It's a Code: Amending the Federal Rules of Evidence to Achieve Uniform Results

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IT'S A CODE: AMENDING THE FEDERAL RULES OF EVIDENCE TO ACHIEVE UNIFORM RESULTS

Daniel J. Capra* & Jessica Berch**

This Article identifies, explores, and attempts to resolve nine conflicts that have arisen in the federal courts regarding the proper interpretation and scope of the Federal Rules of Evidence. For each conflict, we set forth the language of the current rule, its policy goals, and the differing positions taken by the courts. We then analyze the merits of the debate and propose new rule language to resolve the matter.

In this Article, we consider whether theft-based convictions are automatically admissible under Rule 609(a)(2), and how to calculate the passage of ten years for old convictions under Rule 609(b). We chart the hazy line between lay and expert opinion testimony under Rules 701 and 702 to determine whether, for example, a law enforcement officer’s opinion about things like code words qualifies as expert or lay opinion. We discuss two debates arising from Rule 801(d)(2): first, whether an expert’s statements are attributable to the party that retained the expert, and second, whether statements by government officials are statements by a government party, particularly in criminal cases. We tackle whether Rule 803(3) permits statements about a declarant’s state of mind to prove another person’s actions, and the foundation necessary under Rule 803(4) to admit statements by children regarding child abuse. We end the Article by analyzing the meaning of “predecessor in interest” for purposes of Rule 804(b)(1), and also whether exculpatory grand jury testimony is admissible against the government under that same rule.

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INTRODUCTION

The Federal Rules of Evidence assist courts in “ascertaining the truth and securing a just determination” in “every proceeding.”1 A fundamental premise of codification is that it promotes uniformity of results, as opposed to fuzzy case-by-case development under common law.2 But as time has passed and the rules have grown older,3 and as more and more courts have interpreted the rules in cases presenting similar factual circumstances, there has been a steady increase in conflicts regarding the proper interpretation and application of many of the evidence rules.4 The existence of these conflicts—where some

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2. Id. ("These rules should be construed so as to...promote the development of evidence law.").
4. See Daniel J. Capra & Jessica Berch, Evidence Circuit Splits, and What to Do About Them, 56 U.C. Davis L. Rev. 127, 129 (2022); 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
courts admit evidence that others exclude—suggests that justice is not always being done and certainly not being done uniformly.

The courts likely cannot bring themselves into alignment on most of these conflicts. District judges' rulings do not bind even the issuing judges themselves; much less do they compel other district judges to reach like conclusions.\(^5\) One circuit has no obligation to follow decisions issued by other circuits.\(^6\) And the Supreme Court “rarely grants certiorari” in evidence cases.\(^7\)

That is why, in 1992, the federal Advisory Committee was reconstituted with a charge to help resolve these differing interpretations.\(^8\) That Committee has suggested resolutions for many of the conflicts that appear in the case law.\(^9\) In 2022 alone, the Committee proposed amendments to eight different rules, and most of those amendments are designed to rectify divergent interpretations by the courts.\(^10\)

Nonetheless, numerous conflicts still exist. In a previous article, we discussed twelve such conflicts, analyzing the current language of the particular rule, its policy goals, and the reasons animating the split before offering amendments (or recognizing that no action should be undertaken in a particular instance).\(^11\) In this Article, we tackle nine more. This Article reviews each rule’s language and policy, sets forth the varied positions of the courts, assesses the merits of the debate, and proposes amendments to the rules to help achieve the desired outcome of consistent interpretation and, ultimately, to help achieve just results.

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\(^5\) McGinley v. Houston, 361 F.3d 1328, 1331 (11th Cir. 2004) (“The general rule is that a district judge’s decision neither binds another judge nor binds him, although a judge ought to give weight to his own prior decisions.”).

\(^6\) Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987) (explaining that circuits should “give most respectful consideration to decisions of the other courts of appeals” and that circuits should “follow [other circuits] whenever we can,” but recognizing that there is no “automatic deference” to the other circuits).

\(^7\) Becker & Orenstein, supra note 4, at 911.


\(^9\) See Capra & Berch, supra note 4.

\(^10\) COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, SEPTEMBER 2022 21–27 (2022) (recommending that Rules 106, 615, and 702 be transmitted to the Supreme Court with a recommendation that the amended rules be adopted and transmitted to Congress and approving Rules 611(d), 613(b), 801(d)(2), 804(b)(3), and 1006 for public comment).

\(^11\) Capra & Berch, supra note 4 (covering two splits each regarding Rules 407 and 804(b)(3), four splits regarding Rule 1006, and a split regarding each of Rules 611, 702, 801(d)(2), and 806).
We are mindful of the drawbacks inherent in amending the Federal Rules of Evidence, but as to the rules we review we are persuaded that “the need for continuing constructive improvement and advancement of evidentiary standards” outweighs any disadvantage.

This Article is both academic and practical. The depth of analysis that we can offer in an Article, which is unconstrained by the frenzied pace of trial, can help deepen everyone’s understanding of the policy goals, language, and interpretation of the Federal Rules of Evidence. And, in the end, we hope that the articles will spur courts, lawyers, and rulemakers to action.

To keep this Article user-friendly, we have arranged the circuit splits in numerical order by rule number, beginning with two splits regarding the proper interpretation of Rule 609. Our list is not intended to be exhaustive; there may be other interpretive divergences percolating in the courts. Nor have we included rules that the federal Advisory Committee is in the process of amending. More specifically, this Article covers the following conflicts in the case law regarding the Federal Rules of Evidence:

Rule 609: whether theft offenses are automatically admissible to impeach a witness, and how to calculate Rule 609(b)’s 10-year timeframe when using older convictions to impeach a witness;

Rules 701 and 702: where the dividing line lies between lay opinion and expert opinion testimony, particularly regarding police officer testimony;

Rule 801(d)(2): whether retained experts’ and government officials’ hearsay statements may be admitted as statements of an agent of a party-opponent;

Rule 803(3): whether a declarant’s statement regarding another person’s state of mind falls within this exception to the hearsay rule;

Rule 803(4): what foundation is needed to warrant admissibility of a statement for purposes of treatment or diagnosis, when the statement is one from a child identifying a specific person as the abuser; and

Rule 804(b)(1): how to determine who is a “predecessor in interest” allowing prior testimony to be admitted, and whether exculpatory grand jury testimony and other limited-proceeding testimony is admissible under this hearsay exception.

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12. Id. at 129–30 (noting “it may be better to leave [a] general rule untouched rather than try to amend it to resolve a niche issue,” the “significant transaction costs” that may apply in learning the new rule, the possibility that “fixing one weak spot may put pressure on other parts of the rule — or on other rules,” the problem of identifying the circuit split given the deferential standard of review, and the “transaction costs” of the amendatory process itself).

13. Capra & Richter, supra note 8, at 1877.

14. We do not discuss two conflicts that have arisen with respect to Rule 1002: whether a foreign-language original must be admitted to satisfy the best evidence rule, and whether any English-language transcript is substantive
A. **Rule 609: Impeachment by Evidence of a Criminal Conviction**

Federal Rule of Evidence 609 sets standards for determining when a witness’s character for truthfulness may be impeached by evidence that the witness has previously been convicted of a criminal offense. The use of this often highly prejudicial information is permitted because “at least some crimes are relevant to credibility,” and by testifying, witnesses have made their truthfulness a fact of consequence. Rule 609 lays out varied admission standards for different types of convictions, including recent felonies, crimes involving dishonest acts or false statements, old convictions, pardoned convictions, and juvenile adjudications. It makes sense to impute different admission standards because some crimes—such as crimes involving dishonest acts or false statements—more clearly attribute a lack of veracity to the witness (and thus are relatively easy to admit), while other crimes—such as old convictions involving crimes of passion—do not so strongly suggest dishonesty (and thus are relatively harder to admit). Rule 609 takes these variations into account.

Currently, the circuits are divided over at least two issues regarding the interpretation of Rule 609. One is whether theft-based convictions involve “a dishonest act or false statement” so that, as long as these convictions are less than ten years old, they are automatically admissible under Rule 609(a)(2). The second is how to calculate the end date for when “10 years have passed since the evidence or a mere aid. These conflicts are thoroughly and compellingly treated by Professor Liesa Richter in *Lost in Translation: The Best Evidence Rule and Foreign-Language Recordings in Federal Court*, 108 IOWA L. REV. 1839 (2023).

15. **FED. R. EVID.** 609.

16. **FED. R. EVID.** 609 advisory committee’s note to proposed rules.

17. **FED. R. EVID.** 609(a)(1) (setting forth a more difficult admission standard for felonies used against criminal defendants than for felonies used to impeach other witnesses).

18. **FED. R. EVID.** 609(a)(2) (mandating admission of “any crime regardless of the punishment . . . if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement”).

19. **FED. R. EVID.** 609(b) (requiring that the probative value substantially outweigh the prejudicial effect if a conviction is more than ten years old).

20. **FED. R. EVID.** 609(c) (rendering inadmissible most convictions that have been the subject of a pardon, annulment, or certificate of rehabilitation).

21. **FED. R. EVID.** 609(d) (rendering inadmissible most juvenile adjudications).

22. See United States v. Papia, 560 F.2d 827, 846–47 (7th Cir. 1977); United States v. Rogers, 542 F.3d 197, 200–01 (7th Cir. 2008).

23. See *Papia*, 560 F.2d at 845–47 (discussing the meaning of “dishonesty or false statement” and the different interpretations given by different circuits).
witness's conviction or release from confinement" within the meaning of Rule 609(b).\textsuperscript{24}

1. **Rule 609(a)(2) and Theft-Based Convictions**

Rule 609(a)(2) provides that both felonies and misdemeanors "must be admitted" to impeach a witness’s character for truthfulness if "establishing the elements of the crime required [the proponent] proving—or the witness’s admitting—a dishonest act or false statement."\textsuperscript{25} That means that "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense" are automatically admissible, and not subject to Rule 403 balancing.\textsuperscript{26} The drafters considered these convictions to be highly probative of the witness’s potential for untruthfulness, which is why the rule provides the court no discretion to exclude them.\textsuperscript{27}

The text of Rule 609(a)(2) does not list the crimes that involve a qualifying dishonest act or false statement; the list above comes from a Committee Note, and the note leaves open the possibility that there may be "other offense[s] in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness’s] propensity to testify truthfully."\textsuperscript{28}

Courts have had difficulty differentiating those crimes that are "in the nature of crimen falsi" from those are not.\textsuperscript{29} The category of crimen falsi, as noted, requires "some element of deceit, untruthfulness, or falsification."\textsuperscript{30} But most crimes involve at least some deceitful behavior. For example, almost every theft-based crime involves deceit—stealing property or lying about intent to return it. Even shoplifters usually take items when they think no one is looking and often hide items in their clothing, both of which can be described as deceitful acts. More broadly still, "it may be argued that any willful

\textsuperscript{24} See Rogers, 542 F.3d at 200 (discussing approaches taken to "end date" calculations by the Fifth and Seventh Circuits).
\textsuperscript{25} Fed. R. Evid. 609(a)(2).
\textsuperscript{26} Fed. R. Evid. 609 advisory committee’s note to 1990 amendment. Rule 403 permits a court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.
\textsuperscript{27} Fed. R. Evid. 609 conference committee’s note to proposed rules, H.R. Rep. No. 93-1597 ("The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted.").
\textsuperscript{28} Fed. R. Evid. 609 conference committee’s note to 2006 amendment.
\textsuperscript{29} See, e.g., United States v. Brown, 603 F.2d 1022, 1028–29 (1st Cir. 1979); United States v. Papia, 560 F.2d 827, 846 (7th Cir. 1977).
viences a lack of character and a disregard for all legal duties, including the obligations of an oath.” 31 If these expansive views of what constitutes crimen falsi were accepted, then pretty much every criminal conviction would be automatically admissible under Rule 609(a)(2). 32 That was not the intent of the rule or else the drafters would have written this rule: “a witness’s criminal convictions must be admitted.”

This problem of distinguishing underlying deceit from crimes in the nature of crimen falsi is particularly acute when it comes to theft crimes because, “at its broadest, that concept [of dishonest acts] could encompass all manner of crimes in the nature of theft of property.” 33 In fact, following this very reasoning, some courts hold that theft-based crimes are automatically admissible under Rule 609(a)(2). 34 These courts reason as follows:

“[D]ishonesty” is, by definition, “a disposition to lie, cheat, or steal.” Moreover, “in common human experience, acts of deceit, fraud, cheating, or stealing are universally regarded as conduct which reflects adversely on a man’s honesty and integrity.” A common sense approach to the language of Rule 609(a)(2) would support the conclusion that [the witness’s] prior conviction was


32. Although Rule 609 generally does not permit the admission of misdemeanor convictions, FED. R. EVID. 609(a)(1), Rule 609(a)(2) applies to “any crime regardless of punishment,” FED. R. EVID. 609(a)(2). If (almost) all criminal convictions fall within 609(a)(2), then (a)(1)’s distinction between misdemeanors and felonies is unnecessary.

33. 28 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 6135(a)(2) (2d ed. Apr. 2023 update). This problem may be less acute regarding other crimes, such as assault. Some such crimes may be committed in full view of others, and the perpetrators may not attempt to hide their actions.

34. U.S. Xpress Enters., Inc. v. J.B. Hunt Transp., Inc., 320 F.3d 809, 816–17 (8th Cir. 2003) (“The trial court found that [receiving stolen property] was a crime involving dishonesty. Evidentiary rulings are reviewed for an abuse of discretion. The court did not abuse its discretion in allowing USX to use the conviction as a basis for impeachment.” (citation omitted)); United States v. Del Toro Soto, 676 F.2d 13, 18 (1st Cir. 1982) (“The grand larceny conviction could certainly have been introduced under Federal Rule of Evidence 609(a)(2).”); United States v. Brown, 603 F.2d 1022, 1029 (1st Cir. 1979) (permitting convictions more than ten years old, the court stated, “Burglary and petit larceny have a definite bearing on honesty which is directly related to credibility.”); United States v. Carden, 529 F.2d 443, 446 (5th Cir. 1976) (noting that petty larceny is a crime involving dishonesty); cf. United States v. Carr, 418 F.2d 1184, 1186 (D.C. Cir. 1969) (holding, in a pre-Federal Rules case, that larceny convictions are “reflective of diminished honesty and integrity”).
admissible because theft is a crime involving "dishonesty" within the common meaning of that term.35

Most courts, however, understand that the drafters intended a more nuanced, less inclusive approach, and find that theft-based convictions are not automatically admissible under Rule 609(a)(2).36 To determine admissibility, these courts subject felony theft convictions that are less than ten years old to the balancing tests articulated in Rule 609(a)(1).37 In reaching this result, these courts tend to focus on the rule's policy and legislative history, which evidence a stronger distinction between crimen falsi and other sorts of crimes.38 In sum, this circuit split arises because a "plain language" or "common sense approach to the language of Rule 609(a)(2)" might permit theft-based crimes to be automatically admissible, but "[a] different conclusion . . . is suggested when reference is made to the legislative history of Rule 609(a)(2)," which counsels that these crimes fall outside of Rule 609(a)(2)'s ambit.39

On the merits, theft convictions should not be automatically admissible under Rule 609(a)(2). Rule 609(a)(2) must be construed narrowly or else its automatic admission requirement will negate the carefully tailored admission standards that the drafters included for

35. United States v. Papia, 560 F.2d 827, 845–48 (7th Cir. 1977) (cleaned up) (holding that the witness's particular crime involved dishonesty or false statement and therefore declining to decide whether all theft crimes meet the requirements of Rule 609(a)(2)).

36. Id. at 846–47 (listing the approaches of several federal and state courts).

37. E.g., United States v. Washington, 702 F.3d 886, 892–94 (6th Cir. 2012) (theft of services); United States v. Estrada, 430 F.3d 606, 614 (2d Cir. 2005) (shoplifting that involved "tak[ing] elusive action to avoid detection"); United States v. Johnson, 388 F.3d 96, 99–101 (3d Cir. 2004) (purse snatching); United States v. Foster, 227 F.3d 1096, 1100 (9th Cir. 2000) (shoplifting, burglary, grand theft, bank robbery, and receipt of stolen property); United States v. Dunson, 142 F.3d 1213, 1215 (10th Cir. 1998) ([W]e have held that crimes like burglary, robbery, and theft are not automatically admissible under Rule 609(a)(2) . . . ." (quoting United States v. Mejia-Alarcon, 995 F.2d 982, 988–89 (10th Cir. 1993)); United States v. Sellers, 906 F.2d 597, 603 (11th Cir. 1990) ("It is established in this Circuit, however, that crimes such as theft, robbery, or shoplifting do not involve 'dishonesty or false statement' within the meaning of Rule 609(a)(2).")); United States v. Smith, 551 F.2d 348, 362 (D.C. Cir. 1976) ("Attempted robbery is not a crime involving 'dishonesty or false statement' within the meaning of Rule 609(a)(2).")

38. E.g., Washington, 702 F.3d at 893 ("Congress in drafting Rule 609(a)(2) directed courts specifically toward crimes 'in the nature of crimen falsi . . . . The rule is intended to inform fact-finders that the witness has a propensity to lie, and, as morally repugnant as some crimes may be, crimes of violence or stealth have little bearing on a witness's character for truthfulness.").

analyzing whether a prior conviction may be used for impeachment.\textsuperscript{40} Even if the current text of Rule 609(a)(2) is ambiguous—which it is not if read with the understanding that the rule creates "tiers" or "classes" of crimes\textsuperscript{41}—then the legislative history and policy drive the point home. The D.C. Circuit got it right when the court explained as follows:

Rule 609(a)(2) is to be construed narrowly; it is not carte blanche for admission on an undifferentiated basis of all previous convictions for purposes of impeachment; rather, precisely because it involves no discretion on the part of the trial court ... Rule 609(a)(2) must be confined ... to a narrow subset of crimes—that those that bear directly upon the accused's propensity to testify truthfully.\textsuperscript{42}

This narrow reading is also necessary for other crimes that might be considered "underhanded," but do not involve theft. Many crimes, including drug crimes, indicate a background of deceit. The broad view would make automatic admissibility the rule, rather than the exception. And that result is in tension with the very fabric of the Federal Rules of Evidence, which is to allow the court discretion to deal with unfairly prejudicial evidence.\textsuperscript{43} It makes sense to construe the only provision in the entire Federal Rules of Evidence that limits such discretion—Rule 609(a)(2)—to be the exception rather than the rule.\textsuperscript{44}

The federal Advisory Committee is aware of the "long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule

\textsuperscript{40} 28 WRIGHT & MILLER, supra note 33, § 6135 ("[I]t seems unlikely Congress intended such a broad construction in light of the fact subdivision (a)(2) leaves the court no discretion to weigh probative value against prejudice.").

\textsuperscript{41} The other portions of Rule 609 provide for more difficult admission standards. See supra notes 17–21. There would be little need for all these carefully layered standards if all (or almost all) crimes were considered crimes involving a dishonest act or false statement and thus automatically admissible.

\textsuperscript{42} United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978) (internal quotations omitted).

\textsuperscript{43} FED. R. EVID. 609 advisory committee's note on proposed rules.

\textsuperscript{44} Rule 403 backstops almost all the Rules of Evidence. FED. R. EVID. 403 (providing that otherwise relevant evidence may be excluded when its probative value is substantially outweighed by a danger of unfair prejudice, among other reasons). In a few instances, the rules set forth a different balancing test as the backstop. See, e.g., FED. R. EVID. 412(b) (in a civil case, permitting evidence to prove a victim's sexual behavior or predisposition "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party"); FED. R. EVID. 703 (allowing inadmissible facts or data to be disclosed to the jury "if their probative value in helping the jury evaluate the [expert's] opinion substantially outweighs their prejudicial effect"). But only Rule 609(a)(2) specifically overrides a trial judge's discretion to exclude unfairly prejudicial evidence.
In 2006, the Committee amended Rule 609(a)(2) to provide that convictions are automatically admissible only when the conviction (or the guilty plea) required proof of an act of dishonesty or false statement. But the amendment did not address whether theft convictions were automatically admissible. Although the circuit cases holding that theft offenses fall under Rule 609(a)(2) generally predate the 2006 amendments, those cases have not been abrogated.

Because there are conflicting cases in the federal courts—and because the current rule may continue to confuse some lawyers, litigants, and judges—a quick fix to Rule 609(a)(2) is warranted. We suggest the one below:

\[ \text{(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that} \]
\[ \text{establishing the elements of the crime required proving – or the} \]
\[ \text{witness's admitting – a dishonest act or false statement. A crime containing an element of theft may not be treated as requiring} \]
\[ \text{proof or admission of a dishonest act or false statement under this rule.} \]

This proposal neatly resolves the narrow issue dividing courts: whether theft convictions are automatically admissible. Under the clear language of the amendment, they are not. Felony theft convictions that are less than ten years old may be admissible only under the standards set forth in Rule 609(a)(1) after the proponent

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46. Id. at 7–9 (approving an amendment to Rule 609(a)(2) allowing for automatic admission of a conviction “if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness”). The Department of Justice urged the adoption of the amendment because some crimes, particularly obstruction of justice, may be committed “by falsifying documents,” making them crimes of dishonesty, or may be committed in other ways, such as “by threatening a witness,” which does not involve dishonesty. The Committee unanimously voted in favor of the language that “would permit some limited inquiry behind the conviction, but would provide for automatic admissibility only where it is clear that the jury had to find, or the defendant had to admit, that an act of dishonesty or false statement occurred that was material to the conviction.” Id. at 8.
47. See supra note 34 (listing cases).
48. Deletions are customarily shown by strikethrough and new language by underlining. This Article follows that convention.
satisfies the appropriate balancing test; and misdemeanor theft convictions under that rule are inadmissible.

Alternatively, a broader sentence could be added in place of the proposed sentence above: "Crimes that involve stealth, such as theft crimes, may not be treated as requiring proof or admission of dishonest acts or false statements under this rule." Although the issue plaguing the courts centers on whether theft is a crime of deception, courts struggling with the issue have noted that it is stealthy behavior that may subject theft crimes to the automatic admission standard of current Rule 609(a)(2). To the extent that crimes other than theft might also have a "stealth" or "furtive" component—such as drug crimes—a broader amendment may be preferable in order to prevent this same problem from occurring with such convictions. Notably, this second amendment suggestion retains express language precluding theft offenses from admission under Rule 609(a)(2), even if those crimes involve some deceitful or furtive actions.

The Advisory Committee Note could then further crystallize the distinction between crimes such as perjury and fraud, which require lying and are automatically admissible, and crimes like shoplifting and larceny, which may involve deceitful actions but are not automatically admissible. Indeed, the note should specifically state that actions like hiding items during shoplifting or taking steps to avoid detection do not constitute dishonest acts or false statements for purposes of Rule 609(a)(2), but that recent felony convictions may nonetheless be admissible under the evidentiary standards set forth in Rule 609(a)(1). The note should also state that drug crimes may not be considered under Rule 609(a)(2).

49. Fed. R. Evid. 609(a)(1)(A) (regular 403 balance for any witness other than a criminal defendant in a criminal case); Fed. R. Evid. 609(a)(1)(B) (requiring that the "probative value of the evidence outweighs its prejudicial effect to that defendant" if the conviction is offered against the criminal defendant in a criminal case).

50. Fed. R. Evid. 609(a)(2) (admitting misdemeanor convictions that are in the nature of crimen falsi, but not otherwise).

51. See, e.g., United States v. Papia, 560 F.2d 827, 847 n.14 (7th Cir. 1977) ("Theft is an act of stealth whose furtive character distinguishes it from armed robbery, an act of violence in which the perpetrator at least has the 'decency' to let his victim know what he is about. Simply put, the pickpocket, unlike the armed robber, is a 'sneak.'... Accordingly, a prior conviction for theft might reveal a man's propensity for deception and evasiveness that impeaches his testimonial credibility in a way that a prior armed robbery conviction would not.").

52. We note that there have been many calls from the Academy for limiting, or abrogating, Rule 609(a)(2). See, e.g., Aviva Orenstein, Honoring Margaret Berger with a Sensible Idea: Insisting That Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2), 75 Brook. L. Rev. 1291, 1299 (2010); James E. Beaver & Steven L. Marques, A Proposal to Modify the Rule on Criminal Conviction Impeachment,
2. **Rule 609(b) and the Passage of 10 Years**

Rule 609(b) governs convictions for which “more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later” and allows such a conviction to be admitted only if its “probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.”

The admissibility test in Rule 609(b) is the reverse of the forgiving balancing test of Rule 403. Rule 609(b)’s test purposely makes it difficult to admit old convictions on the theory that crimes that are remote in time have less probative value than recent ones, and people may have been rehabilitated in the intervening years.

Calculation of the 10-year timeframe in Rule 609(b) is key. The same fraud conviction is either automatically admissible (governed by Rule 609(a)(2)) or likely inadmissible (governed by Rule 609(b)), depending entirely on its age. The same felony assault conviction is subject to a relatively mild balancing test, or it is subject to the stringent reverse-Rule 403 balance, based solely on whether more than ten years have passed since conviction or release. In sum, the newer conviction is substantially more likely to be admitted than the older one.

To calculate the 10-year period, there must be a starting point and an ending point. Rule 609(b) provides the former: the age of a conviction runs from the witness’s “conviction or release from confinement.”

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53 TEMP. L.Q. 585, 590-91 (1985); Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 47 (1988); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1982-83 (2016). These calls are not concerning a circuit split, but rather about the asserted lack of probative value, and substantial prejudice, involved in impeachment with prior convictions. As such they are beyond the scope of this Article.

54. Compare FED. R. EVID. 609(b) (admissible if the probative value substantially outweighs its prejudicial effect), with FED. R. EVID. 403 (admissible unless probative value is substantially outweighed by unfair prejudice). Rule 609(b) also requires the probative value to be “supported by specific facts and circumstances,” a phrase that does not appear in Rule 403.

55. 28 WRIGHT & MILLER, supra note 33, § 6136 (“[T]he passage of a significant period of time raises the possibility that the witness may have been rehabilitated . . . . Rule 609(b) [also] assumes that, since the probative value of such antiquated conviction evidence is low, that value is probably outweighed by its prejudicial effect.”).

56. The balancing differs depending on who the witness is. See FED. R. EVID. 609(a)(1)(A) (witnesses other than a criminal defendant, regular 403 balance); FED. R. EVID. 609(a)(1)(B) (criminal defendant, probative value must outweigh the prejudice to the defendant). But neither test is especially stringent.

57. FED. R. EVID. 609(b).

58. 28 WRIGHT & MILLER, supra note 33, § 6136 (“[S]ubdivision (b) weighs probative value against prejudice in a way that is dramatically skewed in favor of excluding the conviction evidence.”).
confinement, whichever is later.”50 But the rule does not specify the latter, and a circuit split has developed over the appropriate endpoint.59 As one district court lamented, “[T]here appears to be little uniformity . . . which squarely addresses the appropriate time for a court to conclude the ten[-]year time period.”61

Three candidates have emerged for the end date: 1) the date that the offense being litigated occurred; 2) the date the current trial started; or 3) the date the witness subject to the conviction begins to testify.62 The timing problem admittedly will arise only rarely—it will be an unusual situation where the conviction is so close to hitting the 10-year mark that an earlier endpoint will render the conviction easier to admit, while the later endpoint will subject it to Rule 609(b).

But it is also a split that is easy to resolve and, particularly if the federal Advisory Committee chooses to revise Rule 609(a)(2) as discussed above, it makes sense to look at section (b) as well. After all, if the Committee is going to amend some part of a rule, it is a good idea to leave the entire rule better than it was previously. Serial amendments to a single rule raise the inference that the Committee was not able to get it right the first time.

As stated above, some courts have viewed the endpoint as the date on which the offense being litigated was committed or charged.63 The theory for this approach is that the new offense “negates the

59. Fed. R. Evid. 609(b). Even this is not entirely free from doubt. The date of conviction may be the date judgment is entered or the date a verdict is entered. 28 Wright & Miller, supra note 33, § 6136. If the federal Advisory Committee clarifies the endpoint, the Committee should also clarify the start date.

60. See, e.g., Rodriguez v. United States, 286 F.3d 972, 983 (7th Cir. 2002) (using the date of the “present offense” as the endpoint); United States v. Thompson, 806 F.2d 1332, 1339 (7th Cir. 1986) (using the date “[t]he trial in the present case began” as the endpoint); United States v. Cathey, 591 F.2d 268, 274 (5th Cir. 1979) (noting the defendant “was released from military confinement June 31, 1961, and called to testify in October 1977”); United States v. Foley, 683 F.2d 273, 277 n.5 (8th Cir. 1982) (“computing the amount of time that has elapsed between offenses”).


62. 28 Wright & Miller, supra note 33, § 6136 (also noting a fourth approach urged by “a prominent commentator [who] suggests that the ten-year period must be completed as of the date of indictment”).

63. Foley, 683 F.2d at 277 n.5 (“computing the amount of time that has elapsed between offenses”); Rodriguez, 286 F.3d at 983 (using the date of the “present offense” as the endpoint); see also Cathey, 591 F.2d at 277 n.2 (Fay, J., dissenting) (“If writing on a clean slate, it seems to me the most appropriate closing date would be that of the next succeeding alleged offense rather than commencement of trial. Any other formula serves to reward the felon for delaying prosecution by any means possible.”). There is Ninth Circuit caselaw using the date of the indictment as the endpoint. See United States v. Lorenzo, 43 F.3d 1303, 1308 (9th Cir. 1995).
inference that the witness is in the process of rehabilitation.”  

Obviously, this rationale applies only if the witness is the defendant, and only if the defendant is guilty of the new crime. It is completely irrelevant to the character for truthfulness of a witness that the defendant committed the crime on a particular day. Therefore, this endpoint does not provide a sound basis for rulemaking because it is too focused on just one sort of witness: the criminal defendant.

Most circuits have held that the date the trial begins is the appropriate endpoint for a Rule 609(b) calculation. This solution is appealing, in part, because the date is easy to ascertain and the trial is the point in time when the factfinder begins to assess credibility of witnesses. The Seventh Circuit, for example, concluded that a criminal defendant’s tax fraud conviction was less than 10 years old because the defendant’s last day of confinement was February 22, 1976, and “[t]he trial in the present case began on September 30, 1985.”

A more nuanced version of the use-trial-as-the-endpoint position fixes the endpoint not at the time the trial begins, but instead on the day the particular witness begins testifying, because the factfinder’s
evaluation of that witness's credibility starts at that moment.\footnote{United States v. Cathey, 591 F.2d 268, 274 (5th Cir. 1979) (noting the defendant "was released from military confinement June 31, 1961, and called to testify in October 1977"); see also United States v. Peatross, 377 F. App'x 477, 492 (6th Cir. 2010) ("Mail fraud sentence ended less than ten years prior to the day on which she testified."). Some district courts are in accord; e.g., United States v. Pettiford, 238 F.R.D. 33, 37 (D.D.C. 2006) ("For the purposes of determining whether a conviction is more than ten years old, the question is whether ten years has expired at the time the witness testifies at trial."); Kinium v. Minn. Life Ins. Co., No. 3:10cv399/MCR/CJK, 2013 WL 12146384, at *4 n.10 (N.D. Fla. Jan. 14, 2013) (agreeing with the plaintiff that the ten-year period "ends as of the date of the witness's testimony"); United States v. Brown, 409 F. Supp. 890, 894 (W.D.N.Y. 1976) (describing the "ten-year period ending at the time of the defendant-witness's testimony").} In \textit{United States v. Cathey}, the Fifth Circuit articulated the policy supporting this position: "since the concern is the [witness's] credibility when he testifies[,] the correct point from which to measure backwards in time may be the date when he testifies rather than the date when the trial commences, which in a protracted trial might be considerably earlier."\footnote{Cathey, 591 F.2d at 274 n.13; see also Trindle v. Sonat Marine Inc., 697 F. Supp. 879, 882 (E.D. Pa. 1988) ("Because it is the jury which must evaluate the witness's credibility, the most appropriate time to conclude the ten[-]year period is the date the jury actually hears the witness testify that he had been convicted of a crime.").} Using the date of the witness's testimony best comports with the policy underlying Rule 609 because it is at that moment—when that witness begins to testify—that the factfinder must assess that witness's credibility.\footnote{28 WRIGHT & MILLER, supra note 33, § 6136 ("This is the only approach that makes sense from a policy standpoint. Since the conviction evidence is offered to impeach, the relevant ten-year period must be that immediately preceding the date the witness's credibility becomes an issue." (citation omitted)).} It is also at that moment that any unfair prejudice of the conviction may influence the factfinder.\footnote{Whiteside v. State, 853 N.E.2d 1021, 1028 (Ind. Ct. App. 2006) ("The moment that the jury learns that a witness was previously convicted is the first moment that the unfair prejudice, if any, has the potential to influence the jury.").}

The amendment we propose to Rule 609(b) is straightforward:

This subdivision (b) applies if, on the day the witness first testifies, more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later.

The proposal sets forth a clear ending date (the day the witness first testifies). The Advisory Committee Note might comment on the inherent power of the courts to prohibit gamesmanship, such as strategic attempts to "run out the time clock" by delaying the witness's testimony.
B. Rules 701 and 702: Lay Opinion Testimony Versus Expert Opinion Testimony

The Federal Rules of Evidence distinguish between lay opinion testimony and expert opinion testimony. Lay opinions must be based on personal knowledge and cannot be "based on scientific, technical, or other specialized knowledge," while expert testimony need not be based on personal knowledge but does require "scientific, technical, or other specialized knowledge." That description seems to set up two polar opposites, but "[m]any courts are struggling to define 'the fine line' between the two kinds of opinion testimony."

The distinction matters both procedurally and substantively. Procedurally, expert witnesses are subject to extensive disclosure requirements, but lay witnesses are not. Thus, a party might "evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson." Substantively, expert testimony, but not lay opinion, must meet the requirement of reliable methodology as articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., as well as the additional reliability requirements added to Rule 702 in 2000—that the expert’s testimony be based on sufficient facts and data and that the opinion reflect a reliable application of the principles and methods. Because those standards are rigorous, there is an inherent "risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." So, to help police this "fine line" between lay and expert opinion, the federal Advisory Committee amended

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73. FED. R. EVID. 701 advisory committee’s note to 2000 amendment (“The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case.”).
74. FED. R. EVID. 701.
75. FED. R. EVID. 702(a).
77. FED. R. CIV. P. 26(a)(2); FED. R. CRIM. P. 16(a)(1)(G), (b)(1)(C).
78. FED. R. EVID. 701 advisory committee’s note to 2000 amendment.
80. FED. R. EVID. 702(b), (d).
81. FED. R. EVID. 701 advisory committee’s note to 2000 amendment; see, e.g., In re Taxotere (Docetaxel) Prods. Liab. Litig., 26 F.4th 256, 264, 266 (5th Cir. 2022) (noting that a purported lay witness was asked at trial to evaluate data “as a board certified oncologist” and expressing dismay over the “stratagem of skating the line between Rules 701 and 702 with Dr. Kopreski’s testimony... [which] reflects a calculated and troubling end-run around Rule 702 and Daubert”).
Rule 701 in 2000 and added an extensive note trying to explain the difference between lay and expert testimony.\textsuperscript{82} One reason the courts struggle to define this line is that both an expert and a layperson may provide similar testimony regarding similar subjects.\textsuperscript{83} For example, "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert."\textsuperscript{84} That testimony would be based on personal knowledge. But the same conclusions as to value or projected profits could also be made by an outside expert who has reviewed appropriate documentation for the business and uses specialized knowledge to reach a conclusion.\textsuperscript{85} The difference between the lay opinion on value and expert opinion on the same subject is that "lay testimony results from a process of reasoning familiar in everyday life," while expert testimony results from a process of reasoning which can be mastered only by specialists in the field."\textsuperscript{86} Thus, there is a distinction between a layperson’s personal knowledge, and an expert’s specialized, and often non-personal, knowledge.\textsuperscript{87} Or, as one evidence treatise puts the difference: “one of the major distinctions between lay witness and expert testimony is that experts are permitted to speak without personal knowledge of the underlying facts, and lay witnesses are not; put another way,

\textsuperscript{82} FED. R. EVID. 701 advisory committee’s note to 2000 amendment.
\textsuperscript{83} Imwinkelried, supra note 76, at 80.
\textsuperscript{84} FED. R. EVID. 701 advisory committee’s note to 2000 amendment.
\textsuperscript{85} E.g., LifeWise Master Funding v. Telebank, 374 F.3d 917, 929 (10th Cir. 2004) (reasoning that testimony about lost business profits was expert opinion because it was based on “moving averages, compounded growth rates, and S-curves,” and these “technical, specialized subjects” are not within the purview of Rule 701).
\textsuperscript{86} FED. R. EVID. 701 advisory committee’s note to 2000 amendment ("The amendment incorporates the distinctions set forth in State v. Brown, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on ‘special knowledge.’ In Brown, the court declared that the distinction between lay and expert witness testimony is that lay testimony ‘results from a process of reasoning familiar in everyday life,’ while expert testimony ‘results from a process of reasoning which can be mastered only by specialists in the field.’ The court in Brown noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.”); see also United States v. Riddle, 103 F.3d 423, 429 (5th Cir. 1997) (maintaining that a lay witness must draw “straightforward conclusions from observations informed by his own experience”).
\textsuperscript{87} E.g., Imwinkelried, supra note 76, at 85–86.
experts are allowed under Rule 703 to rely on outside sources for their opinion, and lay witnesses are not." 88

Another reason courts may struggle to delineate lay from expert opinion is that the rule distinguishes between lay and expert testimony, not lay and expert witnesses. 89 That means that the same person may provide both lay opinion and expert opinion testimony in the same trial, thus bringing further fuzziness to the inherently uncertain demarcation. 90 Consider the Ninth Circuit case that spurred the Advisory Committee to amend Rule 701 in 2000 to provide a clearer delineation between lay and expert opinion testimony. 91 In United States v. Figueroa-Lopez, law enforcement agents testified to some observations that should have been the subject of expert opinion and to another observation that was properly labeled lay. 92

Here, the agents testified that the following behaviors were consistent with an experienced drug trafficker: 1) countersurveillance driving; 2) use of code words to refer to drug quantities and prices; 3) use of a third-person lookout when attending a narcotics meeting; 4) use of a rental car to make the drug delivery; 5) hiding the cocaine in the door panels of a car; and 6) dealing in large amounts of very pure cocaine. These "observations" require demonstrable expertise; in fact, several times, the Government instructed the witness to answer questions "based upon your training and experience." Additionally, one agent testified that his familiarity with the fact that narcotics traffickers sometimes speak in code is based upon the training that he had at the DEA Academy.

88. See 3 STEPHEN A. SALTBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 701.02[7], at 701–23 (8th ed. 2001).
89. Fed. R. Evid. 701 advisory committee's note to 2000 amendment.
90. 3 SALTBURG, MARTIN & CAPRA, supra note 88, § 701.02[7], at 701–17 ("[A] single witness can be both an expert and a lay witness."); see also Williams v. Mast Biosurgery USA, Inc., 644 F.3d 1312, 1317–18 (11th Cir. 2011) ("[A] physician may offer lay opinion testimony, consistent with Rule 701, when the opinion is based on his experience as a physician and [is] clearly helpful to an understanding of his decision-[making process in the situation]. These cases make clear that, when a treating physician's testimony is based on a hypothesis, not the experience of treating the patient, it crosses the line from lay to expert testimony, and it must comply with the requirements of Rule 702 and the strictures of Daubert.\) (second alteration in original) (emphasis omitted) (quoting Weese v. Schukman, 98 F.3d 542, 550 (10th Cir. 1996)); United States v. Freeman, 498 F.3d 893, 902 (9th Cir. 2007) (noting witness testified "both as an expert witness concerning coded drug terms and as a lay witness").
91. United States v. Figueroa-Lopez, 125 F.3d 1241, 1243–47 (9th Cir. 1997).
92. Id. at 1246 (noting six "observations" that require[d] demonstrable expertise and one that "provide[d] us with a clear example of when a witness may give his lay opinion").
However, part of the testimony in this case does provide us with a clear example of when a witness may give his lay opinion as to the implications of his observations. INS Special Agent Rapp testified that the movements of the Monte Carlo were “suspicious.” Under [circuit precedent], such testimony related to matters “common enough” to qualify as lay opinion testimony.

Difficulty can be expected when a witness has multiple opinions, some over the line, some not, and some near the line between lay and expert testimony.

Still another reason courts have struggled with the line between lay and expert opinion testimony is that there are factual distinctions among the cases—so just because evidence was (or was not) admitted in a previous case does not necessarily mean that the evidence will (or will not be) admitted in this case too. Judges can readily distinguish the cases based on their facts, especially because two different witnesses are unlikely to have the same basis of information in two different cases.

But, that said, there are cases with strikingly similar facts in which courts come to divergent results on the lay/expert question. Most troublingly, disparate results have occurred in criminal cases where law enforcement agents testify to matters such as code words, gang structure, surveillance techniques, and conspiracy operations. Some courts permit the agents to testify as lay witnesses—without following the disclosure requirements or reliability proscriptions—while other courts require the agents to be disclosed and qualified as experts. For example, the Fifth, Seventh, and Ninth Circuits have permitted law enforcement witnesses to testify as lay witnesses (not experts) regarding the meaning of code words and other ambiguous statements even if the agents relied on transcripts and general experience, while other circuits have barred lay testimony when the

93. Id.
94. Id. at 1245 (distinguishing two cases relied on by the government).
95. United States v. Akins, 746 F.3d 590, 598 (5th Cir. 2014); United States v. Rollins, 544 F.3d 820, 833 (7th Cir. 2008); United States v. Freeman, 498 F.3d 893, 902 (9th Cir. 2006); United States v. Kilpatrick, 798 F.3d 365, 379 (6th Cir. 2015); United States v. Peoples, 250 F.3d 630, 641 (8th Cir. 2001).
96. Akins, 746 F.3d at 598; Rollins, 544 F.3d at 833; Freeman, 498 F.3d at 902; United States v. Walker, 32 F.4th 377, 392 (4th Cir. 2022); Kilpatrick, 798 F.3d at 379.
97. Akins, 746 F.3d at 601; Freeman, 498 F.3d at 900–01; Kilpatrick, 798 F.3d at 379.
98. Akins, 746 F.3d at 598 (upholding the district court’s decision to permit the lead investigator to testify as a lay witness regarding “his understanding of the meaning of code words”); Rollins, 544 F.3d at 832–33 (permitting an agent’s lay testimony regarding code words because he “listened to every intercepted conversation from February through July 2005 [and] . . . became ‘very familiar’ with the voices he heard,” but also noting the “testimony approaches the line
This factual setup—where a law enforcement agent testifies regarding ambiguous and coded language in a drug case—has an objectively correct (although sometimes slippery) answer. As many courts recognize, coded drug language may be the appropriate subject for expert testimony because jurors cannot be expected to know the code. Similarly, a witness with personal knowledge of the particular drug conspiracy can provide a helpful lay opinion about the meaning of ambiguous or confusing drug language. But if a witness testifies about coded drug language on the basis of general information rather than personal knowledge of the particular criminal operation, that witness must qualify as an expert. That conclusion relies on the basic premise that lay witnesses must testify on the basis of personal knowledge, while experts may provide helpful testimony even if they are not personally familiar with the facts of the case.

99. See, e.g., Walker, 32 F.4th at 392 (“We again reiterate that ‘post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701.’ Therefore, if the Government seeks to introduce a law enforcement agent’s testimony about statements made during recorded telephone calls and the agent was neither a party to the conversation nor contemporaneously listening to the conversation, the law enforcement agent should generally be proffered as an expert witness.”) (quoting United States v. Johnson, 617 F.3d 286, 293 (4th Cir. 2010)); Kilpatrick, 798 F.3d at 379 (“Courts often qualify law enforcement officers as expert witnesses under Rule 702 to interpret intercepted conversations that use ‘slang, street language, and the jargon of the illegal drug trade.’ In contrast, when an officer is not qualified as an expert, the officer’s lay opinion is admissible ‘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.’” (emphases omitted) (quoting Peoples, 250 F.3d at 641)). Peoples, 250 F.3d at 641 (disallowing agent’s testimony where she “lacked first-hand knowledge,” but instead based her opinions “on her investigation after the fact, not on her perception of the facts”).

100. Freeman, 730 F.3d at 598 (“An agent qualified as an expert may interpret coded drug language . . . . And a lay witness who has personal knowledge of a particular drug or crime conspiracy may similarly testify to the meaning of coded language within his knowledge.”).

101. Kilpatrick, 798 F.3d at 379.

102. See FED. R. EVID. 703; FED. R. EVID. 602 (exempting expert testimony from the personal knowledge requirement).
But though the resolution in this one area may be easy to articulate and even resolve, the problem of distinguishing lay from expert opinion plagues other types of testimony as well, so any amendment to Rule 701 should encompass more than just coded drug language specifically or even criminal drug conspiracy cases generally. For example, the Eleventh Circuit recently encountered a scenario in which a marine surveyor—who admitted “he had no training or certification on the type of engine that failed in the vessel” and who “did not consider himself an expert”—was permitted to offer lay testimony on the cause of the engine failure. But if the Eleventh Circuit observed that some of the surveyor’s testimony, such as his description about the presence of clams and an elongated connecting rod, was permissible lay testimony, but that the “inferences [the surveyor] drew [that the friction was tied to engine failure] blurs into supposition and extrapolation which crosses the line into expertise.” This case illustrates the problem that arises when a witness concededly has personal knowledge of the underlying facts, and testifies to those facts, but then proceeds to draw an opinion that sounds like something an expert would provide: “He had a hacking cough and he was running a temperature of 101—sure signs of asbestosis.” The coughing and temperature are observations that a lay witness could make, but the medical conclusion strays into expert opinion testimony. This is not a distinction between personal knowledge and no personal knowledge. It is about the line that exists when a witness with personal knowledge goes too far in evaluating that knowledge.

One way to regulate such “too far” testimony is to consider that for such testimony to be of value to the jury, the proponent would have to lay some expert-like foundation, beyond just personal knowledge. For example, the proponent of the (purportedly) lay witness who testified to asbestosis would undoubtedly seek to establish how the witness came to that conclusion. And if, as would be expected, the witness replied, “I came to that conclusion because I received training, am a doctor, and read studies,” then the proponent is really qualifying an expert—and that qualification should be subject to Rule 702. In other words, if the proponent is treating the witness as an expert in order to have the opinion valued by the factfinder, then that witness should be qualified as an expert. The proponent should not be permitted to pitch the witness to the factfinder as an expert and

103. Great Lakes Ins. SE v. Wave Cruiser LLC, 36 F.4th 1346, 1351 (11th Cir. 2022).
104. Id. at 1358 (quoting Lebron v. Sec’y of Fla. Dept of Child. & Fams., 772 F.3d 1352, 1372 (11th Cir. 2014)) (internal quotations omitted).
105. See Fed. R. Evid. 702. If the witness says “because I was there and saw it” that may be lay testimony, but it would not be helpful, and should be excluded under Rule 701. See Fed. R. Evid. 701.
then argue that the witness provided lay testimony simply because the witness had some personal knowledge of the underlying facts.

It is difficult to craft an amendment covering lay witness testimony that goes "too far." The rules already attempt to distinguish lay from expert opinion, and extensive Committee Notes from the 2000 amendment further explore this separation. But because this split has persisted even after the 2000 amendment to Rule 701, and because negotiating the line between lay and expert testimony is a problem that recurs frequently, a further amendment is warranted. The amendment should have two goals: 1) to further emphasize the need for personal involvement with the underlying case for lay opinion to be permissible, and 2) to emphasize that witnesses with personal knowledge must qualify as experts if the helpfulness of their opinions is dependent on a foundation that looks like what an expert would provide. That is, a witness who quacks like an expert must be evaluated as an expert under Rule 702. A revised Rule 701 might read like this:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception firsthand knowledge of the specific facts at issue;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not dependent for its probative value on a foundation that would be required for expert testimony under based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

An Advisory Committee Note could provide examples of cases in which witnesses were properly permitted to offer lay opinions and cases in which the witness was required to satisfy the rules on experts.

106. See Fed. R. Evid. 701 advisory committee's note to 2000 amendment.
107. Id.
109. One note passage could read as follows: "For example, properly construed, a law enforcement officer testifying to code words is a lay witness if she acted as an undercover informant, thus obtaining personal knowledge of the code used by the conspiracy. In contrast, a law enforcement officer who bases her translation on prior experience and listening to tape recordings of the coconspirators must be qualified as an expert." See generally Imwinkelried, supra note 76 (proposing that there is an epistemological difference between the reasoning process used by experts and laypersons). Another note passage could read: "When a lay witness draws an opinion that is helpful only if the witness is qualified by the kinds of qualifications that are expected from experts (such as
C. Rule 801(d)(2): An Opposing Party’s Statement as Applied to Experts and Government Officials

Federal Rule of Evidence 801 defines an opposing party’s statement as “not hearsay.” That means that if A and B have a car accident, and A later tells a colleague, “I was speeding,” that statement is admissible against A at a subsequent trial. It is admissible over a hearsay objection despite the fact that A uttered the statement out-of-court, and the statement will be offered to prove that A was speeding. The reason underlying the rule’s generous view of admissibility is estoppel: we must live with what we say. Rule 801(d)(2) also includes both statements “made by a person whom the party authorized to make a statement on the subject” and statements “made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.” Just as people must live with their own imprudent statements, so too must they live with such statements uttered by agents, employees, and other authorized persons.

At the present time, there are at least two circuit splits over the interpretation and application of Rule 801(d)(2)(C) and (D). One extensive training or education), then the opinion drawn must be evaluated under Rule 702.”

110. FED. R. EVID. 801(d)(2).
111. Essentially, it is hearsay subject to an exemption. See 4 SALTZBURG, MARTIN & CAPRA, supra note 88, § 801.02[2][b] at 801-27 (“Subdivision (d) technically provides an exemption from, rather than an exception to, the hearsay rule.”).
112. FED. R. EVID. 801 advisory committee’s note to proposed rules (“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 case of an admission.” (citations omitted)).
113. FED. R. EVID. 801(d)(2)(C)–(D). There may be some overlap between a “person authorized to make a statement” under Rule 801(d)(2)(C) and a “party’s agent” under Rule 801(d)(2)(D). See Glendale Fed. Bank, FSB v. United States, 39 Fed. Cl. 422, 424 (1997) (“[T]he difference between the ‘person authorized’ of 801(d)(2)(C) and the ‘agent’ of 801(d)(2)(D) is not as apparent.”).
114. See, e.g., Sabel v. Mead Johnson & Co., 737 F. Supp. 135, 138 (D. Mass. 1990) (“Admissibility under [Rule 801(d)(2)(C) and (D)] is governed not by the trustworthiness of the statement, but by the existence and scope of the principal-agent relationship as determined under the common law of agency.”).
115. A third split regarding the party-opponent exemption involves whether a statement by a declarant may be offered against a party who did not make the statement, but whose claim or defense is directly derived from the declarant who did make the statement. See Capra & Berch, supra note 4, at 156–60. On June 7, 2022, the Judicial Committee on Rules of Practice and Procedure (commonly referred to as the Standing Committee) released a draft amendment for public comment. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUNE 7, 2022 25 (2022).
issue is whether statements by an opposing party’s expert constitute an opposing party’s statements. The second is whether a government official’s statements bind the government as party-opponent statements.

1. Rule 801(d)(2)(C) & (D) and Statements by Experts

A circuit split has arisen over whether statements by a party’s expert fall within the non-hearsay ambit of Rule 801(d)(2)(C) or (D), which permits admission of statements by people “authorized to make a statement on the subject” or by “agent[s] or employee[s] on a matter within the scope of that relationship and while it existed.” As one court has lamented, “[t]his area of the law is murky at best with several divergent streams and many highly fact specific eddies making up the case law.” Even so, it is possible to tease out the basic positions.

To begin, it is useful to distinguish between experts who are employees of the party and those who are retained for purposes of investigation or litigation. Courts have generally held that an employee-expert’s statements are admissible—as any employee’s statements would be—if the statements concern a matter within the scope of the employee-expert’s job description. These cases accordingly focus on whether “the subject matter of the [expert’s] statement” match[es] the subject matter of the employee’s job description.” Thus, in *Aliotta v. National Railroad Passenger Corp.*, the Seventh Circuit held that an employee’s statements were made within the scope of his employment. [His] job is to investigate accidents, and in doing so, he speaks with other railroad employees in determining the causes and potential causes of train accidents. The 'vacuum theory' was knowledge he had acquired during the course of his job . . . .

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118. *Fed. R. Evid. 801(d)(2)(C)–(D).*
120. *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 762 (7th Cir. 2003) (holding that the employee could not have been qualified as an expert, but nonetheless holding his deposition statements were admissible at trial under subsection (D) because the deponent’s job was “to investigate accidents, and in doing so, he speaks with other railroad employees in determining the causes and potential causes of train accidents”); see also *Air Crash Disaster v. Nw. Airlines, Inc.*, 86 F.3d 498, 536 (6th Cir. 1996) (explaining a vice president’s statement regarding an accident investigation fell under Rule 801(d)(2)(D)).
121. *Aliotta*, 315 F.3d at 762.
Thus, we believe that [his] statements are not hearsay under Rule 801(d)(2)(D).\textsuperscript{122}

This resolution makes sense for traditional employees who happen to be used as experts, because the employer has vested this employee with authority regarding this subject, and so must live with what the employee has to say. Courts are properly focusing on whether the statements were made within the scope of the employment relationship.\textsuperscript{123} In sum, the admissibility of employee-expert hearsay is appropriately analyzed under Rule 801(d)(2)(D) and does not require an amendment to the rule.

But many experts are not traditional employees and are hired from outside the organization for purposes of investigation or litigation.\textsuperscript{124} Regarding these individuals, some courts have held that their out-of-court statements fall within the scope of Rule 801(d)(2)(C) or (D) because these retained experts are authorized to speak on the subject for which they were hired or are agents who may speak on matters within the scope of the agency relationship.\textsuperscript{125} For example, the Court of Federal Claims explained that deposition testimony by a retained expert is admissible under subsection (C) as not hearsay because "by the time the trial begins, we may assume that those experts who have not been withdrawn are those whose testimony reflects the position of the party who retains them . . . . At this point when an expert is put forward for trial it is reasonable and fair to presume they have been authorized."\textsuperscript{126}

On the other side, the Third Circuit has held that a retained expert's statements generally fall outside both Rule 801(d)(2)(C) and (D) and so are subject to hearsay restrictions.\textsuperscript{127} In Kirk v. Raymark Industries, the Third Circuit held it was an error to permit the plaintiff to read prior trial testimony of the defendant's hired expert.

\textsuperscript{122} Id. at 762-63. Nonetheless, the Seventh Circuit held the statements were properly excluded because they involved "unreliable scientific testimony." Id. at 763.

\textsuperscript{123} Id. at 761-62.

\textsuperscript{124} Collins v. Wayne Corp., 621 F.2d 777, 780-81 (5th Cir. 1980), superseded on other grounds by rule, FED. R. EVID. 103(a) (amended 2000), as recognized in Mathis v. Exxon Corp., 302 F.3d 448, 459 n.16 (5th Cir. 2002).

\textsuperscript{125} In re Hanford Nuclear Rsrv. Litig., 534 F.3d 986, 1016 (9th Cir. 2008) (explaining that the plaintiff's causation expert's testimony at the first bellwether trial fell under Rule 801(d)(2)(C) and thus the defendants could admit that evidence over plaintiffs' objections); Wayne Corp., 621 F.2d at 780-82 (holding that the defendant "employed Greene as an expert to investigate and analyze the bus accident," so the "report on his investigation and his deposition testimony in which he explained his analysis and investigation was an admission of [the defendant]"; cf. Glendale Fed. Bank, FSB v. United States, 39 Fed. Cl. 422, 424-25 (1997) (holding that a retained expert is not an agent under 801(d)(2)(D), but may be a person authorized to speak under subsection (C)).

\textsuperscript{126} Glendale Fed. Bank, 39 Fed. Cl. at 424-25.

\textsuperscript{127} See Kirk v. Raymark Indus., Inc., 61 F.3d 147, 164 (3d Cir. 1995).
from an unrelated case. The court concluded that the expert was not an agent of the defendant under section 801(d)(2)(D): “Since an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent.” Nor did the court believe that the prior testimony fit the requirement of Rule 801(d)(2)(C) that the expert was “authorized” to make a damaging statement: “Because an expert witness is charged with the duty of giving his or her expert opinion regarding the matter before the court, we fail to comprehend how an expert witness, who is not an agent of the party who called him, can be authorized to make an admission for that party.”

On the merits, courts should distinguish between a retained expert’s out-of-court statements made in connection with the current litigation and statements made in connection with other litigation. The latter should not be admissible as statements by the opposing party because the current party exercised no control over what the expert previously said. Under the current language of Rule 801(d)(2)(C), these statements were not “authorized” because they pre-date the party’s authorization. Similarly, under the current language of Rule 801(d)(2)(D), these statements were not made “within the scope of that [agency] relationship and while it existed” because they predate the relationship. But if a nonemployee-expert made statements within the context of the current litigation for which the expert was hired, those statements should be deemed statements by the opposing party. That party exercises some control over who it hires and what they say and, just like a party must live with improvident things its employees say on matters within the scope of the employment relationship, the party ought to have to live with improvident things its experts say on matters about which the experts have been hired to testify. Judge Cowen’s assertion in Kirk that a party does not control an expert is great in principle, but it is belied by the practice.

Revision along the lines we suggest would require a change to both subdivisions (C) and (D), as they tend to overlap when it comes to retained experts. An amendment to Rule 801(d)(2)(C) could read as follows:

128. Id.
129. Id. at 164.
130. Id.
131. FED. R. EVID. 801(d)(2)(C).
132. FED. R. EVID. 801(d)(2)(D).
133. Kirk, 61 F.3d at 164 ("[A]n expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give.").
A statement that meets the following conditions is not hearsay:

(2) The statement is offered against an opposing party and:

(C) was made by a person whom the party authorized to make a statement on the subject, including statements made in the course of the current litigation by experts retained to testify at trial.

An amended Rule 801(d)(2)(D) should provide:

A statement that meets the following conditions is not hearsay:

(2) The statement is offered against an opposing party and:

(D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed, including statements made in the course of the current litigation by experts retained to testify at trial.

The new language fortifies the common threads found in the cases and rules: statements by nontestifying experts are protected.\textsuperscript{134} Statements by employee-experts should be analyzed under the standards set forth in (D) because those experts are employees. Finally—and consistent with the purpose behind the amendments to (C) and (D)—a testifying expert’s out-of-court statements made in connection with the current litigation are party-opponent statements and are admissible against the principal.

2. Rule 801(d)(2)(D) and Statements by Government Agents

Another interpretive disagreement is whether a government agent’s statements are attributable to the government when it is a party.\textsuperscript{135} For example, in a criminal case against a single defendant, anything that the defendant says may be admitted against the defendant over a hearsay objection.\textsuperscript{136} But what about on the government’s side? Is everything the prosecutor or a police officer says admissible against the government? The courts are split over whether such statements are attributable to the government under Rule 801(d)(2)(D).\textsuperscript{137}

\textsuperscript{134} See, e.g., \textit{Fed. R. Civ. P. 26(b)(4)(D)} (“Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.”).

\textsuperscript{135} See, e.g., United States v. Salerno, 937 F.2d 797, 811 (2d Cir. 1991).

\textsuperscript{136} \textit{Fed. R. Evid. 801(d)(2)}.

The common-law rule was that government employees and agents could not bind the sovereign, and thus their statements were hearsay and inadmissible.\textsuperscript{138} In a leading pre-Rules case on this issue, \textit{United States v. Santos}, the Second Circuit explained that “when the Government prosecutes, it prosecutes on behalf of all the people of the United States” and therefore there is no agency relationship between a government actor and the prosecution.\textsuperscript{139} \textit{Santos} is now commonly cited for the position that a government employee’s statements are not admissible against the government under Rule 801(d)(2).\textsuperscript{140}

Less than a decade after the Second Circuit’s \textit{Santos} decision, the Federal Rules of Evidence were enacted.\textsuperscript{141} The plain language of Rule 801(d)(2) does not mention any distinction between cases involving the government as a party and cases not involving the government.\textsuperscript{142} Perhaps because of this lack of specificity in the rule, courts today are divided over whether the common-law rule, as described by \textit{Santos}, survives.\textsuperscript{143}

\textsuperscript{138} See, e.g., United States v. Yildiz, 355 F.3d 80, 81 (2d Cir. 2004) (“[T]he only party on the government side [is] the Government itself whose many agents and actors are supposedly uninterested personally in the outcome of the trial and are historically unable to bind the sovereign.” Other circuits recognized this was the common law rule.” (quoting \textit{Santos}, 372 F.2d at 180)); United States v. Kampiles, 609 F.2d 1233, 1246 (7th Cir. 1979) (“Prior to adoption of the Federal Rules of Evidence, admissions by government employees in criminal cases were viewed as outside the admissions exception to the hearsay rule.”); United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975) (“While evidence of contradictory statements may be used to impeach a government agent, they may not be introduced to prove the truth of the statements offered.”); see also Lee v. Munroe, 11 U.S. (7 Cranch) 366, 368 (1813) (holding that the government is not bound by statements of its employees “unless it most manifestly appear[s] that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make the declaration or representation which is relied on . . . ”).

\textsuperscript{139} \textit{Santos}, 372 F.2d at 180.

\textsuperscript{140} E.g., United States v. Powers, 467 F.2d 1089, 1095 (7th Cir. 1972) (adopting “the rule enunciated in \textit{United States v. Santos}”); see also Edward J. Imwinkelried, Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents’ Statements Offered as Vicarious Admissions Against the Prosecution, 71 MINN. L. REV. 269, 278 (1986) (calling \textit{Santos} the “seminal case” on the issue).


\textsuperscript{142} See \textit{Fed. R. Evid. 801(d)(2)}.

\textsuperscript{143} Michael H. Graham, Evidence Commentary: Admission by Party-Opponent, Fed.R.Evid. 801(d)(2); Government Agent or Employee, Experts, Confrontation Clause, 54 CRIM. L. BULL. 1139, 1151 (2018) (“In a criminal prosecution, whether government employees are or are not to be considered agents or employees of a party-opponent for purposes of admissions rules is highly disputed.”); \textit{In re Antrobus}, 563 F.3d 1092, 1099 n.3 (10th Cir. 2009) (noting that “there is authority holding that the government’s statements in a brief are admissible as the admission of a party opponent,” but also recognizing
Shortly after the enactment of the Federal Rules, the D.C. Circuit held that Rule 801(d)(2) applies to statements by government agents in some circumstances. In that case, a reliable informant told a detective that a young person named “Timmy” sold him drugs. The detective then used that information to swear out an affidavit for a search warrant. In holding that this affidavit was admissible (though under Rule 801(d)(2)(B) as an adopted statement), the D.C. Circuit posited, “The government manifested its belief in the truth of the informant’s statements about Timmy by characterizing them as ‘reliable’ in a sworn affidavit to a United States Magistrate.” Thus, while it did not rely on Rule 801(d)(2)(D), the court did determine that if “the government has indicated in a sworn affidavit to a judicial officer that it believes particular statements are trustworthy, it may not sustain an objection to the subsequent introduction of those statements on grounds that they are hearsay.” The government had “manifested that it adopted or believed [the statement] to be true.” Thus, the D.C. Circuit rejected the reasoning in Santos, noting that “there is nothing in the history of the Rules generally or in Rule 801(d)(2)(B) particularly to suggest that it does not apply to the prosecution in criminal cases,” and “there is no indication in the history of the Rules that the draftsmen meant to except the government from operation of Rule 801(d)(2)(D) in criminal cases.”

Other circuits that have permitted statements to be used against the government also follow a case-by-case approach. For example,

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145. Id. at 935.
146. Id. at 935–36.
147. Id. at 937.
148. Id. at 938; see also id. at 937 n.10 (“Though the proposition seems self-evident, it bears mention that when the government authorizes its agent to present his sworn assurances to a judicial officer that certain matters are true and justifies issuance of a warrant, the statements of fact or belief in the officer’s affidavit represent the position of the government itself, not merely the views of its agent.”).
149. FED. R. EVID. 801(d)(2)(B).
150. Morgan, 581 F.2d at 938.
151. Id. at 938 n.15.
152. E.g., United States v. Barile, 286 F.3d 749, 758 (4th Cir. 2002) (“If [the defendant] can lay a foundation for the statements, they are admissible over any hearsay objection because [the government’s witness] made them in her capacity as a government official on matters within the scope of her employment, and as such, the statements are of a party-opponent and therefore not hearsay.”); United States v. Van Griffin, 874 F.2d 634, 638 (9th Cir. 1989) (holding that the district court erred in failing to treat a Department of Transportation manual as a statement of an agent by a party-opponent and explaining that “[i]n this case the government department charged with the development of rules for highway safety was the relevant and competent section of the government [and so] its
the Second Circuit held that a prosecutor's arguments in a related case were admissible against the government in the current prosecution—but only after meeting a stringent test:

First, "the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial." Second, the court must determine "that the statements of counsel were such as to be the equivalent of testimonial statements" made by the client. Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw "is a fair one and that an innocent explanation for the inconsistency does not exist."

More broadly, the First Circuit has held that the Justice Department should be considered a party opponent in criminal cases, although the court relied on Rule 801(d)(2)(B) rather than (d)(2)(D).

Other circuits continue to adhere to the common-law rule and hold that statements by government employees and agents are not opposing party statements under Rule 801(d)(2). For example, the pamphlet on sobriety testing was an admissible party admission); United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988) ("We agree with Judge Bazelon that the Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases. We can find no authority to the contrary or reason to think otherwise. Whether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases, the Justice Department certainly should be considered such." (internal quotations omitted) (citations omitted)); see also United States v. Branham, 97 F.3d 835, 851 (6th Cir. 1996) ("The government concedes that Rule 801(d)(2)(D) contemplates that the federal government is a party-opponent of the defendant in a criminal case, but argues, nonetheless, that the conversations at issue were not within the scope of the agency between [the paid government informant] and the government. We disagree." (citation omitted)).

153. United States v. Salerno, 937 F.2d 797, 811 (2d Cir. 1991) (regarding Rule 804(b)(1)'s former testimony rule) (internal quotations omitted).

154. Kattar, 840 F.2d at 130 ("Whether or not the entire federal government in all its capacities should be deemed a party-opponent in criminal cases, the Justice Department certainly should be considered such." (citations omitted)).

155. Id. at 131 ("[T]he statements here were admissible under Rule 801(d)(2)(B) as statements of which the party-opponent 'has manifested an adoption or belief in its truth.' The Justice Department here has, as clearly as possible, manifested its belief in the substance of the contested documents; it has submitted them to other federal courts to show the truth of the matter contained therein.").

156. United States v. Zizzo, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997) ("Based on the common law principle that no individual should be able to bind the sovereign, we generally decline to apply Rule 801(d)(2) to statements made by government employees in criminal cases."); see also United States v. Booker, 375 F. App'x 225, 230 (3d Cir. 2010) ("Several courts, including ours, have held that..."
Seventh Circuit broadly follows the common-law rule that out-of-court statements by a government official are not admissible as statements by a party-opponent.\textsuperscript{157}

On the merits, there is a strong case for allowing parties to use at least some statements of government agents against the government. A fair line may be drawn between “sworn statements submitted to a judicial officer,” which should be admissible, versus “those that are not submitted to a court,” which should not be.\textsuperscript{158} A similar line may separate an agent’s stray out-of-court remarks from an agent’s statements that are relied on—and used by—the government in litigation.\textsuperscript{159} The reason supporting these distinctions is straightforward: “The government cannot indicate to one federal court that certain statements are trustworthy and accurate, and then argue to a jury in another federal court that those same assertions are hearsay.”\textsuperscript{160}

Allowing the opponent to use some “litigation-related” statements against the government would help level the playing field. Currently, in some circuits, the government may use every statement its opponent makes, while the opponent may not admit any statements by government officials.\textsuperscript{161} Even the Second Circuit in the Santos case noted the unfairness of allowing the government to admit the defendant’s statements—and the statements of all agents or employees of the defendant—while prohibiting the defendant from using the statements of government officials.\textsuperscript{162}

It also must be remembered that, “[l]ike a corporation, the government speaks and acts only through its agents.”\textsuperscript{163} If litigation-related statements made by government officials or agents cannot be admitted as substantive evidence, then the factfinder is deprived of the information. That result is especially harsh where the statement is itself litigation-generated. It is better to provide the factfinder with such statements, allow the government to explain them away or

\textsuperscript{157.} Zizzo, 120 F.3d at 1351 n.4.
\textsuperscript{158.} United States v. Yildiz, 355 F.3d 80, 82 (2d Cir. 2004).
\textsuperscript{159.} See Lippay, 996 F.2d at 1499 (“We do not believe that the authors of Rule 801(d)(2)(D) intended statements by informers as a general matter to fall under the rule, given their tenuous relationship with the police officers with whom they work.”); United States v. Morgan, 581 F.3d 933, 938 (D.C. Cir. 1978).
\textsuperscript{160.} Kattar, 840 F.2d at 131.
\textsuperscript{161.} Poulin, supra note 156, at 402–03 (noting that it may be unfair to exclude the government from the ambit of Rule 801(d)(2)(D)).
\textsuperscript{162.} United States v. Santos, 372 F.2d 177, 180 (2d Cir. 1967).
\textsuperscript{163.} Poulin, supra note 156, at 404.
mitigate their harmfulness, and let the factfinder give them the weight they deserve.\textsuperscript{164}

The federal Advisory Committee should amend Rule 801(d)(2)(D) to explicitly remove the per se common-law ban on the admissibility of government agents’ statements. Rule 801(d)(2) should allow the court to admit over a hearsay objection a statement that is offered against an opposing party if the statement:

\begin{quote}
(D) was made by the party’s agent or employee, including government-party agents or employees made in the course of litigation, on a matter within the scope of that relationship and while it existed; . . .
\end{quote}

The added language would show that the common-law rule that government employees’ and agents’ statements never bind the sovereign has been abrogated, and it signals to courts that they should focus on the part of Subsection (D) that asks whether the statement was “on a matter within the scope of that relationship and while it existed.” The Advisory Committee should add a note explaining that statements made in a court proceeding are likely to be covered by the amended rule, while certain statements made in the course of a criminal investigation—including statements made to curry favor, such as, “We know you were not involved”—are almost certainly not admissible.\textsuperscript{165} This sort of detail would be unwieldy in the rule itself, but would provide useful guidance to lawyers and judges.

\textbf{D. Rule 803(3): State of Mind Statements Offered to Prove the Conduct of Non-Declarants}

A statement about a declarant’s own state of mind is admissible to prove the declarant’s state of mind.\textsuperscript{166} For example, a statement such as, “I plan to go to lunch today,” is admissible to prove the speaker’s intent to go to lunch today. It also allows an inference that the speaker followed through on those plans and went to lunch, on the ground that a person’s state of mind is probative of conduct consistent with that state of mind.\textsuperscript{167} The policy for admitting state

\begin{quotation}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} Graham, supra note 143.
\textsuperscript{166} \textit{Fed. R. Evid. 803(3)} ("The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . 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.”).
\textsuperscript{167} Mut. Life Ins. Co. of N.Y. v. Hillmon, 145 U.S. 285, 295–97 (1892) (maintaining that a statement of intent is admissible to show that the declarant acted in accordance with the intent)."
\end{quotation}
of mind hearsay statements is that declarants have a unique perspective into their own states of mind.\textsuperscript{168} And because the state of mind must be “then-existing,” there are allegedly fewer problems with misperception or misremembering.\textsuperscript{169} Those policies make sense when declarants are describing their own mental states because they know their own current feelings and plans.

But what if a declarant purports to describe someone else’s state of mind? In other words, if a declarant says, “I plan to go to lunch today with John Doe,” that is certainly admissible to help prove that the declarant went to lunch. The issue splitting the courts is whether that statement is also admissible to prove the conduct of John Doe, the non-declarant.\textsuperscript{170} The statement “I am going to lunch today with John Doe” is two statements in one. One is “I have an intent to go,” and the other is “John Doe has an intent to be there.”

The question of admitting a declarant’s state of mind to prove the conduct of another declarant arose in the famous 1892 case \textit{Mutual Life Insurance Co. of New York v. Hillmon}.\textsuperscript{171} Mrs. Hillmon brought suit against various insurance companies alleging that her husband, Mr. John W. Hillmon, had died.\textsuperscript{172} The insurance companies asserted that “in reality he was alive and in hiding,” and that the body discovered was not Mr. Hillmon’s, but instead that of Frederick Adolph Walters.\textsuperscript{173} Mr. Walters had sent letters to his family stating things such as, “I expect to leave Wichita on or about March the 5th with a certain Mr. Hillmon, a sheep trader, for Colorado, or parts unknown to me.”\textsuperscript{174} The Supreme Court posited that Mr. Walters’ statement that he and Mr. Hillmon both planned to travel to a location was admissible to show that Hillmon likely traveled with Walters to that location:\textsuperscript{175}

\begin{itemize}
\item \textsuperscript{168} \textit{FED. R. EVID. 803(3)} advisory committee’s note to proposed rules.
\item \textsuperscript{169} \textit{FED. R. EVID. 803(3)}; see also \textit{FED. R. EVID. 803} advisory committee’s note to proposed rules (explaining that, for present sense impression under Rule 803(1), the “substantial contemporaneity of event and statement negative the likelihood of . . . conscious misrepresentation” and then recognizing that the state of mind statement under Rule 803(3) “is essentially a specialized application of [the present sense impression]”).
\item \textsuperscript{170} Compare United States v. Delvecchio, 816 F.2d 859, 863 (2d Cir. 1987) (holding a “declarant’s statement of intent may also be admitted against a non-declarant when there is independent evidence which connects the declarant’s statement with the non-declarant’s activities”), with United States v. Houlihan, 871 F. Supp. 1495, 1499, 1501 (D. Mass. 1994) (holding a declarant’s statement of intent may be admitted against a non-declarant without supporting evidence to connect the declarant’s statement with the non-declarant’s activities).
\item \textsuperscript{171} \textit{Hillmon}, 145 U.S. 285.
\item \textsuperscript{172} \textit{Id.} at 285.
\item \textsuperscript{173} \textit{Id.} at 286.
\item \textsuperscript{174} \textit{Id.} at 288.
\item \textsuperscript{175} \textit{Id.} at 296.
\end{itemize}
The letters in question were competent ... as evidence that, shortly before the time when other evidence tended to show that [the declarant Walters] went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention.\textsuperscript{176}

In other words, Walters' statements were admissible not only to prove that Walters went to a location, but also to prove that Hillmon went to that location with Walters.\textsuperscript{177}

Nearly 100 years after \textit{Hillmon}, Rule 803(3) codified the state of mind exception, and the Advisory Committee wrote, "The rule of \textit{Mutual Life Ins. Co. v. Hillmon}, allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed."\textsuperscript{178} But does the "rule of \textit{Hillmon}" include the Court's belief that Walters' statement was admissible to prove that both he and Hillmon went to the same location?\textsuperscript{179} Or is the rule of \textit{Hillmon} simply that Walters' statement is admissible to prove that he alone had that plan and followed through on it?\textsuperscript{180} The report of the House Judiciary Committee expressed the view the former was too broad: "the Committee intends that [Rule 803(3)] be construed to limit the

\begin{itemize}
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.} at 294–95 ("The evidence that Walters was at Wichita on or before March 5th, and had not been heard from since, together with the evidence to identify as his the body found at Crooked creek on March 18th, tended to show that he went from Wichita to Crooked creek between those dates. Evidence that just before March 5th he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked creek with Hillmon. Letters from him to his family and his betrothed were the natural, if not the only attainable, evidence of his intention.").
  \item \textsuperscript{178} \textit{FED. R. EVID.} 803(3) advisory committee's note to proposed rules (citation omitted).
  \item \textsuperscript{179} The Ninth Circuit has read the Committee Note as adopting \textit{Hillmon} in "full force." \textit{United States v. Pheaster}, 544 F.2d 353, 379 (9th Cir. 1976) ("Although the matter is certainly not free from doubt, we read the note of the Advisory Committee as presuming that the \textit{Hillmon} doctrine would be incorporated in full force, including necessarily the application in \textit{Hillmon} itself.").
  \item \textsuperscript{180} The Court's musings on the use of Walters' statement to prove Hillmon's actions are actually dicta because both the plaintiff and the defendant insurance companies agreed that Hillmon made it to Crooked Creek. \textit{See} Lynn McLain, "I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other than the Speaker—And the Role of the Due Process Clause, 32 \textit{CARDozo L. REV.} 373, 384 (2010) ("Under the facts of the case, both parties wanted to show that Hillmon was at Crooked Creek—the insurance company to show that Hillmon had murdered Walters and substituted his body for Hillmon's in an insurance fraud conspiracy, and Mrs. Hillmon to show that the body was Hillmon's—so the point was not one that Mrs. Hillmon would have contested. Justice Gray's statement might be disregarded as dictum on an unbriefed and unargued issue." (footnotes omitted)).
\end{itemize}
doctrine of Mutual Life Insurance Co. v. Hillmon, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person. The language of the rule itself is silent on this matter.182

A circuit split has developed with three separate strands. The First, Third, Fourth, and Tenth Circuits have all adhered to the limitation in the House Report, meaning that a declarant’s statements are not admissible to prove a non-declarant’s intentions. The Ninth Circuit, on the other hand, permits a declarant’s statement to prove the non-declarant’s state of mind and subsequent conduct. Finally, the Second Circuit has adopted a middle approach, allowing a declarant’s statement to be admitted to prove the conduct of a third party, but only when “there was independent evidence that connected the declarant’s statement with the non-declarant’s activities.” For example, a declarant’s statement that he intends to meet someone may be “confirmed by later eyewitness testimony that the meeting actually took place.”

182. Pheaster, 544 F.2d at 379 ("The codification of the state of mind exception in Rule 803(3) does not provide a direct statement of the Hillmon doctrine.").
184. United States v. Joe, 8 F.3d 1488, 1493 n.4 (10th Cir. 1993) ("Rule 803(3), however, applies only to a statement of the declarant’s state of mind. An out-of-court statement relating a third party’s state of mind falls outside the scope of the hearsay exception because such a statement necessarily is one of memory or belief." (citation omitted)); Jenkins, 579 F.2d at 843 (“Approving the Rule in its submitted form, the Congress directed only that it be construed to confine the doctrine in Hillmon so that statements of intent by a declarant would be admissible only to prove the declarant’s future conduct, not the future conduct of others.”); Gual Morales v. Hernandez Vega, 579 F.2d 677, 680 n.2 (1st Cir. 1978) (“[T]he statements that this lawyer, who is not a party to this action, is claimed to have made concerning his intention of seeing defendant Arroyo would not be admissible against Arroyo.”); Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 533 (3d Cir. 1976) (explaining that a declarant’s statement was admissible to show the declarant’s state of mind, but “[t]he preferred course would have been to give a limiting instruction that [the declarant’s] statement was not admissible to show the participation of [others] in the conspiracy”), overruled on other grounds by Croker v. Boeing Co. (Vertol Div.), 662 F.2d 975 (3d Cir. 1981).
185. Pheaster, 544 F.2d at 375 (holding that a declarant’s statements were “relevant and admissible to show that, as intended, [the declarant] did meet Inciso in the parking lot at Sambo’s North on the evening of June 1, 1974,” in a trial before the Rules were enacted); United States v. Astorga-Torres, 682 F.2d 1331, 1336 (9th Cir. 1982) (permitting a statement that the declarant intended to bring others with him subject to a limiting instruction).
187. United States v. Delvecchio, 816 F.2d 859, 863 (2d Cir. 1987) (holding the statement inadmissible because “there was no independent evidence of Delvecchio’s presence at the May 11 meeting”); see also Best, 219 F.3d at 199.
On the merits, the state of mind exception should not cover the state of mind and conduct of a non-declarant. The foundation for admissibility under Rule 803(3) is that declarants have unique perceptions of their own states of mind. But declarants do not have any special insight into the thoughts and plans of others. In addition, the fact that most circuits are already reaching this result—excluding statements about the states of mind of others—means that clarifying the rule will not substantially disrupt litigation.

The rule currently provides that a state of mind statement does not include “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.” A second exception could be added to provide that this rule does not include “a statement offered to prove the state of mind or conduct of someone other than the declarant.” In full, the amended rule would provide that the following is not excluded by the hearsay rule:

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:

(A) 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); or

(B) a statement offered to prove the state of mind or conduct of someone other than the declarant.

The Advisory Committee Note should clearly and unequivocally repudiate the expanded version of state of mind offered in Hillmon.

E. Rule 803(4): Statements by Children Regarding Abuse in the Home

Rule 803(4) provides a hearsay exception for statements made for medical diagnosis or treatment. The policy supporting this hearsay exception is that patients are likely to provide truthful and accurate information to medical professionals in order to receive appropriate diagnoses and effective treatments, thus making this hearsay more

(permitting corroboration by “eyewitness observations” or other “circumstantial evidence”).

188. See supra notes 184–87 and accompanying text.
189. Fed. R. Evid. 803(3).
190. Fed. R. Evid. 803(4) (“A statement that: (A) is made for—and reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause” is admissible, “regardless of whether the declarant is available as a witness.”).
reliable than most other out-of-court statements. Another important guarantee is that the exception requires the statement to be "pertinent" to medical diagnosis or treatment; if it is pertinent to a doctor, in the sense that the doctor would rely on it to diagnose and treat patients, then it is likely to be reliable. In other words, if it is reliable enough for medical work, it is reliable enough for trial work.

The declarant's statements may include the "general cause" of the symptoms, but statements of fault were not intended by the drafters to be admissible. According to the Advisory Committee, "a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light." This is because the medical professional needs to know that the patient has been involved in a car accident in order to properly treat the patient's wounds, but the doctor does not need to know whose fault the accident was for that treatment. In the language of the rule, the general cause of the injury (the automobile accident) is "reasonably pertinent" to diagnosis and treatment of injuries, but the responsibility for the injury (the other person running the red light) is not.

191. United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985) ("[I]t is assumed that a patient has a strong motive to speak truthfully and accurately because the treatment or diagnosis will depend in part upon the information conveyed. The declarant's motive thus provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay rule."); see also Robert P. Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N.C. L. REV. 257, 257 (1989) ("Statements made to a physician for the purpose of receiving medical treatment have long been received under an exception to the rule that excludes hearsay. The theory of the exception in its archetypal form is straightforward: a patient's selfish interest in receiving appropriate treatment guarantees the trustworthiness of the statement. In this archetypal form, the exception is among the most solidly founded within the hearsay rules.").

192. FED. R. EVID. 803(4).

193. United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980) ("This [hearsay exception] recognizes that life and death decisions are made by physicians in reliance on such [statements] and as such [they] should have sufficient trustworthiness to be admissible in a court of law.").

194. FED. R. EVID. 803(4) advisory committee's note to proposed rules ("Statements as to fault would not ordinarily qualify under this latter language.").

195. Id.

196. E.g., Renville, 779 F.2d at 436 ("Statements of identity seldom are made to promote effective treatment; the patient has no sincere desire to frankly account for fault because it is generally irrelevant to an anticipated course of treatment. Additionally, physicians rarely have any reason to rely on statements of identity in treating or diagnosing a patient. These statements are simply irrelevant in the calculus in devising a program of effective treatment.").
Despite the exclusion of blame statements, courts routinely admit accusatory statements of children who report acts of abuse by members of their family or household.\textsuperscript{197} In these cases, knowing the identity of the abuser is key not only to treatment of the child’s present condition, including any “emotional and psychological injuries,”\textsuperscript{198} but also to properly protecting the child from future harm.\textsuperscript{199} Protection may demand that the child be removed from the abuser’s household.\textsuperscript{200} In sum, although the rule seems to disallow identity statements, courts routinely admit identity statements in child abuse cases.\textsuperscript{201}

The courts, however, divide over what foundation is necessary to admit the blame statement.\textsuperscript{202} The Eighth Circuit permits admission of a child’s statement attributing fault only “where the physician makes clear to the victim that the inquiry into the identity of the abuser is important to diagnosis and treatment, and the victim manifests such an understanding.”\textsuperscript{203} In other words, “it must be shown that the child understands the medical significance of being truthful, i.e., the role of the medical health professional in trying to help or heal her, which triggers the motivation to be truthful.”\textsuperscript{204} The Tenth Circuit is mostly in accord, but puts the burden on the defendant to show that the child did not understand that he or she

\textsuperscript{197} Mosteller, supra note 191, at 275 (“Most courts that have recently examined the issue have found that unlike statements of fault, which are generally excluded from the exception, statements of identification are admissible because of the special character of diagnosis and treatment issues in child sexual abuse cases.”); see, e.g., Danaipour v. McLarey, 386 F.3d 289, 297 (1st Cir. 2004) (“Statements by young children amounting to disclosure to treating therapists that they have been abused by a member of their family are reasonably pertinent to treatment of the child.”); United States v. Pacheco, 154 F.3d 1236, 1241 (10th Cir. 1998) (“A child’s statement to a physician identifying the person who caused the injuries is admissible under Rule 803(4) if the alleged abuser was a member of the victim’s family or household.”).

\textsuperscript{198} Renville, 779 F.2d at 437.

\textsuperscript{199} Id. at 436 (“Statements by a child abuse victim to a physician during an examination that the abuser is a member of the victim’s immediate household are reasonably pertinent to treatment.” (emphasis omitted)).

\textsuperscript{200} Id. at 438.

\textsuperscript{201} Id. at 436.

\textsuperscript{202} See cases cited infra notes 203–07.

\textsuperscript{203} Renville, 779 F.2d at 438; see also United States v. Sumner, 204 F.3d 1182, 1185 (8th Cir. 2000) (“Although Dr. Zitzow explained that he was a doctor, he did not discuss with [the child victim] the need for truthful revelations or emphasize that the identification of the abuser was important to Dr. Zitzow’s attempts to help her overcome any emotional trauma resulting from the abuse to which she had been subjected.”); Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988) (citing Renville with approval).

\textsuperscript{204} Sumner, 204 F.3d at 1185 (internal quotations omitted).
was being treated and needed to be truthful.\textsuperscript{205} In contrast to the Eighth and Tenth Circuits, most circuits admit the blame statements without any heightened foundation requirements.\textsuperscript{206} In the Ninth Circuit, for example, a more relaxed foundation is permissible: it is sufficient that the child-victim “understood that the [medical professional] was seeking information for purposes of diagnosis or treatment” and “made the statements in response to questions posed by a medical professional during a medical examination conducted at a medical facility.”\textsuperscript{207} These are requirements that are inherent in the exception itself.

On the merits, Rule 803(4) should be amended to explicitly permit the admission of identity evidence in child abuse cases; this is what most courts are doing anyway, and it will clear up any possibility for mistakes if the text of the rule conforms to widely accepted practice. It is never ideal to have the courts construe rule language differently from the rule actually says—and if the courts that are doing so are reaching the right results, then it is time for the rule to change.\textsuperscript{208} And this result is right because medical personnel have the obligation not only to treat the child-victim’s physical injuries but also to assure that the injuries will not happen again.

As for foundation, it is sufficient that the regular foundational requirements of Rule 803(4) are met—that the declarant made the statements for medical diagnosis or treatment and that the statements are reasonably pertinent to those needs.\textsuperscript{209} Adding complicated structure and heightened requirements is bound to lead to confusion and misapplication, and the hearsay exception itself already requires a strong showing of trustworthiness, particularly

\textsuperscript{205} United States v. Pacheco, 154 F.3d 1236, 1241 (10th Cir. 1998) (The defendant “has not pointed to any actual evidence indicating that [the child victim] did not understand that she was being examined by doctors and needed to be truthful in her discussions with them.”).

\textsuperscript{206} E.g., United States v. Kootswatewa, 893 F.3d 1127, 1133 (9th Cir. 2018) (“An adequate foundation may be laid under Rule 803(4) by introducing objective evidence of the context in which the statements were made. That evidence can include testimony provided by the medical professional who conducted the examination.” (citation omitted)); Danaipour v. McLary, 386 F.3d 289, 297 n.1 (1st Cir. 2004) (rejecting, explicitly, the Eighth Circuit’s foundation requirements); United States v. Edward J., 224 F.3d 1216, 1219 (10th Cir. 2000) (rejecting, also explicitly, the Eighth Circuit’s foundation requirements); United States v. Kappell, 418 F.3d 550, 557 (6th Cir. 2005) (requiring “sufficient indicia that the statements were made for the purpose of medical diagnosis or treatment” and focusing on whether the child victim realized “the importance of telling the truth”); see also United States v. Wandahsega, 924 F.3d 868, 881 (6th Cir. 2019) (noting that the Sixth Circuit has not adopted the Eighth Circuit’s test).

\textsuperscript{207} Kootswatewa, 893 F.3d at 1133.


\textsuperscript{209} FED. R. EVID. 803(4)(A).
Because an amendment to Rule 803(4) is relatively straightforward, we offer one here that codifies the current practice of admitting identification statements in child abuse cases and leaves to a committee note an explanation of the necessary foundation. Rule 803(4) should be amended to provide that the following is not excluded by the hearsay rule:

(4) A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and

(C) identifies the perpetrator if the case involves child abuse.

The notes should clarify that the foundation required in child abuse cases is the same as required for other medical statements—sufficient evidence that the statement was made for and reasonably pertinent to diagnosis or treatment.²¹⁰

F. Rule 804(b)(1): Former Testimony

Rule 804(b)(1) provides that former testimony “at a trial, hearing, or lawful deposition” by a now-unavailable declarant is admissible if it is “offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.”²¹¹ The rationale behind this rule is that this testimony is reliable because it has already been subjected to the oath requirement and adversarial testing, albeit not in front of the current factfinder.²¹²

Two circuit splits have developed over the application of Rule 804(b)(1). The first involves who counts as a “predecessor in interest” in civil cases. The second concerns whether a defendant in a criminal case may offer exculpatory grand jury testimony against the government.

1. Rule 804(b)(1) and the Meaning of Predecessor in Interest

Rule 804(b)(1) provides a hearsay exception for prior testimony, and in civil cases the exception covers testimony that was developed by a “predecessor in interest” of the opponent, so long as the predecessor in interest had a similar motive to develop the testimony.

²¹⁰ Fed. R. Evid. 803(4).
²¹¹ Fed. R. Evid. 804(b)(1).
²¹² Fed. R. Evid. 804(b)(1) advisory committee’s note on proposed rules (“[B]oth oath and opportunity to cross-examine were present in fact.”).
as the opponent would have if the declarant were now to testify.\(^{213}\) A conflict has arisen in the cases regarding the phrase “predecessor in interest” and whether that test requires privity.\(^{214}\) This is important where the testimony is developed in the previous proceeding by one party but is admitted at a subsequent trial against another party. The phrase “predecessor in interest” is not defined in the Rules of Evidence. Indeed, “predecessor in interest” did not originally appear in the Rules (only language that the prior party have a similar “motive and interest”).\(^{215}\) The House Judiciary Committee inserted the “predecessor in interest” language, explaining that “[t]he Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party.”\(^{216}\) The Senate Judiciary Committee concluded that this change was not very significant and accepted the House amendment.\(^{217}\) Thus, the rule uses the predecessor in interest language for civil cases, and also requires a “similar motive” to develop the testimony.\(^{218}\) The Committee Note says that “strict identity, or privity” is not required to meet the predecessor in interest language.\(^{219}\)

Thus far, perhaps guided by the note language, “every federal Court of Appeals to address the issue head-on has determined that the term ‘predecessor in interest’ does not invoke the common law concept of privity.”\(^{220}\) To determine whether one party is a predecessor in interest for purposes of the former testimony rule, courts consider whether there are distinctions between the cases that


\(^{215}\) *See* H.R. REP. No. 93–650, at 15 (1973), *as reprinted in* 1974*U.S.C.C.A.N.* 7075, 7088 (“Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person ‘with motive and interest similar’ to his had an opportunity to examine the witness.”).

\(^{216}\) *Id.*


\(^{218}\) *Fed. R. Evid.* 804(b)(1)(B).

\(^{219}\) *See* *Fed. R. Evid.* 804(b)(1) advisory committee’s note to proposed rules (“The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest.”).

\(^{220}\) Volland-Golden v. City of Chicago, 89 F. Supp. 3d 983, 987–88 (N.D. Ill. 2015) (emphases omitted) (citing cases from the Third, Fourth, and Sixth Circuits). *But see* Dartez v. Fibreboard Corp., 765 F.2d 456, 462 (5th Cir. 1985) (declining to decide whether to follow a broad definition of predecessor in interest and focusing on the residual exception).
would make the parties’ motives different;\textsuperscript{221} or, to put the test more positively, courts consider whether there is “a sufficient community of interest” regarding the testimony between the prior party and the current party against whom the hearsay testimony is offered.\textsuperscript{222} The justification for admitting the evidence, even if the parties do not have a strict privity relationship, is that if the parties’ interests are similar and the party in the earlier case thoroughly addressed the testimony or had the opportunity to do so, then the testimony is sufficiently reliable to be admitted against the new party—especially given the alternative, which is no testimony at all given the declarant’s (required) unavailability.\textsuperscript{223}

Despite the relative uniformity at the circuit court level, a few district courts have interpreted “predecessor in interest” to mean something close to the stricter concept of common-law privity, at least in part because the House Judiciary Committee added the predecessor in interest language to make the test regarding a similar “motive and interest” harder to meet.\textsuperscript{224} For example, in \textit{In re IBM Peripheral EDP Devices Antitrust Litigation}, the Northern District of California, focusing on the House Judiciary Report, posited that

\textit{[t]he term ‘predecessor in interest’ was apparently used in its old, narrow, substantive law sense. It could not have been used...}

\textsuperscript{221} \textit{See, e.g., Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 128 (4th Cir. 1995); Clay v. Johns-Manville Sales Corp., 722 F.2d 1289, 1295 (6th Cir. 1983) (adopting a “practical...view” that is not “formalistically grudging,” and looking at whether the party in the former suit had a “like motive to cross-examine about the same matters as the present party would have.” (quoting Lloyd v. Am. Export Lines, Inc., 580 F.2d 1179, 1187 (3d Cir. 1978))); Rule v. Int’l Ass’n of Bridge, Structural & Ornamental Ironworkers, Loc. Union No. 396, 568 F.2d 558, 569 (8th Cir. 1977) (requiring a “substantial identity of issues and parties”); see also Volland-Golden, 89 F. Supp. 3d at 987 (“The question must be whether the two parties had roughly commensurate stakes in the outcome of their respective proceedings.”).}

\textsuperscript{222} \textit{Id. at 1187 (“If it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party.” (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 256, at 619–20 (2d ed. 1972))}. Indeed, it is possible that if the prior party did not actually develop the testimony, but instead merely had the opportunity, then the prior party’s “motive” was not sufficiently similar to the current party’s to be able to use the former testimony exception.

\textsuperscript{223} \textit{See In re Screws Antitrust Litig., 526 F. Supp. 1316, 1318–19 (D. Mass 1981); Lightsey v. John Crane, Inc., No. 1:02-CV-03391-ODE, 2005 WL 8156547, at *3 (N.D. Ga. Sept. 2, 2005) (“The Advisory Committee Note to Rule 804(b)(1) squarely rejects the position that a similar interest and motive in cross-examination is sufficient for admissibility,” and thus “this Court is inclined to give the term ‘predecessor in interest’ its common definition.”).}
in an evidentiary sense, where probative force would be its rationale, since it would then be equivalent to ‘those having a similar motive and opportunity to develop the testimony’ a concept rejected by Congress.\textsuperscript{225}

This development by some district courts is disconcerting because most evidence issues are won or lost at trial, given the nearly insurmountable standard of review.\textsuperscript{226} Even though the circuits that have decided the point have found that predecessor in interest does not require a privity relationship,\textsuperscript{227} the appearance of contrary district court decisions shows that it is time to amend the rule.\textsuperscript{228} The \textit{IBM} court is correct that the expansive interpretation of “predecessor in interest” does end up reducing the admissibility requirement to a “similar motive and opportunity.” But that is the correct result, given the adversarial testing by a party with a similar motive to develop the testimony; and given the fact that the declarant is unavailable, the contrary result would mean no information at all coming from that declarant.\textsuperscript{229}

But there are some hurdles to amending Rule 804(b)(1). \textit{First}, amending Rule 804(b)(1) to clarify that predecessor in interest should be interpreted broadly (as the circuits are already doing) would require tinkering with language added by the House Judiciary Committee. “The practice of the Evidence Advisory Committee has been to err on the side of deference to Congress,” and thus not generally to change rules substantially created or revised by Congress

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\textsuperscript{225} 444 F. Supp. 110, 113 (N.D. Ca. 1978) (quoting \textsc{Jack B. Weinstein} & \textsc{Margaret A. Berger}, \textsc{Weinstein’s Evidence} § 804(b)(1)[04], at 804–65 (1976)).


\textsuperscript{227} See, \textit{e.g.}, \textit{Lloyd}, 580 F.2d at 1179.

\textsuperscript{228} See, \textit{e.g.}, \textit{In re IBM Peripheral EDP Devices Antitrust Litig.}, 444 F. Supp. at 113.

\textsuperscript{229} See \textit{Lloyd}, 580 F.2d at 1191 (Stern, J., concurring) (explaining that the broad view of “predecessor in interest” reduces the rule to requiring only a similar motive in civil cases). We note that the broad rule of “predecessor in interest” adopted by most courts, and espoused here, is not applicable in criminal cases. The rule language itself limits “predecessor in interest” admissibility in civil cases. Moreover, allowing prior testimony against a criminal defendant, on the ground that it was cross-examined by a different criminal defendant, would undoubtedly violate the Confrontation Clause. See \textit{generally} Crawford v. Washington, 541 U.S. 36 (2004) (declaring that if a hearsay statement is testimonial, there is no substitute for the accused’s personal right to cross-examine the declarant).
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rather than the Advisory Committee. Second, courts are generally getting it right, thus lessening the need to speak on this subject. At least at the circuit level, courts routinely (and correctly in our view) hold that “predecessor in interest” is a broader concept than parties in privity. Finally, the amendment itself would likely be complicated (as will be seen below), and there are some transaction costs to changing a rule’s language, particularly when the amended language is not self-explanatory. That is, if the rule is amended, it might need some additional qualifiers—such as the prior party’s development must have been at least as adequate as the new party’s development would have been (as a new party should not be saddled with ineffective development merely because the two parties had similar motives). The imprecision of what constitutes “effective” will surely invite more litigation—thus reducing any efficiency gains promoted by amending the rule to eliminate the confusion over “predecessor in interest.”

Despite these drawbacks, there is utility in amending Rule 804(b)(1) to ensure that (1) “predecessor in interest” is not equated with privity and (2) the previous party’s development of the testimony was adequate. Without this clarification, a lawyer not versed in evidence law may, in a civil case, forego the opportunity to offer prior testimony that was developed by a non-party. And district courts in jurisdictions without controlling circuit precedent might continue to construe the rule too narrowly.

The amendment should allow the following to be admitted when the declarant is unavailable:

Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party:

(i) who had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination; or

(ii) who, in a civil case, has a similar motive to develop the testimony as that of a party who did develop it effectively, by direct, cross-, or redirect examination.

The amendment omits the troubling predecessor in interest language so that lower courts do not mistakenly import privity or

230. Capra & Richter, supra note 8, at 1903 (citing examples from the meeting minutes).

231. See, e.g., Lloyd, 580 F.2d at 1187.
privity-like requirements. The amendment also separates in Section (B)(i) the general case (where the opponent remains the same in the two cases) from Section (B)(ii)'s civil case where another party’s development of testimony might bind a current party. Section (B)(ii) clarifies that if the testimony is offered in a civil case against someone who was not a party in the original suit, the previous development of the testimony must have been sufficiently effective before it binds the new party. That adverb “effectively” appears in (B)(ii) but not in (B)(i) because of the nonmutuality of the parties and the fear that a new party might be burdened with poor lawyering by the prior party’s attorney. As always, further exploration and clarification can be had in the Committee Notes.

2. Rule 804(b)(1) and Exculpatory Grand Jury Testimony Offered by the Defendant Against the Government

As stated above, Rule 804(b)(1) provides a hearsay exception for certain former testimony by an unavailable declarant that is now offered against “a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination.” In a criminal case, grand jury testimony is not admissible against the accused under this exception because the prosecutor calls witnesses; the defendant is not present and so, of course, has no opportunity to develop the testimony. But occasionally a prosecutor calls a witness before the grand jury, and the witness—likely to the prosecutor’s surprise—provides testimony beneficial to the defendant. At trial, if that witness is unavailable (perhaps by invoking the Fifth Amendment privilege against self-incrimination), the defendant may wish to offer the grand jury testimony under Rule 804(b)(1) because although the defendant had no opportunity to develop the testimony, the prosecutor did.

The conflict that has arisen in this scenario is whether a prosecutor has a “similar motive to develop” the witness’s testimony at a grand jury proceeding as at a trial. Because a grand jury indictment requires only probable cause, while a guilty verdict requires proof beyond a reasonable doubt, some courts—such as the First and Second Circuits—have held that exculpatory grand jury testimony is generally inadmissible under Rule 804(b)(1). As

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233. See cases cited infra note 236; see also United States v. McFall, 558 F.3d 951, 953 (9th Cir. 2009).
234. The Rule 804 exceptions require unavailability, which is defined in Rule 804(a). See FED. R. EVID. 804(a)(1)–(5).
235. FED. R. EVID. 804(b)(1)(B).
236. See generally United States v. Omar, 104 F.3d 519, 523–24 (1st Cir. 1997); United States v. DiNapoli, 8 F.3d 909, 912 (2d Cir. 1993) (en banc) (“We do not accept the position, apparently urged by the appellants, that the test of similar motive is simply whether at the two proceedings the questioner takes the
explained by the Second Circuit, sitting en banc: “because of the low burden of proof at the grand jury stage, even the prosecutor’s status as an ‘opponent’ of the testimony does not necessarily create a motive to challenge the testimony that is similar to the motive at trial.”237 In addition, the court was concerned that, while still in the grand jury investigatory phase, there may be “an important public interest in not disclosing prematurely [through questioning the witness] the existence of surveillance techniques such as wiretaps or undercover operations, or the identity of cooperating witnesses.”238 The en banc court summed up its position as follows:

The proper approach, therefore, in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.239

The First Circuit has similarly noted that the prosecution ordinarily does not have a similar motive to develop testimony before the grand jury as it would have at trial, but that court looks at the “specific portion of the testimony at issue,” rather than the overall positions of the parties.240 The First Circuit has explained its position this way:

Often, the government neither aims to discredit the witness nor to vouch for him. The prosecutor may want to secure a small piece of evidence as part of an ongoing investigation or to compel an answer by an unwilling witness or to “freeze” the position of an adverse witness. In particular, discrediting a grand jury witness is rarely essential, because the government has a modest burden of proof, selects its own witnesses, and can usually call more of them at its leisure.241

Thus, at least two circuits generally disallow exculpatory grand jury testimony when offered by the defendant because the same side of the same issue. The test must turn not only on whether the questioner is on the same side of the same issue at both proceedings, but also on whether the questioner had a substantially similar interest in asserting that side of the issue.”)

237. DiNapoli, 8 F.3d at 913 (emphasis omitted).
238. Id.
239. Id. at 914–15 (emphasis added).
240. Omar, 104 F.3d at 523.
241. Id.
government does not have the same intensity of interest in attacking grand jury testimony that favors the defendant as it does in attacking trial testimony that favors the defendant.\textsuperscript{242}

On the other side of the issue, some courts hold that the “similar motive” requirement is met because the prosecution is on the same side of the issues both before the grand jury and at trial,\textsuperscript{243} and the prosecution’s motive remains the same—determining the guilt of the defendant.\textsuperscript{244} These courts acknowledge that the prosecution’s motive in questioning exculpatory witnesses before the grand jury is “likely not as intense as it would have been at trial,”\textsuperscript{245} but nonetheless find the “similar motive” requirement met.\textsuperscript{246} After all, similar does not mean identical. The Ninth Circuit explained that motives should be assessed “at a high level of generality,” not a “fine-grained level of particularity.”\textsuperscript{247} The rule requires a similar motive, not a similar intensity.\textsuperscript{248}

Amending Rule 804(b)(1) to resolve the conflict poses problems. \textit{First}, the cases are quite fact bound and, at least if the Advisory Committee chooses to permit admission of exculpatory grand jury testimony, the defendant had ample incentive to develop testimony that would incriminate [the defendant].

\textsuperscript{242} See DiNapoli, 8 F.3d at 913; Omar, 104 F.3d at 523.

\textsuperscript{243} See United States v. Foster, 128 F.3d 949, 956 (6th Cir. 1997) (holding the lower court abused its discretion in excluding the exculpatory grand jury testimony); United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990) (“[A]s several circuits have recognized, the government had the same motive and opportunity to question [the witness] when it brought him before the grand jury as it does at trial.”); United States v. Young Bros., Inc., 728 F.2d 682, 691 (5th Cir. 1984) (noting no concerns with admission because “[t]he party against whom the testimony was being offered at trial, the government, had an opportunity to question the witnesses fully during the grand jury hearing”); United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984); United States v. Klauber, 611 F.2d 512, 516–17 (4th Cir. 1979); cf. United States v. Hargrove, 382 F. App’x 765, 779–80 (10th Cir. 2010) (admitting testimony from a state-court preliminary hearing because the defendant—the party against whom the testimony was admitted—had a similar motive “given that he was facing the same charge, capital murder, involving the same victims” and acknowledging the fact that the defendant did not as thoroughly cross-examine during the preliminary hearing so as to not “tip[] his hand” (alteration in original) (citations omitted)).

\textsuperscript{244} Miller, 904 F.2d at 68 (“Before the grand jury and at trial, [the witness’s] testimony was to be directed to the same issue—the guilt or innocence of [the defendant].”).

\textsuperscript{245} United States v. McFall, 558 F.3d 951, 963 (9th Cir. 2009).

\textsuperscript{246} Id.

\textsuperscript{247} Id. at 962.

\textsuperscript{248} Id. at 963 (“On balance, we agree with the D.C. Circuit’s elaboration of the ‘similar motive’ test and conclude that the government’s fundamental objective in questioning [the declarant] before the grand jury was to draw out testimony that would support its theory that [the defendant] conspired with [the declarant] to commit extortion—the same motive it possessed at trial. The motive may not have been as intense before the grand jury, but Rule 804(b)(1) does not require an identical quantum of motivation . . . . [The] prosecutors [had] ample incentive to develop testimony that would incriminate [the defendant].”).
testimony, the Committee will need to craft language allowing for appropriate flexibility. The Committee Note could acknowledge that an inquiry into admissibility should include reasons why impeachment may not have been pursued during the grand jury testimony, such as when doing so might jeopardize ongoing investigations. Leaving these factors to a note would allow different courts to use and weigh the factors differently. But language like “intensity of interest” may also invite more litigation and interpretive difficulties. It is surely possible that setting forth flexible standards will result in the courts eventually dividing along the same line as they already do.

Second, in 2010, the Advisory Committee considered addressing the admissibility of exculpatory grand jury testimony under Rule 804(b)(1) and decided not to propose an amendment. The Committee concluded that “any attempt to amend the Rule would probably cause more problems than it would solve.” The rule might face significant opposition from the Department of Justice (if exculpatory grand jury testimony were deemed admissible) or from the defense bar (if not). The Advisory Committee expressed hope that the Supreme Court would resolve the conflict since the Court had “previously shown an interest in interpreting Rule 804(b)(1) as it applies to grand jury testimony.” Because the Committee has considered this issue recently, and ultimately took no action, the Committee may not have the appetite to reopen the debate.

Third, although the split has arisen regarding exculpatory grand jury testimony, the question of intensity of interest arises in other

249. Id. at 962-63 (citing United States v. DiNapoli, 8 F.3d 909, 915 (2d Cir. 1993) (en banc) (reviewing three factors for determining whether the prosecution at trial has a similar motive to the prosecution at the grand jury stage: (1) whether the defendants have already been indicted, (2) whether the grand jurors have indicated that they do not believe a grand jury witness, and (3) whether the prosecutor declined to impeach a grand jury witness to avoid disclosing secret evidence).


251. Id. at 8.

252. Id. at 8-9 (“The Committee determined that any attempt to amend the Rule would probably cause more problems than it would solve. The conflict in the cases concerns an important question, but it is a narrow one in the context of Rule 804(b)(1). Any attempt to amend the Rule would also have to take into account the consequences for admissibility of preliminary hearing testimony against the accused. And most importantly, resolving the question of admissibility one way or the other would surely be controversial . . . . Finally, drafting a solution that would cover all the nuances of when exculpatory testimony might fairly be admissible against the government under a ‘similar motive’ test would be extremely difficult.”).

253. Id. at 9. That hope has not been met to date. The Supreme Court has not attempted to rectify this conflict about the applicability of Rule 804(b)(1) to exculpatory grand jury testimony.
areas as well. For example, parties’ motives to develop testimony, particularly their “intensity of interest,” may also differ at preliminary hearings and other sorts of limited proceedings, when compared to trial. Or, to take an example more germane to the civil world, intensity often differs at depositions and trials. Thus, any amendment could carefully limit itself to the current split, or the amendment could more broadly tackle all these limited hearings. Neither solution is ideal; the former is arguably too narrow and will require piecemeal amendments as other similar issues percolate, but the latter has the possibility of unintended consequences and, if specific hearings and proceedings are included, then the exclusion of others might lead courts to believe that they are not included within the new rule language.

Despite these drawbacks in amending the rule, it is appropriate to amend the rule to generally permit a party to use testimony from a limited-purpose proceeding even if the level of “intensity” may differ. The current rule does not require a similar intensity, but rather a similar motive, so the courts focusing on intensity are inappropriately narrowing the exception. The rule should be amended to allow hearsay testimony by an unavailable declarant if it:

was given as a witness at a trial, hearing, grand jury proceeding, or lawful deposition, whether given during the current proceeding or a different one; and

is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

A motive may be “similar” even if the incentive to develop the testimony at the time it was made is less than it would be if the declarant were to testify at trial.

The Committee Note should specify that the conflict in the courts has been resolved in the Ninth Circuit’s favor—and that the possibility of differing intensity can arise in other situations, such as preliminary hearings, with the same result of admitting the statement, so long as the goal of developing the testimony when it was made is similar to the goal that the opponent would have in developing the testimony if the declarant were available. The Committee Note should also specify that there may be situations in which there is no incentive to develop the testimony—because, for example, to do so may undermine a continuing investigation—and in such case the absence of any incentive to develop the testimony should also mean that there is no motive to develop it.

CONCLUSION

The Federal Rules of Evidence themselves are generally the best evidence of what they mean. But over the decades, as trial judges are forced to make quick evidence rulings that are usually upheld under deferential standards of review, more and more circuit splits have emerged and deepened as to the proper meaning and interpretation of some of the Rules of Evidence. We have offered our opinions about the language of the current rules and their policy goals and urged potential amendments to some of the rules. We do not claim to be comprehensive. But we do hope that this project proves useful to students as they realize that despite the apparent clarity of the rules (and, quite frankly, of law more generally), there are often ambiguities; to practitioners, as they marshal arguments for and against the admission of evidence; to judges, as they rule on complex evidentiary issues; to academics, as they consider other areas of law that may interact with the Rules of Evidence or other ways to improve the rules themselves; and, of course, to members of the federal and state advisory committees as they continue to shape the rules of evidence so that proceedings remain fair and just, without causing too much expense or delay.255 These are the Federal Rules of Evidence. We should strive to keep their interpretation uniform.