsay exception required that statements have "circumstantial guarantees of

Cir. Apr. 9, 2012) (explaining the district court did not abuse its discretion in admitting a statement where it "was consistent with the testimony of the guard . . . and with a recording of the robbery by a surveillance camera inside the shopping mall"); United States v. Moore, 651 F.3d 30, 83 (D.C. Cir. 2011) (reviewing fingerprint evidence and other matters extrinsic to the statement); United States v. Bell, 367 F.3d 452, 467 n.6 (5th Cir. 2004) ("[T]he district court can properly consider any corroborating circumstances that clearly indicate that the statement is trustworthy.").

158 FED. R. EVID. 804 advisory committee's note to 1972 proposed rules ("requirement of corroboration").

159 *See infra* notes 160–62 and text accompanying notes.

trustworthiness," and courts debated whether those circumstances included outside evidence or instead were limited to the circumstances intrinsic to the statement.[160] In 2019, Rule 807 was amended to resolve the conflict. The Rule now requires courts to consider "the totality of circumstances under which [the statement] was made and evidence, if any, corroborating the statement."[161] The Committee Note explains that this change was necessary because "some courts have disagreed" with the notion that they must consider external corroborating evidence.[162]

On the merits, there is little reason to follow the restrictive approach of the First, Sixth, and Eighth Circuits that limits the corroborating circumstances inquiry to the circumstantial guarantees of trustworthiness inherent in making the statement. The language of the current rule does not require such a stingy approach; the phrase "corroborating circumstances" is broad enough to encompass extrinsic evidence. Nor is there a good policy reason to be so narrow. Extrinsic corroboration bolsters reliability just as intrinsic guarantees of trustworthiness do. The Supreme Court in *Wright* did not explain why using extrinsic evidence might allow an inaccurate statement to be admitted;[163] after all, if the extrinsic evidence confirms the statement, does not that suggest that the statement is, in fact, likely to be the truth? These sorts of considerations led the Advisory Committee to unanimously eschew the restrictive vision of trustworthiness in Rule 807.[164] Corroborating evidence is presented at trial every day in the search for truth. Why should it be any different in assessing the trustworthiness of a statement offered under Rule 804(b)(3)?

The time has come to amend Rule 804(b)(3)(B) to clarify that independent evidence may be used to corroborate a statement against interest. Because "something borrowed" and hence previously vetted

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160 ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 21, 2017, at 7-8 (2017) https://www.uscourts.gov/sites/default/files/spring_2017_evidence_rules_committee_minutes_final_0.pdf [perma.cc/CG5T-6T7E] [hereinafter MEETING MINUTES OF APR. 21, 2017] ("Committee members all agreed that requiring the court to consider corroborating evidence was useful to resolve a split in the courts, and that it was important to include corroboration in the trustworthiness inquiry because its presence or absence is highly relevant to a consideration of whether the hearsay statement is accurate.").

161 FED. R. EVID. 807(a)(1).

162 FED. R. EVID. 807 advisory committee's note to 2019 amendment. The Eighth Circuit was the major offender. *See* United States v. Stoney End of Horn, 829 F.3d 681, 686 (8th Cir. 2016) (relying on *Idaho v. Wright* and holding that corroborating evidence was irrelevant to the trustworthiness enquiry of Rule 807).

163 Idaho v. Wright, 497 U.S. 805, 823 (1990).

164 MEETING MINUTES OF APR. 21, 2017, *supra* note 160, at 7-8.

and interpreted by the courts is better than something new,[165] the amended language should pull from amended Rule 807. Rule 804(b)(3)(B) could be revised in the following way:[166]

> (b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:
>
> . . .
>
> (3) Statement Against Interest. A statement that:
>
> . . . .
>
> (B) if it is offered in a criminal case as ~~one~~ a statement that tends to expose the declarant to criminal liability, the court finds the statement is supported by corroborating circumstances that clearly indicate its trustworthiness. The court may consider the totality of the circumstances under which the statement was made and evidence, if any, corroborating the statement.[167]

That last sentence is patterned off the 2019 amendment to Rule 807, which also requires a court to "consider[] the totality of the circumstances under which [the statement] was made and evidence, if any, corroborating the statement."[168] The Committee Note to Rule 804, mirroring the Note to the amended Rule 807, should reaffirm that "the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement."[169] Some of the intrinsic factors may include the following: "spontaneity and consistent repetition," the "mental state of the declarant," and the declarant's "lack of motive to fabricate."[170] That list is not exhaustive; other factors may also "relate to whether the . . . declarant was particularly likely to be telling the truth when the statement was made,"[171] including whether the

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165 *See* Capra & Richter, *supra* note 1, at 1913.

166 The Standing Committee has approved a draft amendment for release for public comment. *See* JUNE 7 STANDING COMMITTEE MINUTES, *supra* note 7, at 25-26.

167 Note that the non-underlined (that is, original) language has been moved around for this amendment.

168 FED. R. EVID. 807.

169 FED. R. EVID. 807 advisory committee's note to 2019 amendment.

170 Idaho v. Wright, 497 U.S. 805, 821-22 (1990).

171 *Id.* at 822.

statement is confirmed by other testimony or physical evidence in the record.

An amendment will mean that circuits that currently look only to intrinsic guarantees of trustworthiness will have to broaden their perspectives and conduct a more complex inquiry. The additional time expended in the inquiry is worth it to promote a uniform application of the rules, and to avoid excluding hearsay that is truthful.

B. Rule 804(b)(3) and the Applicability of the Corroborating Circumstances Requirement to Civil Cases

A second divergence among the circuits has surfaced over the statement against interest exception. Rule 804(b)(3) states that the proponent of a declaration against penal interest must show "corroborating circumstances that clearly indicate [the statement's] trustworthiness, *if it is offered in a criminal case*."[172] The Advisory Committee Note candidly admits that "[t]he amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases."[173] Despite the clear modifier — "in a criminal case" — the Seventh and Third Circuits have held that the corroborating circumstances requirement applies in civil cases too.[174]

The Seventh Circuit offered two reasons for this position. First, the court noted it was "best to continue to utilize a unitary standard for applying Rule 804(b)(3)."[175] Second, the corroborating circumstances

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[172] FED. R. EVID. 804(b)(3)(B) (emphasis added).

[173] FED. R. EVID. 804(b)(3) advisory committee's note to 2010 amendment.

[174] *In re* Flat Glass Antitrust Litig., 385 F.3d 350, 373 (3d Cir. 2004) (listing requirements for admission under Rule 804(b)(3), including that "the trustworthiness and reliability of the statement [is] corroborated by the totality of the circumstances in the case") (citations omitted); Am. Auto. Accessories, Inc. v. Fishman, 175 F.3d 534, 540 (7th Cir. 1999) ("[A] statement will be admissible under Rule 804(b)(3) if: (1) the declarant is unavailable; (2) the statement was against the declarant's penal interest; and (3) *corroborating circumstances exist* indicating the trustworthiness of the statement.") (emphasis added) (citation omitted).

Some district court decisions also import the corroborating circumstances requirement into civil cases. *See, e.g.*, JVC Am., Inc., v. Guardsmark, LLC, No. 1:05-CV-0681-JOF, 2007 WL 2872454, at *2 (N.D. Ga. Sept. 26, 2007) ("To come within Rule 804(b)(3), . . . the statement [must be] corroborated by circumstances indicating its trustworthiness.") (quotation marks omitted) (citation omitted); S.E.C. v. 800america.com, Inc., No. 02 Civ. 9046(HB), 2006 WL 3422670, at *4 (S.D.N.Y. Nov. 28, 2006) (requiring corroborating circumstances in a civil SEC enforcement proceeding).

[175] *Am. Auto. Accessories*, 175 F.3d at 541. The Seventh Circuit specifically addressed the need for a unitary standard for statements that both exculpate and inculpate a third

requirement provides "circumstantial evidence supporting the truth of the statement," and if there are doubts about the reliability of statements against penal interest, then those doubts apply equally in civil cases and need to be shored up with the same showing that would be required in a criminal case.[176] In *American Automotive Accessories v. Fishman*, a civil case, the Seventh Circuit determined that there were insufficient corroborating circumstances to demonstrate trustworthiness because the declarant made his statements "in an attempt to curry favor with his interrogators."[177]

The Fourth Circuit, on the other hand, takes the straightforward position that the corroborating circumstances requirement applies only to criminal cases because that is what the text of the rule provides,[178] taking seriously the Supreme Court's warning that courts "cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases."[179] In *Davis v. Velez*, the Second Circuit appeared poised to reach that same conclusion, but found any error harmless because "even if the special corroboration requirement is applicable in civil cases, there were in the record sufficient indicia of trustworthiness."[180] Before reaching that harmless error conclusion, the court noted both that the rule textually requires corroboration only in criminal cases[181] and that the Third and Seventh Circuit cases applying the requirement to civil cases both predated the 2010 amendment adding the "in a criminal case" language.[182]

As the Second Circuit noted in *Davis*, the Third and Seventh Circuits required corroborating circumstances in civil cases in decisions dated 2004 and 1999, respectively. That timing is significant because, before 2010, Rule 804(b)(3) did not contain the language "in a criminal case."

party, but this desire for uniformity also informs applying the corroborating circumstances requirement in both civil and criminal cases.

176 *Id.*

177 *Id.* at 542. The Seventh Circuit could have found this statement inadmissible by focusing on Rule 804(b)(3)'s requirement that the statement must tend to disserve the declarant's interest. FED. R. EVID. 804(b)(3)(A). Because the Circuit agreed with the magistrate that the declarant was attempting to curry favor, the statements he made might not be truthful because a reasonable person could say inculpatory things in order to shift blame and work out a settlement. It is interesting that the Seventh Circuit seemed to go out of its way to import the corroborating circumstances requirement into Rule 804(b)(3) rather than rely on the more straightforward analysis that this statement was not truly against the declarant's interest.

178 United States v. Riley, 920 F.3d 200, 208 (4th Cir. 2019).

179 United States v. Salerno, 505 U.S. 317, 322 (1992).

180 Davis v. Velez, 797 F.3d, 192, 205 (2d Cir. 2015).

181 *Id.* at 204.

182 *Id.*

Before 2010, the rule read, "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[183] Thus, criminal defendants had to meet the corroborating circumstances requirement (because criminal defendants would be trying to exculpate themselves), but that language did not explicitly require the prosecution to provide corroborating circumstances when the out-of-court statement exposed the declarant to liability (but inculpated the defendant). Nor did the rule explicitly address what should be done with a statement tending to expose the declarant to criminal liability when that statement was offered in a civil case. In sum, before 2010, there were two ambiguities in the rule. *First*, the rule did not require prosecutors to offer corroborating evidence when they offered statements against penal interest in criminal cases — thus creating a lopsided rule within the criminal sphere. *Second*, the rule was silent about whether corroborating circumstances were required in civil cases.[184]

In 2002, the Advisory Committee released a revised Rule 804(b)(3) for public comment that would have (1) retained the corroborating circumstances requirement for statements against penal interest offered by the accused in criminal cases, (2) added a similar requirement, labeled "particularized guarantees of trustworthiness," when such statements are offered by the prosecution,[185] and (3) extended the corroborating circumstances requirement to civil cases.[186] "Several public comments" urged the Committee not to extend the corroborating circumstances requirement to civil cases.[187] After the public comment period, the Committee unanimously decided to delete the extension to civil cases, citing two reasons.[188] One was that

[183] FED. R. EVID. 804(b)(3) (pre-2010 version).

[184] MEETING MINUTES OF APR. 19, 2002, *supra* note 143, at 6 ("In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest; but by its terms the Rule imposes no similar requirement on the prosecution. Nor does the Rule require a showing of corroborating circumstances in civil cases.").

[185] The "particularized guarantees of trustworthiness" language was used to conform the hearsay exception to the Supreme Court's then-extant Confrontation Clause jurisprudence. *Id.* at 6-8.

[186] *Id.* at 8.

[187] ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 25, 2003, at 2 (2003) https://www.uscourts.gov/sites/default/files/fr_import/403EVMin.pdf [perma.cc/3AT3-KCU4]; *see also id.* at 3 ("[S]ubstantial public commentary that was critical of the proposed extension of the corroborating circumstances requirement to civil cases.").

[188] *Id.* at 4.

Congress, when adding the corroborating circumstances requirement to the rule, had been "concerned that a criminal defendant could engineer a hearsay statement from an associate," while no such similar problem threatened civil cases.[189] The second was that the proposed amendment, despite the goal of providing a unitary standard for all cases, fell short because of the differing requirements in criminal cases: corroborating circumstances when offered by the defendant and particularized guarantees of trustworthiness when offered by the prosecution.[190] The Committee therefore concluded that "the costs of an amendment (in upsetting settled precedent and in making it more difficult to bring some civil cases) outweighed whatever benefits the amendment would provide."[191]

The proposed amendment in 2002, now limited to criminal cases, but maintaining the differing standards on the prosecution and defense, ultimately was not enacted. The Supreme Court, having recently decided *Crawford v. Washington*,[192] had changed its approach to the Confrontation Clause and sent the amendment back to the Standing Committee to make sure the proposal embraced current constitutional standards in criminal cases.[193] After *Crawford*, no longer was the benchmark for Confrontation "particularized guarantees of trustworthiness"; instead, the Confrontation issue hinged on whether a statement was testimonial (and therefore inadmissible) or nontestimonial (and therefore admissible).

In 2009, after concluding that *Crawford*'s new focus on testimonial evidence did not preclude imposing an additional evidentiary requirement on the government, the Advisory Committee once again proposed an amendment to Rule 804(b)(3) — this time providing a unitary standard in criminal cases so that both the defense and the prosecution would be burdened by the same corroborating circumstances requirement.[194] That amendment, requiring that corroborating circumstances must be shown for all statements against

[189] *Id.* at 3.

[190] *Id.*

[191] *Id.*

[192] 541 U.S. 36 (2004) (holding that the Confrontation Clause bars certain testimonial hearsay from introduction against the accused).

[193] ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 29TH AND 30TH, 2004, at 23 (2004), https://www.uscourts.gov/sites/default/files/fr_import/EV04-2004.pdf [perma.cc/9C6K-BZFF].

[194] ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 23-24, 2009, at 80 (2009), https://www.uscourts.gov/sites/default/files/fr_import/EV04-2009-min.pdf [perma.cc/5S28-DZU2].

penal interest "offered in a criminal case," became effective in 2010.[195] The Rule thus embraced a "unitary approach" *in criminal cases* to incriminating statements — that is, requiring a showing of corroborating circumstances by both prosecution and defense — to ensure that "only reliable hearsay statements will be admitted under the exception."[196] At that time, the Advisory Committee decided not to address an expansion to civil cases.[197]

On the merits, and keeping in mind the backlash to adding a corroborating circumstances requirement in civil cases when that issue was explored nearly 20 years ago, it seems best to leave well enough alone and not extend Rule 804(b)(3)'s corroborating circumstances requirement to civil cases. The original Seventh and Third Circuit cases, holding that the corroborating circumstances requirement does apply to civil cases, both predate the 2010 amendment that explicitly limited the requirement's applicability to "a criminal case." Thus, it is unlikely that additional circuits will join the Third and Seventh because that position is textually wrongheaded. Moreover, given the relative clarity of the rule as it stands today, it is possible that the Third and Seventh Circuits will revise their rulings on the applicability of Rule 804(b)(3)'s corroborating circumstances requirement to civil cases. Even if they do not, no amendment is needed if the phrase "in a criminal case" means what it says — that corroborating circumstances must be shown for declarations against penal interest offered in criminal cases only. Nor may the Advisory Committee add a Note to Rule 804 without amending its text.[198] Thus, we recommend leaving this part of Rule 804(b)(3) as is. The basic guarantee of reliability — that people would not make statements that could send them to jail unless they were true — is a sufficient guarantee of reliability for civil cases. It is not worth the transaction costs of an amendment to correct wayward interpretation in a couple of courts, especially over an evidentiary question that rarely arises. The use of declarations against penal interest by an unavailable declarant in a civil case is not a common occurrence.

VII. RULE 806: IMPEACHING NONTESTIFYING DECLARANTS WITH EXTRINSIC EVIDENCE OF BAD ACTS

Rule 806 governs impeachment of a hearsay declarant — that is, a person whose hearsay statement is presented in court, but who does not

195 FED. R. EVID. 804(b)(3).

196 FED. R. EVID. 804(b)(3) advisory committee's note to 2010 amendment.

197 *Id.*

198 Capra & Richter, *supra* note 1, at 1917.

testify. Rule 806 allows the hearsay declarant's credibility to be attacked "by any evidence that would be admissible for those purposes if the declarant had testified as a witness."[199] Thus, for impeachment purposes, the hearsay declarant should be treated like any other trial witness, and the opposing party should be permitted to employ the full panoply of impeachment techniques allowed as to trial witnesses under the Federal Rules of Evidence. As the Committee Note explains, "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified."[200] Without Rule 806, a party might deliberately choose *not* to call a declarant as a witness, and attempt to admit the declarant's hearsay statements through a different witness, in an effort to avoid impeachment of the declarant (as opposed to impeachment of the witness). The less appealing or more flawed the declarant, the more valuable to the profferer this impeachment-avoidance technique would become. Rule 806 attempts to put an end to this sort of gamesmanship.

Rule 608(b) provides one method of impeachment of trial witnesses, allowing a cross-examining attorney to question a witness about specific instances of conduct "if they are probative of the character for truthfulness."[201] But the rule restricts the cross-examiner to the witness's answers and precludes introduction of extrinsic evidence.[202] These limitations are designed to avoid confusion and minitrials.[203] For example, a cross-examining attorney may ask the witness, "Isn't it true that you plagiarized a term paper in college?" Posing that question to the witness on the stand is *not* extrinsic evidence and is a permissible question. But calling the witness's former professor as a witness to testify about the plagiarism would constitute impermissible extrinsic evidence. So, if the witness denies the bad act, the cross-examiner is stuck with the witness's denial and may not use extrinsic evidence to

199 FED. R. EVID. 806.

200 FED. R. EVID. 806 advisory committee's note to proposed rules; *see also* Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 496 (1995) ("When an out-of-court statement is admitted for its truth, therefore, the declarant's credibility is in issue, in the same manner as it would be if the declarant were a testifying witness.").

201 FED. R. EVID. 608(b) ("Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness of the witness.").

202 *Id.*

203 Cordray, *supra* note 200, at 523.

prove that the witness did, in fact, plagiarize the paper. That works well enough when the witness is the one who is being impeached — the jury at least hears the accusation and response, and a collateral minitrial is avoided.

A circuit split has arisen regarding the viability of impeaching an absent hearsay declarant with specific bad acts showing untruthfulness. The assumption underlying Rule 608 is that the cross-examining attorney is impeaching a testifying witness. The very text of the rule discusses using "specific instances of a *witness's* conduct in order to attack or support the *witness's* character for truthfulness."[204] But when the statement is that of a hearsay declarant, impeachment under Rule 608(b) (disallowing extrinsic evidence of specific instances of conduct) would involve the cross-examining attorney asking the *witness* about bad acts of the *declarant*. That works adequately if the witness who testified to the hearsay statement happens to know about the declarant's bad acts. Then the witness can answer the attorney's questions. But if the testifying witness is unaware of the declarant's bad acts (or if the statement was made in a record and the record is produced), there is nobody ask. And Rule 608(b)'s ban on extrinsic evidence means that the opponent can never bring the bad act to the jury's attention — even though Rule 806 appears to put the hearsay declarant on the same footing as the testifying witness.[205]

This tension between the plain language of Rule 608(b), which bans extrinsic evidence, and the express purpose of Rule 806, which subjects hearsay declarants and testifying witnesses to the same forms of impeachment, has led to a circuit split regarding which rule takes priority. In other words, because the plain language of Rule 608 appears inconsistent with the clear purpose of Rule 806, the courts are struggling with reconciling the two.

The Second Circuit permits presentation of extrinsic evidence of the hearsay declarant's bad acts because "resort to extrinsic evidence may be the only means of presenting such evidence to the jury."[206] But other circuits, including the Third and D.C. Circuits, focus on the plain

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[204] FED. R. EVID. 608(b) (emphases added).

[205] Cordray, *supra* note 200, at 525 ("If the declarant does not testify, the attacking party will not have an opportunity to cross-examine the declarant about relevant misconduct . . . . If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify.").

[206] United States v. Friedman, 854 F.2d 535, 570 n.8 (2d Cir. 1988); *see also* United States v. Burton, 937 F.2d 324, 328-29 (7th Cir. 1991) (holding the trial court abused its discretion in excluding cross-examination regarding the criminal background of a hearsay declarant).

language of Rule 608(b) and hold that extrinsic evidence is never admissible to impeach a hearsay declarant.[207] The Third Circuit understood that its approach may have "possible drawbacks,"[208] but thought its result was "dictated by the plain — albeit imperfectly meshed — language of Rules 806 and 608(b)."[209]

The choice between the purpose of the extrinsic evidence ban of Rule 608(b) and the purpose of Rule 806 is made more complex because Rule 806 made an exception to Rule 613 (regarding extrinsic evidence of a witness's prior inconsistent statement) when that rule as written would not apply easily to hearsay declarants. Rule 613(b) requires an attorney to give a *witness* "an opportunity to explain or deny" any prior inconsistent statement as a condition for presenting extrinsic evidence of the statement.[210] But, by definition, a Rule 806 hearsay declarant is not at trial, so this foundation cannot be laid. In response to that problem, Rule 806 provides that "[t]he court may admit evidence of the declarant's inconsistent statement or conduct, regardless of . . . whether the declarant had an opportunity to explain or deny it."[211] In other words, Rule 806 makes Rule 613's "opportunity to explain or deny" requirement inapplicable to impeachment of hearsay declarants. Usually, the expression of one exception implies the exclusion of another.[212] So, in concluding that Rule 608(b) means what it says and bars extrinsic evidence even in the non-testifying declarant scenario, the Third Circuit wrote, "The fact that Rule 806 does not provide a comparable allowance for the unavailability of a hearsay declarant in the context of Rule 608(b)'s ban on extrinsic evidence indicates that the

[207] United States v. Saada, 212 F.3d 210, 221 (3d Cir. 2000); United States v. White, 116 F.3d 903, 920 (D.C. Cir. 1997) ("Although Fed. R. Evid. 806 provides that the credibility of a hearsay declarant 'may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness,' counsel attacked Williams's credibility using specific examples of misconduct, which, under Fed. R. Evid. 608(b), cannot be proved by extrinsic evidence.").

[208] *Saada*, 212 F.3d at 222 (noting the ban on extrinsic evidence prevents bad acts impeachment of hearsay declarants).

[209] *Id.* at 221.

[210] FED. R. EVID. 613(b) ("Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires.").

[211] FED. R. EVID. 806.

[212] *E.g.*, N.L.R.B. v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017) (describing the *expressio unius* canon of construction).

latter's ban on extrinsic evidence applies with equal force in the context of hearsay declarants."[213]

It is difficult to divine why Rule 806 contains an accommodation for Rule 613(b) so that it works in the non-testifying declarant scenario, but did not provide such an accommodation regarding Rule 608(b). It may be that the costs of excepting the rule for hearsay declarants are greater when it comes to Rule 608(b). With prior inconsistent statements, the only cost of bypassing Rule 613 is that the witness is not allowed to explain or deny the statement. But bypassing Rule 608(b) means that a party will be allowed to introduce extrinsic evidence to prove a bad act of a hearsay declarant. This will require time and effort and is likely to be a distraction — which are the very risks to which Rule 608(b) is directed. It is nonetheless unwise to leave Rules 806 and 608(b) in tension with each other so that courts must choose which one to follow.

On the merits, and because "the need to determine the credibility of a hearsay declarant is even greater than the need with respect to an in-court witness,"[214] the Committee should offer an amendment to Rule 806 to allow the jury to be informed about a bad act of the hearsay declarant — if that bad act could be asked about were the declarant to testify. One solution would be to allow proof of the act through extrinsic evidence. But that solution is not only costly, as discussed above; it also puts the impeaching party in a *better* position than if the declarant had testified at trial (in which case extrinsic evidence of the bad act would be barred). A better tailored remedy would be to allow opposing counsel to inform the jury of the declarant's bad act, much as counsel would have informed the jury via cross-examination of a witness regarding the witness's bad act.[215] Without this sort of remedy, there remains an incentive for a party to use hearsay statements rather than call the declarant as a witness in order to avoid, or substantially mitigate, a searing cross-examination over prior bad acts.

An amendment to Rule 806 that would permit disclosure of the bad act to the jury could read as follows:

> . . . The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. <u>And the court may allow disclosure to the</u>

[213] *Saada*, 212 F.3d at 222.

[214] SALTZBURG, MARTIN & CAPRA, *supra* note 12, at § 806.02[3].

[215] *Id.*

> jury of specific instances of the declarant's conduct if they are probative of the declarant's character for untruthfulness. . . .

The Committee Note should include the provision that applies to impeachment with bad acts under Rule 608(b): counsel may not raise bad acts before the jury without a "reasonable, good-faith basis" for believing the acts occurred.[216]

It could be argued that this solution is odd because there is actually no evidence being presented; counsel would just be informing the jury that there is some evidence of the bad act. But if the declarant were to testify, it would be the same result; there is no evidence of the bad act presented, only a question raised about it on cross-examination. So, the "telling the jury" solution is the one that best replicates what would happen if the declarant were to testify and be impeached — which is to say, it is the best way to promote the policy of Rule 806.

VIII. RULE 1006: SUMMARIES TO PROVE CONTENT

Rule 1006 creates an exception to Rule 1002's requirement that original writings, recordings, or photographs must be used to prove their contents.[217] Rule 1006 allows a party to "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court" as long as "[t]he proponent . . . make[s] the originals or duplicates available for examination or copying, or both."[218] This summary serves as a substitute for the voluminous matters that otherwise would have been admissible.[219] As the Advisory Committee explained, "The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury."[220]

The courts are experiencing quite a bit of confusion regarding Rule 1006 summaries — indeed, this Article tracks four circuit splits[221] —

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216 *See* United States v. Bruguier, 161 F.3d 1145, 1149 (8th Cir. 1998).

217 FED. R. EVID. 1002 ("An original writing, recording, or photograph is required in order to prove its content unless these rules of a federal statute provides otherwise.").

218 FED. R. EVID. 1006.

219 United States v. Milkiewicz, 470 F.3d 390, 396 (4th Cir. 2006).

220 FED. R. EVID. 1006 advisory committee's note to proposed rule.

221 This Section of the Article discusses issues explored in the excellent memorandum to the Advisory Committee on Evidence Rules drafted by Professor Liesa L. Richter, Academic Consultant. Memorandum from Liesa L. Richter, Acad. Consultant to Advisory Comm. on Evidence Rules 187 (2021), https://www.uscourts.gov/sites/default/files/advisory_committee_on_evidence_rules_agenda_book_november_202110-19_0.pdf [https://perma.cc/G4ZN-97HV].

and much of that confusion is about the difference between summaries of admissible evidence (under Rule 1006) and summaries of evidence or argument that are offered as illustrative aids for the jury (under Rule 611).[222] Illustrative aids used to assist the jury's understanding under Rule 611 "are not admitted as evidence," are merely "displayed to assist the jury's understanding of the evidence," and require that the information on which they are based be admitted into evidence.[223] The Fourth Circuit has summarized the correct distinction between Rule 611 illustrative aids and Rule 1006 summaries:

> Charts *admitted* under Rule 1006 are explicitly intended to reflect the contents of the documents they summarize and typically are substitutes in evidence for the voluminous originals. Consequently, they must fairly represent the underlying documents and be accurate and nonprejudicial. By contrast, a pedagogical aid that is allowed under Rule 611(a) to illustrate or clarify a party's position . . . may be less neutral in its presentation.[224]

Federal courts have split over four issues arising from the intersection of Rule 1006 with Rule 611.[225] *First*, the circuits disagree over whether Rule 1006 summaries are substantive evidence. *Second*, there is a divergence of opinion regarding whether the underlying voluminous records must themselves be admitted into evidence before a Rule 1006

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[222] *E.g.*, United States v. Janati, 374 F.3d 263, 273 (4th Cir. 2004) ("Rule 1006 summary charts are distinguishable from other charts and summaries that may be presented under Federal Rule of Evidence 611(a) to facilitate the presentation and comprehension of evidence already in the record.") (citations omitted).

Part II, *supra*, addresses the difference between demonstrative and illustrative evidence in Rule 611.

[223] *Janati*, 374 F.3d at 273.

[224] *Milkiewicz*, 470 F.3d at 397-98 (emphasis added) (quotation marks omitted) (citations omitted).

[225] A subsidiary issue has arisen regarding the foundation necessary for the admission of a Rule 1006 summary. Most circuits require that someone involved in creating the summary lay the foundation. *See* United States v. Fechner, 952 F.3d 954, 959 (8th Cir. 2020) ("witness who prepared it"); United States v. Spalding, 894 F.3d 173, 185 (5th Cir. 2018) ("chart preparer"); United States v. Fahnbulleh, 752 F.3d 470, 479 (D.C. Cir. 2014) (noting "the witness who prepared the summary should introduce it," but also "approv[ing] introduction of summary testimony when the witness supervised others who prepared the summary"); United States v. White, 737 F.3d 1121, 1136 (7th Cir. 2013) ("spreadsheet's creator"); United States v. Bray, 139 F.3d 1104, 1110 (6th Cir. 1998) ("the witness who supervised its preparation"). But that position is not unanimous. *See* United States v. Lynch, No. 17-1144, 735 F. App'x 780, 786 (3d Cir. 2018) (noting that "Rule 1006 contains no such requirement" that the person who prepared the summary lay the foundation at trial).

summary may be used at trial. *Third*, the courts have reached different conclusions regarding whether Rule 1006 summaries may contain assumptions and conclusions that are not part of the voluminous records, as long as they are based on record evidence. *Fourth*, there is some confusion over the propriety of using a witness to orally summarize the contents of voluminous documents.[226]

A. Rule 1006 and Whether Summaries Constitute Evidence

Rule 1006 permits the proponent to "use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court."[227] The verb chosen for the rule — "use" — may be ambiguous as to whether the summary itself may be admitted as substantive evidence. But the Advisory Committee's view was not ambiguous. The Advisory Committee Note clarifies that Rule 1006 summaries are "admi[tted]" as evidence so that their "contents [are] available to the judge and jury."[228] Despite this clear signaling, the circuits are split over whether a Rule 1006 summary constitutes evidence.

Most circuits, including the First, Fourth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, have recognized that Rule 1006 summaries are substantive evidence, and so do not require a limiting instruction, because they substitute for the voluminous documents themselves (which would have been admitted in evidence but for the fact they are too unwieldy to review).[229] For example, the Seventh Circuit explained that a limiting instruction that a summary chart was "not evidence and

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[226] The Standing Committee has approved a draft amendment for release for public comment. *See* JUNE 7 STANDING COMMITTEE MINUTES, *supra* note 7, at 22.

[227] FED. R. EVID. 1006.

[228] FED. R. EVID. 1006 advisory committee's note to proposed rule.

[229] *See White*, 737 F.3d at 1135 ("[T]he summary itself is substantive evidence."); United States v. Rizk, 660 F.3d 1125, 1130 (9th Cir. 2011) (upholding the district court's decision to admit Rule 1006 summary charts as evidence); *Milkiewicz*, 470 F.3d at 404 (noting that Rule 1006 summaries are admissible as evidence); *Janati*, 374 F.3d at 272 ("Rule 1006 is a rule to admit charts into evidence as a surrogate for underlying voluminous records that would otherwise be admissible into evidence."); Peat, Inc. v. Vanguard Research, Inc., 478 F.3d 1154, 1159 (11th Cir. 2004) ("[A] Rule 1006 exhibit constitutes substantive evidence."); United States v. Weaver, 281 F.3d 228, 233 (D.C. Cir. 2002) ("[Exhibit 38] was a 'summary' exhibit' under Rule 1006 and was itself evidence, serving as a substitute for actual payroll evidence."); United States v. Behrens, 689 F.3d 154, 162 (10th Cir. 1982) (finding no abuse of discretion in the admission of a summary chart). The Fourth Circuit has conflicting precedent on whether a Rule 611 summary chart is also substantive evidence. *See* United States v. Simmons, 999 F.3d 199, 219 n.10 (4th Cir. 2021).

that it was only admitted to aid you in evaluating other evidence . . . was appropriate for a 611(a) summary, not a Rule 1006 summary[.] . . . Rule 1006 charts are most certainly evidence."[230] Or, in the words of the Fourth Circuit, "Rule 1006 summaries are independent evidence," and thus "[n]o limiting instruction is required for summary charts admitted under Rule 1006."[231] Indeed, "[t]he purpose of this Rule is to reduce the volume of written documents that are introduced into evidence by allowing in evidence accurate derivatives from the voluminous documents."[232] These summaries may be taken into the jury room during deliberations and considered by the factfinder as substantive evidence, just as their counterparts — the voluminous records — would have been.

But other circuits are not in accord. Some, including the Second and Sixth Circuits, have held that a summary does not constitute independent evidence and must be accompanied by a limiting instruction.[233] In *United States v. Bailey*, for example, the Sixth Circuit posited that a limiting instruction was required "[b]ecause summary evidence poses risks that the jury might rely upon the alleged facts in the summary as if these facts have already been proved, that the jury will use the summary as a substitute for assessing the credibility of witnesses, or that the summary might emphasize too much certain portions of the [proponent's] case."[234] The Eighth Circuit takes the odd position that Rule 1006 summaries do constitute substantive evidence, but nonetheless require limiting instructions.[235]

To further complicate matters, some courts have conflicting intra-circuit precedent regarding whether Rule 1006 summaries are admitted

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230 *White*, 737 F.3d at 1136.

231 *Simmons*, 999 F.3d at 219 nn.10-11.

232 *Janati*, 374 F.3d at 272.

233 *See* United States v. Bailey, 973 F.3d 548, 567 (6th Cir. 2020) ("The summary should be accompanied by a limiting instruction which informs the jury of the summary's purpose and that it does not constitute evidence.") (alteration accepted) (citation omitted); United States v. Ho, 984 F.3d 191, 210 (2d Cir. 2020) ("This court has long approved the use of charts in complex trials, and has allowed the jury to have the charts in the jury room during its deliberations, so long as the judge properly instructs the jury, as the judge did here, that it is not to consider the charts as evidence.") (quotation marks omitted) (citation omitted).

234 *Bailey*, 973 F.3d at 567-68 (alterations accepted) (quotation marks omitted) (citations omitted).

235 *See* United States v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005) ("Charts properly admitted under Rule 1006 can be treated as evidence and allowed in the jury room during deliberations, but the district court should issue proper limiting instructions.").

as substantive evidence, making it hard to predict how a trial court will handle this issue if it arises.[236]

It seems that the circuits holding that Rule 1006 summaries are not substantive evidence and requiring limiting instructions are conflating Rule 1006 summaries with illustrative aids that fall under Rule 611. The latter may be more persuasive and less factual, may be used to illustrate a party's position rather than summarize voluminous documents, and are not admitted as evidence.[237]

These circuits may also be misled by the word "use" in Rule 1006. After all, even illustrative aids are "used" at trial. If Rule 1006 were clearer that its summaries were not merely used, but were admitted as substantive evidence, then the conflation of Rule 1006 summaries and Rule 611 summaries should abate.

The proposed amendment to accomplish this result is relatively simple:

> The ~~proponent~~ court may ~~use~~ admit as evidence a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. . . .

Exchanging "the court may admit" for the phrase "the proponent may use" clarifies that a Rule 1006 summary is offered, and may be admitted, as substantive evidence. That is further reinforced by using the phrase "as evidence" in the text of the rule. This should help courts and counsel to understand the distinction between Rule 1006 summaries and Rule 611 pedagogical aids.

Because there is so much confusion in the courts, it is probably a good idea to make the distinction between Rule 1006 summaries and Rule 611 summaries even clearer. This could be done with a new subdivision to Rule 1006, which could read as follows:

> (b) An illustrative aid that summarizes evidence or argument is governed by Rule 611.

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[236] *See* United States v. Spalding, 894 F.3d 173, 185 n.17 (5th Cir. 2018) ("Our caselaw diverges on whether trial courts must offer a limiting instruction."); United States v. Bray, 139 F.3d 1104, 1111 (6th Cir. 1998) ("Since Rule 1006 authorizes the admission in evidence of the summary itself, it is generally inappropriate to give a *limiting* instruction for a Rule 1006 summary. This is a point, however, on which in the past this court has been less than clear.").

[237] *See* United States v. Milkiewicz, 470 F.3d 390, 397-98 (1st Cir. 2006).

This textual reference will provide a neat tie-in to the proposed amendment to Rule 611 that would specifically govern illustrative aids, discussed above in Part II.

The Advisory Committee Note should further explain that, because Rule 1006 summaries are evidence, they may be considered by the jury during deliberations and generally will not require limiting instructions. The Note should also explore the differences between Rule 611 summaries, which may be more in the nature of advocacy, and Rule 1006 summaries, which must be more factual.

B. Rule 1006 and the Admission of the Underlying Records

Rule 1006 allows a summary to be admitted as evidence instead of admitting the voluminous underlying writings, recordings, or photographs on which the summary is based.[238] The rule itself notes that the underlying matters "cannot be conveniently examined in court," suggesting there is little utility in admitting those records (because they cannot be digested by the factfinder) as well as practical reasons for not requiring the full underlying documents (because they are voluminous and unwieldy).[239] The Advisory Committee Note reaffirms that the summary may be the "only practicable means of making their contents available to judge and jury," again strongly implying that the underlying matters do not need to be admitted into evidence.[240] Nonetheless, a multi-way circuit split has developed over whether the underlying matters *must* be admitted into evidence, *must not* be admitted into evidence, or *may* be admitted into evidence.

Several circuits hold that the underlying documents may be admitted into evidence, but need not be.[241] These courts note that the underlying

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[238] *E.g.*, United States v. White, 737 F.3d 1121, 1135 (7th Cir. 2013) ("[A] Rule 1006 exhibit is supposed to substitute for the voluminous documents themselves.").

[239] FED. R. EVID. 1006.

[240] FED. R. EVID. 1006 advisory committee's note to proposed rule.

[241] *See* United States v. Appolon, 715 F.3d 362, 374 (1st Cir. 2013) ("Federal Rule of Evidence 1006 does not require that the documents being summarized also be admitted . . . . Accordingly, whether the documents themselves were introduced is of no consequence."); *White*, 737 F.3d at 1135 ("[A] Rule 1006 exhibit is supposed to substitute for the voluminous documents themselves."); United States v. Irvin, 682 F.3d 1254, 1261 (10th Cir. 2012) ("Although the materials upon which a Rule 1006 summary is based need not themselves be admitted into evidence, they must at least be admissible.") (emphasis omitted); United States v. Rizk, 660 F.3d 1125, 1131 (9th Cir. 2011) ("[T]he underlying evidence does not itself have to be admitted in evidence and presented to the jury."); United States v. Hemphill, 514 F.3d 1350, 1358 (D.C. Cir. 2008); *Bray*, 139 F.3d at 1110 ("[T]he underlying documents need not themselves be in evidence.").

records must be admissible, but nothing requires them to be admitted.[242] In these courts, the admission or exclusion of the underlying records does not affect the admissibility of the summary.[243] There may be times when the underlying voluminous writings or recordings themselves are admitted in addition to the summary — and that is a matter committed to the discretion of the trial court.[244] This interpretation of the rule represents the position of most of the circuits that have published precedent on the matter.

The Fifth and Eighth Circuits have conflicting intra-circuit caselaw regarding whether the underlying materials must be, or must not be, admitted. Both circuits have some cases that *require* the admission of the underlying materials.[245] As the Fifth Circuit described this position, Rule 1006 "applies to summary charts based on evidence *previously admitted* but which is so voluminous that in-court review by the jury would be inconvenient."[246] But both circuits also have some cases that *preclude* admission of the voluminous records.[247] The Fifth Circuit has noted the inconsistency over "whether rule 1006 allows the introduction of summaries of evidence that is already before the jury, or whether instead it is limited to summaries of voluminous records that have not been presented in court."[248]

On the merits, the proper construction of Rule 1006 is that while the voluminous underlying materials must be *admissible*, they need not be — though may be — introduced as evidence. In general, it makes little sense to clutter the docket with items that are so voluminous they

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[242] *E.g.*, *Irvin*, 682 F.3d at 1261 (explaining that the voluminous records must "at least be *admissible*").

[243] *See* United States v. Milkiewicz, 470 F.3d 390, 396 (1st Cir. 2006) ("We . . . explicitly hold that summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence.").

[244] *See id.* ("[W]e can imagine instances in which an attorney does not realize until well into a trial that a summary chart would be beneficial, and admissible as evidence under Rule 1006, because the documents already admitted were too voluminous to be conveniently examined by the jury."). *But see* United States v. Anekwu, 695 F.3d 967, 981-82 (9th Cir. 2012) (indicating displeasure with allowing a summary of the records if the underlying materials have already been admitted).

[245] *See* United States v. Harms, 442 F.3d 367, 375 (5th Cir. 2006); United States v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005).

[246] *Harms*, 442 F.3d at 375 (emphasis added).

[247] *E.g.*, United States v. Grajales-Montoya, 117 F.3d 356, 361 (8th Cir. 1997) ("The rule appears to contemplate, however, that a summary will be admitted instead of, not in addition to, the documents that it summarizes.") (citations omitted).

[248] United States v. Armstrong, 619 F.3d 380, 383 (5th Cir. 2010).

cannot "be conveniently examined in court."[249] The opposing party has the right to inspect the documents to assess whether the summary is accurate without burdening the record with the voluminous matters. But if the underlying materials are introduced and admitted as evidence, nonetheless the Rule 1006 summary should still be admissible as substantive evidence because the underlying records remain unwieldy. The summary will provide the only real means for the factfinder to evaluate the materials. As the First Circuit has said, "whether the [underlying] documents themselves were introduced is of no consequence."[250] Thus, even when the underlying materials have been admitted, the summary should also be admitted to aid the factfinder.

An amendment to Rule 1006 to elucidate this matter would provide as follows:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The underlying materials may, but need not, be admitted in evidence. . . .[251]

The underlined language would clarify that the underlying matters may be admitted, but are not required to be admitted. The Committee Note could explain that generally the underlying records should not be necessary (indeed, they may lead to clutter and confusion), but that there may be instances when both the records and the summary are admitted into evidence — such as when there is a challenge to the accuracy of the summary — and that determination is committed to the trial court's discretion.

C. Rule 1006 and Summaries that Include Assumptions and Conclusions Not Contained in the Underlying Records

As discussed in the previous two Subsections, properly understood, Rule 1006 summaries are admitted as substantive evidence in place of (or in addition to) the voluminous underlying materials. A third conflict has arisen over whether a Rule 1006 summary may contain assumptions, conclusions, or other matters that are not reflected in the voluminous materials, but are contained elsewhere in the record.

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[249] FED. R. EVID. 1006.

[250] United States v. Appolon, 715 F.3d 362, 374 (1st Cir. 2013).

[251] Each proposed amendment relates solely to the issue in the particular subsection. They are not cumulative with other amendments to Rule 1006 suggested in this Article.

Most federal circuit courts have held that Rule 1006 summaries must accurately reflect the underlying materials and cannot contain additional arguments, assumptions, or conclusions.[252] As the Sixth Circuit explained:

> [A] summary document must be accurate and nonprejudicial. This means first that the information on the document summarizes the information contained in the underlying documents accurately, correctly, and in a nonmisleading manner. Nothing should be lost in translation. It also means, with respect to summaries admitted in lieu of the underlying documents, that the information on the summary is not embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise.[253]

Based on similar reasoning, the Third Circuit refused to admit a "summary" that, in the court's words, was "better described as a synthesis. . . . The calculations went beyond the data they summarized and included several assumptions, inferences, and projections about future events, which represent [an] opinion, rather than the underlying information."[254]

But the Fifth, Eighth, and Eleventh Circuits all permit a Rule 1006 summary to "include assumptions and conclusions" as long as "said assumptions and conclusions [are] based upon evidence in the record," though not in the voluminous documents themselves.[255] These rulings

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[252] *See* United States v. Bailey, 973 F.3d 548, 567 (6th Cir. 2020) (summary must be "accurate and nonprejudicial"); United States v. Lynch, 735 F. App'x 780, 786 (3d Cir. May 29, 2018) (summary must "accurately represent the facts that it purports to summarize"); United States v. Fahnbulleh, 752 F.3d 470, 479 (D.C. Cir. 2014) (summary must be "accurate and nonprejudicial"); United States v. White, 737 F.3d 1121, 1135 (7th Cir. 2013); United States v. Irvin, 682 F.3d 1254, 1262 n.6 (10th Cir. 2012) (summary should have been excluded because it did not accurately reflect the underlying materials); United States v. Milkiewicz, 470 F.3d 390, 396 (1st Cir. 2006) ("[T]he summary [must] accurately summarize[] the source materials."); United States v. Janati, 374 F.3d 263, 272 (4th Cir. 2004) ("To comply with this Rule, therefore, a chart summarizing evidence must be an *accurate* compilation of the voluminous records sought to be summarized."); Fagiola v. Nat'l Gypsum Co. AC & S., Inc., 906 F.2d 53, 57 (2d Cir. 1990) (summary must "fairly represent[] the underlying documents").

[253] United States v. Bray, 139 F.3d 1104, 1110 (6th Cir. 1998) (quotation marks omitted) (citation omitted).

[254] Eichorn v. AT&T Corp., 484 F.3d 644, 650 (3d Cir. 2007).

[255] United States v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005); *see also* United States v. Mazkouri, 945 F.3d 293, 301 (5th Cir. 2019) ("We have held that for Rule 1006, the essential requirement is not that the charts be free from reliance on any

again seem to result from conflation of summaries of voluminous evidence and summaries that are used to illustrate evidence or argument.

On the merits, "summaries to prove content" (the title of Rule 1006) should actually do what the rule says they do: summarize the content of the voluminous materials that they are proving. Or, to put this another way, because the purpose of a Rule 1006 summary is to serve as a substitute for the underlying records that are too voluminous to be "conveniently examined in court," the summary should accurately reflect those records and not include information outside of those records.[256] Thus, the majority of courts has it right that Rule 1006 summaries should not include assumptions, conclusions, or arguments contained in other evidence, but should reflect only the information from the underlying materials. Other witnesses — or closing arguments — can be used to urge the jury to draw particular conclusions from the summarized evidence. To the extent that a summary includes assumptions and arguments, it becomes an illustrative aid and so its use should be governed by Rule 611.[257] But there is enough confusion over the distinction between illustrative aides and Rule 1006 summaries that the courts should not permit hybridization (with its concomitant confusion) of the two.

An amendment to Rule 1006 that would codify the majority approach would read as follows:

> The proponent may use <u>an accurate</u> summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.[258]

The adjective "accurate" reminds trial participants that the summary must reflect the content of the voluminous matters, but should not embellish on them. An Advisory Committee Note should further admonish that a summary that includes other record information — but not deriving from the voluminous materials themselves — is not "accurate" within the meaning of the rule.

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assumptions, but rather that these assumptions be supported by evidence in the record.") (quotation marks omitted) (citations omitted); United States v. Melgen, 967 F.3d 1250, 1260 (11th Cir. 2020) (same) (citing Fifth Circuit caselaw).

256 FED. R. EVID. 1006.

257 *See supra* Part II.

258 Recall that the proposed amendments are not cumulative, so this does not include the proposed language from the previous two splits regarding Rule 1006.

D. Rule 1006 and Oral Summaries of Voluminous Records

One final disagreement regarding the scope and meaning of Rule 1006 is beginning to percolate: whether the Rule permits an oral summary of voluminous records.[259] The rule expressly permits use of "a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs," but does not explain whether that "summary" may include an oral summary.[260]

The Fifth Circuit endorses the use of "summary witnesses in a limited capacity," permitting "summarization of voluminous writings, recordings, or photographs through testimony if the case is sufficiently complex and the evidence being summarized is not live testimony presented in court."[261] The court requires that the summary "must be accompanied by a limiting instruction, and the underlying evidence must be admitted and available to the jury."[262] Thus, an oral summary, if permissible, would require admission of the underlying matters and a limiting instruction while a written summary does not.[263]

The Fifth Circuit recognizes the dangers inherent in allowing a witness to summarize voluminous documents, such as summary witnesses being "used as a substitute for, or a supplement to, closing argument."[264] There is a danger that oral summaries might become unmoored from the underlying materials as the witness continues to speak and ultimately argues the proponent's position that certain conclusions should be drawn from the summarized evidence.

Despite these dangers, the Fifth Circuit is not alone in allowing, or at least contemplating allowing, use of an oral summary through witness testimony. In *United States v. Kapnison*, the Tenth Circuit permitted the use of a testimonial summary — though nobody complained that the

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[259] An oral summary of voluminous records is not to be confused with a summary of oral testimony. The latter is not permitted under Rule 1006: "Charts summarizing voluminous records are governed by Rule 1006 and are admissible evidence, while charts that highlight or summarize testimony of witnesses are not admissible pursuant to Rule 1006, but are merely pedagogical devices." United States v. Lefevbre, No. 93-50012, 1994 WL 315669, at *1 n.2 (9th Cir. June 29, 1994) (quotation marks omitted) (citation omitted). *But see* United States v. Goldberg, 401 F.2d 644, 647-48 (2d Cir. 1968) (pre-rules case permitting admission of summary chart constructed "from the testimony of the government's witnesses and from . . . voluminous business records").

[260] FED. R. EVID. 1006; *see also* United States v. Fullwood, 342 F.3d 409, 413 (5th Cir. 2003) ("[T]his rule does not specifically address summary witnesses.").

[261] United States v. Lucas, 849 F.3d 638, 644-45 (5th Cir. 2017) (quotation marks omitted).

[262] *Id.* (footnotes omitted).

[263] *See supra* Part VIII.A.

[264] *Fullwood*, 342 F.3d at 414.

summary was inadequate — because the district court had issued an appropriate limiting instruction.[265] The First Circuit and D.C. Circuits both have "expressed concern" over the use of summary witnesses, but neither has explicitly banned the practice.[266]

Before this division becomes more entrenched, and because there are other issues in Rule 1006 that require the Advisory Committee's attention already, it makes sense to amend Rule 1006 to clarify whether oral testimonial summaries are permitted under Rule 1006 and, if so, whether those (unlike written summaries) require limiting instructions. On the merits, admissibility under Rule 1006 should be limited to written summaries, charts, or calculations, which can be provided ahead of trial to the opposing party. With written summaries, the opponent will know beforehand exactly what the summary contains and whether the summary is objectionable for any reason, including that it contains arguments or conclusions. If the summary is oral, then the opponent is placed in the difficult position of not being able to object until the objectionable statement is made — such as a fact or conclusion not contained in the underlying documentation. But by then, the proverbial cat is out of the bag, and even with appropriate curative instructions, the jury may remember the improper evidence. Moreover, requiring a written summary avoids the danger of a witness turning from a summary witness to an advocate.

An amendment to Rule 1006 reflecting the position that summaries cannot be oral would provide as follows:

> The proponent may use a <u>written</u> summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. . . .[267]

The phrase "written summary" clearly precludes a witness from taking the stand and orally summarizing voluminous records on the spot.[268] The Advisory Committee Note should discuss the problems with oral summaries, such as the inability to review and audit the summaries

[265] United States v. Kapnison, 743 F.2d 1450, 1458 (10th Cir. 1984).

[266] *See* United States v. Appolon, 695 F.3d 44, 63 (1st Cir. 2012); United States v. Moore, 651 F.3d 30, 55 (D.C. Cir. 2011) (noting the "obvious dangers posed by summarization of evidence by a non-expert witness") (quotation marks omitted) (citation omitted).

[267] Recall that the proposed amendments are not cumulative, so this does not include the proposed language from the previous three splits regarding Rule 1006.

[268] The written summaries may include electronic information. *See* FED. R. EVID. 101(b)(6) (defining "written").

beforehand and the possibility that the summaries bleed over into advocacy.

One problem with shoring up Rule 1006 is that this may put pressure on other rules. For example, an enterprising attorney may try to use a summary witness — now barred by Rule 1006 — citing Rule 611 and its allowance of illustrative aids. If attorneys begin to turn to elsewhere to try to circumvent the ban on live oral summaries in Rule 1006, then additional refinements to this or other rules may be necessary.[269] The Advisory Committee Notes could also flag this potential misuse of the rules. Additionally, parties may object under Rule 403 to unfairly prejudicial or confusing testimonial summaries offered under other rules.

CONCLUSION

The purpose of the Federal Rules of Evidence is to help proceedings run "fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just administration."[270] But when the circuits use and interpret the rules differently, then the Federal Rules cease to be federal in scope. This disuniformity creates unfairness and increases expense and delay as parties — and courts — struggle to understand and apply circuit precedent. This Article has described and attempted to resolve thirteen of the most troubling circuit splits regarding the Rules of Evidence. We hope that this Article provides assistance to the federal Advisory Committee and state committees that are tasked with ensuring the utility of the rules and to judges and practitioners who face these difficult evidentiary issues every day.

[269] Or perhaps not. Because Rule 611 allows pedagogical aids, testimonial summaries might fall within that rule's ambit, and parties and courts should carefully police the accuracy of those summaries and request, and issue, appropriate limiting instructions. In addition, summary testimony is also regulated by Rule 701, which prohibits the summary from going beyond the witness's personal knowledge. *See* United States v. Meises, 645 F.3d 5, 14-15 (1st Cir. 2011).

[270] FED. R. EVID. 102.