

2019

Conference on Proposed Amendments: Experts, the Rules of Completeness, and Sequestration of Witnesses

Recommended Citation

Conference on Proposed Amendments: Experts, the Rules of Completeness, and Sequestration of Witnesses, 87 Fordham L. Rev. 1361 (2019).

Available at: <https://ir.lawnet.fordham.edu/flr/vol87/iss4/1>

This Lecture is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE PHILIP D. REED LECTURE SERIES
ADVISORY COMMITTEE ON EVIDENCE RULES
CONFERENCE ON PROPOSED AMENDMENTS:
EXPERTS, THE RULE OF COMPLETENESS,
AND SEQUESTRATION OF WITNESSES*

MODERATOR

Professor Daniel J. Capra

CHAIR OF RULES COMMITTEE

Hon. David G. Campbell

CHAIR OF ADVISORY COMMITTEE

Hon. Debra Ann Livingston

ADVISORY COMMITTEE MEMBERS

Hon. James P. Bassett

Daniel P. Collins, Esq.

Hon. Shelly D. Dick

Traci L. Lovitt, Esq.

Hon. John Thomas Marten

Kathryn N. Nester, Esq.

Hon. Thomas D. Schroeder

Elizabeth J. Shapiro, Esq., Department of Justice

ADVISORY COMMITTEE LIAISONS AND ASSISTANTS

Hon. James C. Dever III

FEDERAL JUDICIAL CENTER REPRESENTATIVES

Timothy Lau, Esq.

Timothy Reagan, Esq.

* This conference was held on October 19, 2018, at University of Denver Sturm College of Law under the sponsorship of the Judicial Conference Advisory Committee on Evidence Rules. The transcript has been lightly edited. It represents the panelists' individual views only and in no way reflects those of their affiliated firms, organizations, law schools, or the judiciary.

PANELISTS

Hon. Philip A. Brimmer
Hon. James O. Browning
Ted R. Hunt, Esq., Department of Justice
Eric G. Lasker, Esq.
Professor Christopher Mueller
Hon. Kathleen M. O'Malley
Paul L. Shechtman, Esq.
Judith A. Smith, Esq.
Aimee H. Wagstaff, Esq.
Rick Williamson, Esq.

JUDGE LIVINGSTON: Thank you all for coming today. We are especially interested in hearing from all of you outstanding experts on the questions that the Advisory Committee is currently considering. And we give great thanks to the University of Denver Sturm College of Law, and to Dean Bruce Smith, for having us here in these lovely surroundings.

Our first order of business today is to discuss possible changes to Federal Rule of Evidence 702, which is the main rule on expert testimony.¹ A Subcommittee on Rule 702, chaired by Judge Schroeder, has done outstanding work in preparing the Advisory Committee for difficult questions regarding forensic expert testimony and the questions of admissibility and weight that are encountered by a court reviewing expert testimony. I would like to call on Judge Schroeder to start us off.

I. TOPIC ONE: RULE 702 AND FORENSIC EVIDENCE

JUDGE SCHROEDER: A subcommittee was constituted to explore some of the considerations that were raised at our previous meetings and has identified three main issues. The first is whether Rule 702 should be amended to regulate forensic expert testimony. The Advisory Committee began addressing that issue at its last symposium, in which scientific experts, judges, practitioners, and academics discussed the recent challenges to the reliability of forensic expert testimony.²

The second issue was whether Rule 702 should be amended to address the perception that a sufficient number of courts are relegating their gatekeeper role to the jury or, more precisely, that they're not discharging the duty to determine admissibility by a preponderance under Rule 104(a)³ but are stating that questions as to experts' opinions only raise issues of weight and

1. See FED. R. EVID. 702 (outlining the requirements an expert witness must meet to be permitted to testify).

2. See generally Symposium, *Forensic Expert Testimony, Daubert, and Rule 702*, 86 FORDHAM L. REV. 1463 (2018).

3. See FED. R. EVID. 104(a).

credibility under the Rule 104(b) standard, and so all challenges go off to the jury.⁴

The third issue was whether there are other non-rule-related efforts like education, best practices, et cetera that would be useful to address the issues that we've been debating. Our reporter, Dan Capra, has prepared extensive materials, now in the agenda book⁵ for our review, and has done an excellent job of trying to organize some of the cases to help us drill down on these. We met three times over the summer by phone, and received some documentary input from the DOJ and the Federal Judicial Center, and, in September, our meeting was devoted to the DOJ's explanation of a case file involving tool mark and firearms experts and how they go through the process along with the kind of statements that they would make from that.

We haven't reached any recommendations yet, and this conference is going to be helpful, I think, for all of us to more deeply consider some of these issues. We have reached some preliminary conclusions in the effort to clear some brush away. One suggestion was that we consider a lengthy Committee note on forensic evidence, which we're recommending against. I think that was the PCAST⁶ that had recommended that.

We considered whether there should be a separate rule for forensic evidence, and I think the concern now is that there couldn't really be a rule that would be sufficiently inclusive yet—to cover all forensic testimony—or sufficiently specific. We also looked at the possibility of preparing a best practices manual on forensic evidence⁷ and, at least at this point, because it largely exceeds our Committee's charter and would be too difficult to do, we would probably recommend against that. So, we focused on two areas, and that's what we're here for today.

While we start with forensics, I am going to mention both issues at this time, because they do relate to each other, I think. The first is the overstatement issue, and, as you can see from the materials, the cases

4. *See, e.g.*, *United States v. Silva*, 889 F.3d 704, 718 (10th Cir. 2018) (finding that “errors in the implementation of otherwise-reliable DNA methodology typically ‘go to the weight that the trier of fact should accord to the evidence and not to its admissibility’” (quoting 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.06[5][b] (2d ed. 2018))); *United States v. Carlson*, 810 F.3d 544, 553 (8th Cir. 2016) (considering defendants' arguments that a Drug Enforcement Administration chemist's methodology was not subject to peer review or publication and that it had no known rate of error as questions of weight, not admissibility); *United States v. Rodriguez*, 581 F.3d 775, 794–95 (8th Cir. 2009) (determining that a timing issue concerning an expert's acid-phosphate test on a victim's body was a question of weight for the jury and not an admissibility question for the judge).

5. *See generally* ADVISORY COMM. ON EVIDENCE RULES, AGENDA OF OCTOBER 19, 2018 (2018), https://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book_0.pdf [<https://perma.cc/CG8B-7QA6>].

6. PCAST refers to the President's Council of Advisors on Science and Technology. *See generally* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFFICE OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [<https://perma.cc/DU9J-VWRS>].

7. *See* ADVISORY COMM. ON EVIDENCE RULES, *supra* note 5, at 30–36, 94, 97.

demonstrate that the courts are permitting experts to overstate their conclusion. Some examples are pretty clear.⁸

Appeals courts have reversed trial courts that excluded an expert's opinion because it was a one in a million chance that it was wrong,⁹ or the expert was permitted to testify that something, in fact, indeed was a match, or offer testimony that the expert was 100 percent sure or certain, or statements, typically, in the fingerprint arena, that, as far as I know, there are not more than fifty erroneous identifications ever made on fingerprints.¹⁰ You know, there's really no basis for that kind of statement.

And then, you have the cases dealing with experts opining to a reasonable degree of medical or ballistics or other scientific certainty,¹¹ and the question is, what does that really mean? That standard is largely meaningless and it's probably an overstatement, to the extent it expresses some kind of certainty.

So, some of the concerns we've identified, and I think we can discuss today, exist because the current circuit law permits many forms of evidence that PCAST has shown to be subject to overstatement, like fingerprints and firearms.¹² Further, the district courts are tending to reject challenges by citing, simply, to the circuit law, without consideration of Rule 702 even though the Rule was changed in 2002,¹³ after the cases relied upon have been decided. And, another concern is, well, what exactly is an overstatement and how would we regulate that? How would we define it to regulate it? We've obviously concluded that prohibiting overstatement is an important area to focus on, but a forensic-only rule appears to be too narrow.

And so, a concern is, what effect would a rule have if it prohibits overstatement as to all experts, beyond limiting potential overreach by some of the forensic experts that are testifying, and how would it affect criminal defense experts, for example, or experts in civil cases? We determined we'd like to have more information on some of these topics, particularly the civil arena, and, if an amendment is offered, which would be better? And you've seen in the materials, there's a negative rule—thou shall not overstate¹⁴—as

8. *See, e.g.*, *United States v. Straker*, 800 F.3d 570, 631 (D.C. Cir. 2015) (finding the ACE-V method of fingerprint identification was reliable even though the expert testified there was “zero rate of error in the methodology”); *United States v. Mire*, 725 F.3d 665, 675 (7th Cir. 2013) (allowing a chemist to testify that the rate of error was “infinitesimal”).

9. *Wendell v. Glaxo Smith Kline, LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017) (reversing a trial court that prevented an expert from testifying that a person has a one in six million chance of developing a specific type of cancer without exposure to a specific drug).

10. *See United States v. Casanova*, 886 F.3d 55, 61–62 (1st Cir. 2018) (permitting a criminalist to testify that he knows of fewer than fifty erroneous identifications in the United States).

11. *See, e.g.*, *United States v. Johnson*, 875 F.3d 1265, 1280–81 (9th Cir. 2017) (letting a ballistics expert testify to a “reasonable degree of ballistics certainty”); *United States v. Williams*, 506 F.3d 151, 157 (2d Cir. 2007) (permitting a ballistics expert to testify to a “match”).

12. *See* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., *supra* note 6, at 3 (listing language likely to accompany an overstatement).

13. *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment.

14. *See* ADVISORY COMM. ON EVIDENCE RULES, *supra* note 5, at 164.

well as a positive alternative, that the expert must accurately state the conclusions drawn from the principles or methods.¹⁵ Which is preferable?

The other area of our concern is admissibility and weight. Specifically, some courts are not discharging the gatekeeper duty defined in Rule 702, to weigh the admissibility factors and admit only by a preponderance of the evidence, especially in the areas of the sufficiency of the basis of the opinion—whether it’s based on sufficient facts or data—and then, whether it’s the product of reliable principles and methods—a reliable application of the principles and methods. And those issues are being determined to be jury issues.¹⁶ Some cases just fail to address it explicitly.

Others, even though there’s no discussion, if you read the cases carefully, it looks like the right result is probably obtained—that a preponderance standard was employed—but there’s no discussion of how the court got there. Some courts are simply saying that, where the admissibility factors are disputed, the dispute goes to the weight and credibility. They commonly will cite to *Daubert* for that proposition,¹⁷ although *Daubert* speaks to shaky but admissible evidence,¹⁸ and find the factors are ones that go to the weight, and so they’re going past the admissibility questions.

The problems are in the appellate decisions as well as the trial court decisions, so it’s not like it’s a trial court problem that’s getting fixed on appeal. And we’ve had some discussion that the difficulties are as follows: Where do you draw the line on the question of whether it’s enough evidence and whether it’s sufficient facts and data, and how does a trial judge do that, and what could be done to change the Rule to get the judges to focus on the 104(a) issue?

So, in the materials, there’s a draft that sets forth a proposal that actually puts the preponderance standard in the Rule to focus the courts more on that. But, of course, it’s already in the rules. It’s in 104(a).¹⁹ One proposal would be to make it explicit in the text of Rule 702.

15. *Id.*

16. *See, e.g.*, *United States v. Turner*, No. 07-3095, 2008 WL 2699921 (6th Cir. July 9, 2008) (charging the jury with determining which of two competing footwear-impression analyses should have been used); *United States v. Williams*, No. CR 06-00079, 2013 WL 4518215 (D. Haw. Aug. 26, 2013) (leaving the question of whether DNA source-attribution methodologies were reliable to the jury).

17. *See, e.g.*, *United States v. Rodriguez*, 581 F.3d 775, 794 (8th Cir. 2009) (citing *Daubert* just before finding that the district court did not err in permitting expert testimony that had not been peer reviewed).

18. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”).

19. FED. R. EVID. 104(a). While not explicitly in the Rule, courts are required to use a preponderance of the evidence standard. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

Proposed Rule 702 Addressing the Preponderance of the Evidence Standard Problem:

Rule 702. Testimony by Expert Witnesses.

The following requirements must be established by a preponderance of the evidence for a witness to testify as an expert in the form of an opinion or otherwise: ~~A witness who~~

(a) the witness is qualified as an expert by knowledge, skill, experience, training, or education ~~may testify in the form of an opinion or otherwise, if:~~

~~(a)~~ *(b) the expert's witness's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;*

~~(b)~~ *(c) the testimony is based on sufficient facts or data that reliably support the witness's opinion;*

~~(c)~~ *(d) the testimony is the product of reliable and objectively reasonable principles and methods; and*

~~(d)~~ *(e) the expert witness has reliably applied the principles and methods to the facts of the case and reached a conclusion without resort to unsupported speculation.*

Finally, I think it's fair to say we've identified an interrelationship between these two issues—overstatement and admissibility/weight—and it may be that the overstatement problem is resulting at least in part from the trial courts not addressing the admissibility issue under 104(a).

Proposed Rule 702 Addressing the Overstatement Problem:

Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; ~~and~~

(d) the expert has reliably applied the principles and methods to the facts of the case; *and*

(e) the expert does not overstate the conclusions that may reasonably be drawn from the principles and methods used.

[Or: the expert accurately states the conclusions that may reasonably be drawn from the principles and methods used.]

[Or: the expert accurately states the bases for the opinion and the limitations relating to the results of any examinations or methods used.]

The draft Committee Note for the forensics proposal provides as follows:

Rule 702 has been amended to provide that an expert may not overstate the conclusions that can reasonably be drawn from the principles and methods used by the expert. Experience shows that even when experts use reliable methodology and apply it reliably, some experts state the opinion in terms that overstate the results that the expert could reliably reach. For example, an expert may testify that something is a fact even though it is only the expert's opinion. Or an expert may express a degree of certainty

that the methodology does not support. Even when experts reliably apply reliable principles and methods to arrive at opinions, testimony that overstates their conclusions undermines the purposes of the Rule. Just as jurors are unable to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors lack a basis for assessing critical claims by an expert that a particular process is “certain” or “infallible” or “error-free.”

The amendment applies to all experts but it has special relevance to testimony of forensic experts. Forensic experts—especially those testifying to a feature comparison—assess probabilities, and the accuracy of their assessment depends on a foundation of relevant empirical studies. So it is important that the expert accurately inform the factfinder of the meaning of the results that are reached. Accurate testimony will ordinarily include a fair assessment of the rate of error of the methodology employed, as well as other relevant limits inherent in the methodology. For example, a forensic expert who testifies to a “zero error rate” or to some other claim of infallibility will by definition be overstating the results of the forensic inquiry.

Claims that an expert expresses an opinion to a “reasonable degree of [scientific/medical/forensic] certainty” should be prohibited under the amendment. That phrase has no scientific meaning and is misleading. See National Commission on Forensic Science, *Testimony Using the Term “Reasonable Scientific Certainty”*, <https://www.justice.gov/ncfs/file/795146/download> (“Rather than use ‘reasonable . . . certainty’ terminology, experts should make a statement about the examination itself, including an expression of the uncertainty in the measurement or in the data. The expert should state the bases for that opinion (e.g., the underlying information, studies, observations) and the limitations relating to the results of the examination.”). Examples of properly verified conclusions, when supported by the data and methodology, include statements such as “cannot be ruled out” or “more likely than not.” Of course this amendment does not bar testimony that is required by substantive law.

And if, at the end of the day, there’s some interest in doing something about the overstatement issue but not the preponderance issue, then there’s a question as to whether we could deal with it somehow—maybe in the Note or something—because there is some relationship between the two.

PROFESSOR CAPRA: Thank you, Judge Schroeder. So that’s the challenge, and, with our roundtable panel, we’re going to focus, at least first, on forensics. But, as Judge Schroeder says, the two issues on Rule 702 are interrelated, so no problem if we mix them together in this discussion. So, what’s at stake in forensics is the admission of expert testimony that is either not valid or overstated, and Rick Williamson sees these stakes as a public defender, so I wanted to ask him if he would open up our discussion. What kind of problems do you see, or do your colleagues see, in terms of forensic evidence that might be regulatable?

MR. WILLIAMSON: One of the problems I see is that the Department of Justice has said we’re going to address, with our internal protocol, the problem of overstatement by forensic experts, and we’re going to make sure that our experts don’t say things like, “to a reasonable degree of scientific

certainty.” So, I did some research and found a couple of things which I thought were interesting, and one was a report that says “FBI Laboratory” on it, and it’s DNA, different from tool mark, different from fingerprints, but basically looks like this. [Holds up a paper with a string of numbers.] And that’s what DNA is. Just use fancy machines and test tubes and spectral whatever to make your conclusion that this looks like this. Great science. So, we’re not supposed to overstate anymore.

PROFESSOR CAPRA: Well, what do you do if an expert does, in your opinion, overstate the conclusions?

MR. WILLIAMSON: Well, I think, what we’d try to do, if you did it the right way under 104(a), which is preponderance of the evidence, is you would try to deal with the foundational elements of it up front—maybe a *Daubert* hearing in front of the district court judge to lay the groundwork—and, if you let this in after this hearing, don’t let them say “X.” And if you have the report, you might have a clue about whether that expert is prepared to say “X,” of which you would say it’s improvident.

Of course, the Department of Justice has changed their practice, so I’m looking here at a DNA report, which is brand new, in a case of ours up in Wyoming, and they’re prepared to testify that there’s “extremely strong support” for this DNA match. So, to me, that would be something that would give me a clue that that might fall into the category of overstatement.

PROFESSOR CAPRA: So, how likely is it that you would win that argument?

MR. WILLIAMSON: Are you kidding me?

PROFESSOR CAPRA: No, really. I’m asking you seriously.

MR. WILLIAMSON: Well, I think it depends on the judge and on the lawyers. If you’re prepared to go in with your ducks lined up and to make an intelligent argument to a district court judge, at the early phase, and I’m talking about the pretrial 702 phase, then the chance that, if you’re sort of front-ending the overstatement as part of that process, you’re going to have, in my experience, and I hate to say it, but, in my experience a receptive ear, because almost all judges now know about PCAST. They’ve heard it ad nauseam, but I think most of the litigation that surrounds that, in the 702 pretrial context—the *Daubert* context—isn’t done very well by the lawyers.

PROFESSOR CAPRA: Why is that? Is it a lack of information or a lack of process or something else?

MR. WILLIAMSON: I think it’s almost cultural. I don’t think challenging forensic experts at the admissibility level has worked its way up, because most of the lawyers, including me, sort of operate on the conventional wisdom, the way things have always been done, and we think, well, all these cases say it’s admissible, so I have to leave it for cross-examination.

PROFESSOR CAPRA: Yes.

MR. WILLIAMSON: Nobody drills into the case to see why that older case said it’s okay, so you habituate, and you develop a way of doing things. I think part of the problem is that the defense bar and my colleagues on the

other side haven't really wrapped their heads around a way of doing things that's different and should be approached in a more systematic and Rule of Evidence-driven 702, 104(a) way. So that's an educational issue, I think.

PROFESSOR CAPRA: Well, the way they educate is to, perhaps, change the Rule, right?

MR. WILLIAMSON: Well, that's one way.

PROFESSOR CAPRA: So, what is a DNA expert supposed to say, other than "extremely unlikely" or "extremely strong"?

MR. WILLIAMSON: Here's what I would argue. You let the expert, who has been through the vetting process and is going to be allowed to testify at trial, describe what he saw. This is this. This is this. This is the sample. These are the tests we did. These are the slides that show this, show that. I would say okay. Thank you. I get it.

Here's an example of how, now, in the modern era—and the transcript involves DNA again—the Department of Justice and their agents, the FBI, use the new protocol. So a poor lawyer asks this question: "Did the DNA sample taken, pursuant to that search warrant, match the DNA taken from the scene?" Answer by the agent: "The results from the laboratory indicated that there were four DNA profiles on the rubric. It is thirteen times more likely that those DNA profiles are associated with the defendant and three unrelated, unknown individuals, than for them to be associated with four unknown individuals." I understood absolutely none of what you just said. How can the jury understand that? So that is a big problem with the DOJ protocols.

PROFESSOR CAPRA: I'm going to turn it over to Ted Hunt of the DOJ for—would you call it a rebuttal? I don't know if it's a rebuttal, but, Ted, I wanted to get the public defender and the DOJ out in front, and then others can have their say.

MR. HUNT: Sure. First of all, the new Uniform Language for Testimony and Reports are online,²⁰ both the laboratory protocols²¹ and the guidelines on expert testimony.²² I would encourage everybody to read those. Second, in terms of DNA, that statement of probability is an absolutely correct scientific statement. Likelihood ratios in DNA are the current state of practice, and you will find any expert, any scientist, inside of forensics or out, saying that is the correct way to characterize that. Some evidence has very low probative value, but thirteen times more likely that the evidence supports prosecution's hypothesis is high probative value.

20. *Uniform Language for Testimony and Reports for Forensic Autosomal DNA Examinations Using Probabilistic Genotyping Systems*, DEP'T JUST. (2018) [hereinafter *Uniform Language for Testimony*], <https://www.justice.gov/olp/page/file/1095961/download> [<https://perma.cc/8JPM-B33W>].

21. *Testimony Monitoring Framework*, DEP'T JUST. (2018), <https://www.justice.gov/file/1036791/download> [<https://perma.cc/NH7C-7B4K>].

22. *Code of Professional Responsibility for the Practice of Forensic Science*, DEP'T JUST. (2018), https://www.justice.gov/sites/default/files/code_of_professional_responsibility_for_the_practice_of_forensic_science_08242016.pdf [<https://perma.cc/QA3G-AJVM>].

In some cases, it's going to be a million times more likely, and that's the basis for the "extremely strong support" statement. That is a statement that is correlated to an empirically derived figure, so it is a verbal equivalent, and those are set out in our scale.²³ Now, the exact statement that was recited by Mr. Williamson is from a previous iteration before the Uniform Standards came on board. A "very strong support" is now the term of art that is used, as opposed to extremely strong support; a million times more likely or more is very strong support.²⁴ Again, any scientist inside or outside of forensics would say that's correct.

PROFESSOR CAPRA: I think, if you're defense counsel, you'd rather have "very strong support" than something like "a billion times more probable."

MR. HUNT: A statistician will tell you that, if it's a million times likely or more, it's irrelevant to get into further verbiage. Now, that's coming from basic scientists, so that's the DNA example. There's an empirical basis for every part of the scale that is there. So, I can only move to firearms, and, compared to DNA, this is apples and oranges, because, with DNA, this is an empirically derived number. An empirically derived number is impossible with firearms tool marks and also with fingerprints, currently, and it probably always will be.

There's a lot of misunderstanding in Joe Cecil's memo to you.²⁵ I think he embodied a lot of the misunderstanding about the apples and oranges distinction here. When we say something is identified, it's not an empirical claim on the external world. We're not saying that it's not possible that in China there's another print that was reproduced that could be similar to the one that you found. It's not that kind of claim. The claim is simply based upon identification, and identification is different than individualization and uniqueness.²⁶

With individualization, there's two elements. One is absolute certainty, which we don't subscribe to, and the second is uniqueness and like prints, which we do not subscribe to. So, when we say it's an identification, it's a case-based specific comparison between a latent and a known. Now, what's the empirical basis that we have for making that claim and why is that not an overstatement? The reason is because we have thousands and thousands of examples, where a questioned print has been successfully identified—source identified—to a known print.

23. See *Uniform Language for Testimony*, *supra* note 20, at 4.

24. See *id.*

25. Joe Cecil of the Federal Judicial Center, an expert on forensic evidence, sent an email to the Reporter, which stated that the DOJ standards were problematic because they allowed the forensic expert to testify to an identification or a "match" when the methodology does not support a specific identification. See ADVISORY COMM. ON EVIDENCE RULES, *supra* note 5, at 101–05.

26. *Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline*, DEP'T JUST. (2018) [hereinafter *Forensic Latent*], <https://www.justice.gov/olp/page/file/1083691/download> [<https://perma.cc/3ELD-JSQZ>].

That's been done in training, preparatory competency tests, where they do hundreds or thousands of comparisons before they're ever allowed to go online, so we know they can make source identifications. Those are ground truth samples, where they're making a comparison. Then, they show increasing and continued proficiency, and these proficiency tests and the studies uniformly show no greater than around a 1 percent error rate. These are open set samples, so we have demonstrated, in an empirical way, the basis for making that claim. But again, it's not an empirical claim about the external world. It's a claim about whether I can successfully compare this questioned print to a known one.

PROFESSOR CAPRA: But how does that testimony about "identification" play to a jury? Is a jury making that distinction between identification in the world and comparison among samples? How are they about to do that?

MR. HUNT: It's 100 percent in the Uniform Standards; if you look up the standards, we say that you have to make that qualification.²⁷ You can't say that this is typically derived or verified or based on an actual comparison of all the prints in the world. That's an exaggeration. Now, the folks outside forensics, the critics keep saying, "Well, you can't make a claim of identification." This is an empirical statement. We explicitly say it's not, and we're going to explain to the jury that this is an opinion, it's a decision.²⁸ It's not an epistemic or empirical claim on the external world. It's just a claim, and it is a skill- and experience-based claim that I can do this based on my track record.

PROFESSOR CAPRA: Yes, and yet, in that case study that was provided to the Committee by the DOJ, the expert called himself a scientist. He did.

MR. HUNT: Well, I don't, now, what case—

PROFESSOR CAPRA: It was a ballistics study.

MR. HUNT: I have to say something about the cases. I read every single one of them.²⁹

PROFESSOR CAPRA: Yes.

MR. HUNT: And I have to tell you that I think a lot of what is being said in those cases—actually, I've conceded there were probably three overstatements for non-DOJ examiners and two out of the fifteen appellate cases for DOJ examiners. I look at the district court cases, and I didn't see one. There was one that was questionable, and here's why I say that—because, in every single case, the judge, in the judge's own voice, is stating what is occurring. We don't know, in these district court cases, since these are in limine rulings, if that's what the witness was going to say. And the actual red flag is that the word "match" is not used in these disciplines, but

27. See *Uniform Language for Testimony*, *supra* note 20, at 4–5.

28. See *Forensic Latent*, *supra* note 26, at 2.

29. Mr. Hunt is referring to a case digest on forensic expert testimony prepared by the Reporter and submitted for the roundtable discussion. See ADVISORY COMM. ON EVIDENCE RULES, *supra* note 5, at 17–67.

the judges are all using the term “match,” and that’s being attributed to the examiner as an overstatement.

PROFESSOR CAPRA: That’s an interesting point.

MR. HUNT: Also, these statements are being pulled out of in limine motions by defense attorneys, and the judge is quoting the defense attorney. This is not the witness. I looked up—there were several cases where there was a claim that a match was going to be stated.³⁰ You ran a word search and in those cases the word “match” doesn’t appear in the opinion anywhere—nowhere in the opinion.³¹ So, before we take the drastic step of trying to move on this, I would urge everyone to read every single one of those cases and decide for yourself what’s actually going on here.

PROFESSOR CAPRA: Thanks. Chris?

PROFESSOR MUELLER: It seems to me we’ve just gotten an illustration of the proposition that the agenda of science and the agenda of law are different, and it’s very hard to make them fit together, and, no matter how hard we try, we’re not going to completely solve that problem. It seems to me the good thing about the suggestion that we put in a rule like 702, that the judge should guard against overstatement, is that it gives express authority to something that I think is implicit in 702 already, on a judge, who will have a hard time saying to a lawyer, well, 702, as currently written, authorizes me to essentially edit the remarks you’re going to give to the jury. And, if you make it express, I think it will give judges an easy answer to that kind of objection.

A bad thing, in my opinion, or at least a weakness in the proposal, is it doesn’t really solve the problem, and, I mean, I listened to what you just said, Mr. Hunt, about how every expertise needs a different form of words to translate some sort of empirical observation into some sort of conclusion that a jury could digest, without being somehow misled or led down a primrose path into a thicket that they can’t understand. And so, while it gives the judge some authority, it really doesn’t tell them what exactly to do in any individual case.

It’s also very odd, frankly, to find in the Rules of Evidence a rule like this, which authorizes the judge essentially to supervise the form in which testimony is given. And, it seems to me, this will be a unique provision. I don’t think there’s anything else that’s really like it in the Rules of Evidence.

PROFESSOR CAPRA: Oh, I don’t know. Like Rule 704(b) is telling the judge that you can say one thing and not another.³²

PROFESSOR MUELLER: Well, I guess that’s true, but it still doesn’t go to the form of testimony. It excludes a certain area of expertise.

30. *See, e.g.*, *United States v. Stone*, 848 F. Supp. 2d 714 (E.D. Mich. 2012); *United States v. Rose*, 672 F. Supp. 2d 723 (D. Md. 2009).

31. Mr. Hunt provided examples of cases in which the word “match” does not appear, including *Stone* and *Rose*. Email from Ted R. Hunt, Senior Att’y, Dep’t of Justice (Jan. 12, 2019, 19:59) (on file with author).

32. FED. R. EVID. 704(b) (providing that an expert may not express an opinion that a criminal defendant did or did not have the requisite mental state to commit the charged crime).

PROFESSOR CAPRA: And Rule 611(a) gives the trial judges authority over the form and content of testimony.³³

PROFESSOR MUELLER: Yeah.

PROFESSOR CAPRA: So I want to go to our judicial panel. Judges, when you have forensics experts before you, what do you do about potential overstatement? Would a rule prohibiting overstatement help you? Yes, Judge O'Malley?

JUDGE O'MALLEY: May I just say something first? You know I was on the National Academy of Sciences project to rewrite the FJC Manual on Scientific Evidence³⁴ and, at the time, the first question we had to address was whether to do forensics and all other scientific evidence in the same manual. And we decided not to. We did a whole separate study through the National Academy of Sciences on forensics, and the conclusion was that, other than DNA, it's not really science.³⁵

And so, I think, maybe the problem is that by trying to treat all categories, science generally and forensic evidence as one and the same thing, that you create a problem of not focusing the judges on the fact that forensics is not really science. It is an opinion that's formulated on experience rather than the scientific method.

There's lots of reasons to attack forensics. But judges are afraid to not let forensics in because it's been admitted forever. We thought there would be a lot more exclusion after the study came out from the National Academy of Sciences. And we were shocked to learn, a few years later, that pretty much everybody just kept letting it in. I also thought that it would be a roadmap for public defenders and for defense attorneys to, at least have been able to, really attack these forensic methods on cross-examination. But, they're likely to come in anyway.

You've got a huge roadmap, provided by the National Academy of Sciences, to destroy that evidence in front of the jury, but we didn't see that happening either. So, I think, maybe the problem is that forensic evidence, at least in my view, other than DNA, I agree with the study results that it's not really science and that judges should be differentiating between what they're actually considering and what standards they're applying.

PROFESSOR CAPRA: The fact that forensics are not science raises a question of overstatement when a forensic expert calls himself a scientist. That's essentially an overstatement, wouldn't you say?

JUDGE O'MALLEY: Right. But if you've got 702, and it lays out what the Committee believed was really the *Daubert* standards, and then you're

33. *Id.* r. 611(a) (outlining three purposes for why a judge should exercise "reasonable control" over the examination of witnesses).

34. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE v (3d ed. 2011), <http://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf> [<https://perma.cc/YP2T-D78K>].

35. See PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., *supra* note 6, at 3, 12, 13, 19, 29, 117, 137, 144 (noting that various types of forensic science are not scientifically defensible, justified, reliable, or valid).

assessing forensic evidence under the *Daubert* standards for scientific evidence, I think it's not—there's no fit, and that's the problem.

PROFESSOR CAPRA: Well, it's the *Daubert-Kumho* standards, expressly applicable to technical as well as scientific experts,³⁶ but, yes, go ahead.

JUDGE LIVINGSTON: Maybe you can help us with this: It's the definition of science, right? So the PCAST report talks about these black box studies as being what should be—what forensics science should be held to.³⁷ You should use black box studies, and then you can be more empirical in your testimony. In our discussions, there are a lot of things that we think of, loosely, as science that come in under 702 that don't have black box studies. It's not just forensics. It's all social science.

I was looking at an event study, an opinion I wrote some years ago, where an economist testified, "Well, the stock price came down because I made some judgments about these events, and I took them out of my consideration." That would not be science by the black box study, but it comes in as a form of expertise, so it is hard to draw the line and separate out all sorts of forensics.

I remember that the National Academy of Sciences report also is pessimistic about the adversarial system being a way to improve forensics,³⁸ and it talked about putting more money into improving the labs³⁹ and trying to do what you could with the adversarial system.

So, I wanted to ask you, Rick Williamson, to return to you for just a moment—when the people in your office want to prepare a cross-examination of the forensics expert, you said everybody knows about PCAST now. You have the training, the resources to do the best that you can in preparing to challenge the evidence before the court, and then, if the court did not exclude it, you'd bring out on cross-examination its infirmities?

MR. WILLIAMSON: Yes. In fact, in the case I was referring to, coming up soon in trial with part of our office, we have our own DNA person. We have the resources to retain them and for them to do their own analysis and to also work with us. And we're presuming we're past the *Daubert* phase and we're into the trial phase, to help us with precisely that—cross-

36. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–90 & n.8 (1993) (explaining that Rule 702 applies to "technical, or other specialized knowledge" but focusing only on the scientific context); see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (concluding that a trial judge's "gatekeeping" duty applies to "technical" and "other specialized" knowledge in addition to "scientific" knowledge).

37. See PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., *supra* note 6, at 5–6 (summarizing the essential points of the report, one of which is that "[e]valuations of validity and reliability must . . . be based on 'black-box studies'").

38. See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra* note 34, at 65 n.49 (citing a National Research Council report on forensic science that explained that there are limitations to using the adversary process to improve forensic science).

39. *Id.* at 66 (referring to a National Research Council report on forensic science that explained how more funding was needed to improve the discipline). The manual describes numerous problems with laboratories, many of which could be remedied by additional funding. *Id.*

examination—because it takes us into weight versus admissibility, an area I'm not all happy about, but cross-examination with those kinds of resources is really where the rubber hits the road.

PROFESSOR CAPRA: Would you say you could cross-examine him in a way that would elucidate the distinction that Ted was making, between identification and not an identification—kind of an identification, but not in the identification sense?

MR. WILLIAMSON: I don't think so.

MS. WAGSTAFF: We've been talking about the criminal context, but since this will be under 702—in the civil context, we have to prove specific causation and general causation.⁴⁰ You have a differential diagnosis, and you have a specific causation expert. Is the defense going to be claiming that it's an overstatement if the specific causation expert does a differential diagnosis and says, to a reasonable degree of certainty, they think that this caused this?

PROFESSOR CAPRA: The intent is to regulate, at least through the Committee Note, the reasonable degree of certainty standard, at least on the federal level. Because it is a meaningless standard that scientists don't use, and it confuses the jury; and *Daubert* doesn't require it.

But you could frame that testimony in another way. And something that the Committee would need to work through is what the alternative iteration would be, and that's what we're here for.

JUDGE SCHROEDER: One proposal is to allow the expert to testify to an identification as “more likely than not.” My sense is, in the civil arena, that might work because the jury is applying the preponderance standard to all the evidence.⁴¹ I worry a little more about the criminal arena because, if you limit experts to largely a preponderance statement, the standard of proof is beyond a reasonable doubt.⁴² How's that going to play out in a criminal case if the expert only testifies that, “Well, I think it's more likely than not that this bullet came from this gun”?

PROFESSOR CAPRA: That's a good question. The “more likely than not” iteration was required by Judge Rakoff in the *Glynn* case,⁴³ where he had the experts testify that the bullet more likely than not came from the

40. *See Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir. 1999) (describing the burden a plaintiff's expert needs to meet to prove an injury was caused by exposure to a specific substance, which includes showing general causation (that the substance was harmful to humans generally) and specific causation (that the substance harmed the plaintiff specifically)).

41. *See* FED. R. EVID. 104(a); *see also Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

42. *See Miles v. United States*, 103 U.S. 304, 312 (1881) (“The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.”).

43. *United States v. Glynn*, 578 F. Supp. 2d 567 (S.D.N.Y. 2008).

defendant's gun.⁴⁴ He concluded that anything more certain was not supported by the questionable methodology.⁴⁵

MR. SHECHTMAN: There was other evidence.

PROFESSOR CAPRA: What?

MR. SHECHTMAN: I said there was other evidence.

JUDGE SCHROEDER: I would imagine that the lawyers are going to make a big deal about that, particularly a case that turns on forensics. And one of the reasons we're here, I think, is because we recognize how powerful this evidence is.

PROFESSOR CAPRA: Yes. Right. I think the answer is that even though "more likely than not" seems weak in a criminal case, that is what the court should require if that is all the certainty that the methodology supports. The government can't say, "Judge, we need to have our expert overstate his results, otherwise we can't convict the defendant."

JUDGE O'MALLEY: I believe that judges do have the tools right now and can say, "All right, this is your area of expertise, you can testify up to that level, and you can't testify to other alternate questions." Judges have the tools to say, "Your case has to be done, your civil case has to be done with building blocks." And so you have someone who's maybe a toxicity expert. They can testify to that.

You have to have a separate warnings expert. The one can't testify to the other, and then, ultimately, the question of causation gets decided and gets interpreted. I think the judges have the tools. I think, if you create a new rule that's applicable to the civil cases, the danger is, and I think there's already some of this happening, but the danger is that there is going to be a broader exclusion of legitimate evidence, because I think the judges will think that their job is not just to decide, by preponderance of the evidence, whether it's reliable, but you're going to see judges who say I have to decide if your science is right. There's a lot of that going on.

PROFESSOR CAPRA: Judge Brimmer?

JUDGE BRIMMER: How do these 702 issues get resolved? Well, you've got the lawyers arguing. You've got the judge. That's the way it should be, and if you have the National Academy of Sciences studies,⁴⁶ it's the gold standard. But yet, if the studies are not percolating through because of various other factors, like reliance on precedent, why do you think that a rule amendment is going to suddenly cause the breakthrough?

PROFESSOR CAPRA: That's a good question, but hopefully rulemaking is a way to educate judges and litigants. Or there might be other ways to educate them.

JUDGE BRIMMER: I agree with Judge O'Malley, that judges are already aware of the standard and can prohibit overstatement. It's for the gatekeeper

44. *Id.* at 575 (holding that "the ballistics opinions offered at the *Glynn* retrial may be stated in terms of 'more likely than not,' but nothing more").

45. *Id.*

46. *See generally* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra* note 34.

to close the gate. This just isn't about duty to do these things. You have to file a motion, and once that's presented to the court, I think that the adversarial process, even though there may be some skepticism about that, that's the single best method to ensure that the proper standards get applied.

And, you know, particularly, if you have some National Academy of Sciences or other—or Department of Justice standards, or whatever—it should inform the decision.

PROFESSOR CAPRA: Well, one of the reasons the NAS report had very little effect is because it wasn't case law and it wasn't a rule, and, so, there's no call for a court to actually make a change, in spite of all the case law. So, I mean, at least in my own personal opinion, if there's going to be change, it really needs to be at the rule level, because the court's not going to change given the prior precedent.

JUDGE O'MALLEY: But the Federal Judicial Center Manual on Scientific Evidence goes into this stuff in great detail,⁴⁷ and that's provided to all of the judges, and all the judges get training when they come on. And so, what I'm saying is that, by making a rule change just to deal with forensics, if that rule change interrupts what, I think, is a mechanism that can work—I believe there are probably some courts that are getting it wrong, but, you know, that happens all the time.

The way 702 is written right now, I think, is brilliant, and if you look, at least most of the judges I know, who are very careful, if you look at what they do, they do walk through, they understand that there are certain circumstances where things get absolutely excluded, like an economist who doesn't take into consideration variables, critical variables. That's easy to exclude. Or, if someone says they did a test and it turns out they didn't do the test, or they did it wrong, those are easy to exclude.

But that's very different from saying you're going to now get a rule that says when you're talking about things like epidemiological studies, differential diagnosis, those kinds of things. You get judges who, if you give them too many directions, they're going to think their job is to decide whether or not that study was perfect, when those of us who've been dealing in science a lot know there is no such thing as a perfect study, just like there's no such thing as a perfect survey. And so, it's at the margins that you've got the problem, that we could create a problem, if you take an amendment into the civil arena.

MR. SHECHTMAN: Yes, I'll try to be brief. My practice is mostly white collar, and so I don't get a lot of these forensic issues, but a couple things come to mind. One is the issue we haven't yet talked about: Should the amendment specifically refer to 104(a)? And I wouldn't do that. My own sense is that's what one does—one goes to 104(a). Judges should know that. It's already in the Rule. It seems to me this is a question of educating judges and lawyers, and I wouldn't change the Rule to do it.

47. See generally *id.*

The second thing is with the overstatement issue. I've read a lot of state court cases where there's wild overstatement, and so, I have a sense that there's an overstatement issue. And when we're talking about federal court and civil cases, we're obviously not just talking about the DOJ scientists who are subject to some limiting standards. Once you begin to regulate, though, the world can get complicated because, as Professor Mueller says, this will be the first time. And Dan, I think your example's different, that you're really regulating what a witness can say.

Of course, the greatest overstatement in life is "that's the man" in an identification case, because it may well not be "the man." And so, if you think about Judge Rakoff's case, the most his expert could say is "more likely than not." The cross-examination goes like this: "So the best you can say is that this is more likely than not?" To which his answer is, "That's not the best I can say. That's all the judge will let me say." Right?

So, you made a new world here, when you start to do this. The proposed Note says, "The amendment requires the expert to accurately inform the factfinder of the meaning of the results found by the expert, including a fair assessment of the rate of error as well as relevant limits." I would have thought a lot of that is what we do on cross-examination, and so, to the extent you're saying you have to do that on direct, that's a new world as well.

PROFESSOR CAPRA: No, that's the *Daubert* world. If the idea is that everything would be left for cross-examination, that's what *Daubert* actually challenges.

MR. SHECHTMAN: Pertaining to admissibility, I don't know any judge who says, "Okay, now tell us the limits," on direct examination. I would have thought that's what cross was, so you are entering a new world here. I don't mean to minimize it, but just be aware that, if you begin to regulate what can be said, that's new.

PROFESSOR CAPRA: That's what the DOJ is doing, is stating its limits on direct examination. Am I right?

MR. HUNT: Yes, there are certain things that cannot be said unless other things are said to qualify those and to properly calibrate the appropriate probative value in those cases, and I think one of the problems that I've seen, and I've worked in this field for a long time, is humans, especially scientists and lawyers, we are all obsessed with putting things in one box or another, such as scientific and nonscientific, and the Supreme Court says, "Don't do that."

It says it would be difficult, if not impossible, for judges to administer evidentiary rules under which the gatekeeping obligation depended upon a distinction between scientific knowledge and technical or other specialized knowledge. There's no clear line that divides the one from the others.⁴⁸

48. The U.S. Supreme Court made this point in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999), where it noted that "there is no clear line that divides" scientific knowledge from technical or other specialized knowledge.

That's very good advice, and the problem is that, when you're dealing with forensics, it doesn't fit neatly in one box or another. There are aspects of forensic science that are empirical. There are aspects of forensic science that are experience-based. When you get to the conclusion expression, that's an opinion. There is some subjectivity to that, to be sure, but it's not based on conjuring; it's based on empirical evidence that the witness has observed and recorded, so there is an empirical basis. And also, there is a less strong empirical basis in some aspects, so it really straddles *Kumho* and *Daubert*. And, to try to put it in one box or another is not going to work because it's not one or the other.

PROFESSOR CAPRA: But the quote from *Kumho* is about whether the gatekeeping function should apply.⁴⁹ And what was said was, well, it needs to apply because if you said it applied to science and nonscience, then you have this problematic distinction.⁵⁰ But the question we're focusing on is what can you testify to, right? While a gatekeeping function applies to all expert testimony without a science/nonscience distinction, certainly a gatekeeper should be concerned if an expert states that he is a scientist when he is not, for example.

MR. HUNT: But what you can testify to is directly dependent upon whether a judge says this is in the science box or this is in the engineering box. Another problem is that case law, when you rely exclusively on that as a reason for change, is history. I looked at the cases where there was probably overstatement, and they were litigated between five and ten years ago.⁵¹ So the critics, many of them, are co-opting the past for the present.

And they're doing it through saying, "Hey, look at these cases." You look at them. They were litigated before the National Academy of Sciences report.⁵² They're not real recent in origin, and a lot of these claims of 100 percent certainty, or the math that has no error. Those aren't allowed anywhere anymore. You're not going to hear anybody say that.

There are two standards that are in front of the Academy Standards Board, which is the body that creates standards across the board for latent fingerprints.⁵³ Everybody ought to take a look at them, and they're very consistent with what we do and what the consensus of forensics has come to, which is that we're not making those overstated claims anymore. And so I would urge you, a lot of what's written in law reviews and in published opinions really is a reflection of how the past looked; it's not the present. So,

49. *Id.*

50. *Id.*

51. Mr. Hunt noted that eleven of the fifteen appellate decisions and seventeen of the twenty-six district court cases provided in the reference materials were five or more years old. See Email from Ted R. Hunt, *supra* note 31.

52. The National Academy of Sciences report was published in 2011. See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra* note 34.

53. See *Notice of Standard Development and Coordination*, ACAD. STANDARDS BOARD, <http://www.asbstandardsboard.org/notice-of-standard-development-and-coordination/> [https://perma.cc/2EAW-EPHJ] (last visited Feb. 12, 2019).

to use that as evidence to change the rule in the present is a very, very low-resolution way to go about decision-making.

Let me read one more thing, and this is from—on this issue of source conclusion—Professor David Kaye, who certainly you know and he’s a very thoughtful guy, in a *Brooklyn Law Review* article:

In appropriate cases, therefore, it is ethical and scientifically sound for an expert witness to offer an opinion as to the source of the trace evidence. Of course, it would be more precise to present the random-match probability, instead of the qualitative statement, but scientists speak of many propositions that are merely highly likely as if they have been proved. They’re practicing rather than evading science when they round off in this fashion.⁵⁴

So that’s a realization that implies we routinely accept statements or decisions as true, even if there is a nonzero probability they’re false. Look at verdicts. Verdicts can get it wrong. We made very important decisions based on the best available information that we had. We’re not claiming that we’re infallible. Certainly, the judicial system isn’t. Neither is science. But we’re making the best informational-based decisions that we can at the time, and I think there is absolutely an empirical basis for a source conclusion claim, and it’s the foundation of having matched known sourced samples.

PROFESSOR CAPRA: Okay. Are there any other questions on forensics for our roundtable participants?

MR. LAU: Mr. Hunt, I am sure you know of the National Institute of Standards and Technology report on facial recognition, where they show that using artificial intelligence, the improvement between 2015 and 2017 is such that, in 2015, facial recognition technology by AI is only at student level, and, in 2017, at examiner level,⁵⁵ and who knows what these would look like in 2024? And I suspect this is not only for facial recognition, but also for possible development in, say, ballistics, tool marks, and all those different disciplines. So what is the prognosis towards being more and more certain through technology? What would things look like in 2024? Is it all going to be AI? And how would you prevent overstatement in those situations?

MR. HUNT: Well, it is coming very fast, and I think one of the disservices PCAST did was it said that all forensics is metrology.⁵⁶ It’s absolutely not. You look at the definitions that they use in the *International Vocabulary of*

54. David H. Kaye, *Probability, Individualization, and Uniqueness in Forensic Science Evidence: Listening to the Academies*, 75 BROOK. L. REV. 1163, 1176 (2010). The Reporter notes that just after the passage quoted, Professor Kaye states:

This is not to say that such testimony is the best method of communicating the test results to a lay jury. There is a cogent argument that such opinions are not helpful when more precise indications of probative value are available to permit the jury to reach its own conclusion about the source of the trace evidence.

Id.

55. P. Jonathon Phillips et al., *Face Recognition Accuracy of Forensic Examiners, Superrecognizers, and Face Recognition Algorithms*, 115 PROC. NAT’L ACAD. SCI. U.S. 6171, 6175 (2018).

56. See PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., *supra* note 6, at 23 (categorizing forensic “feature comparison methods” as “metrology”).

*Metrology*⁵⁷ and they do not fit, and I'm a little cynical why they did that because they wanted to put it squarely into the *Daubert* box, to hit it over the head. It's not all metrology.

There is 3-D optical photography that is coming online with fingerprints and firearms and tool marks, which will add an objective basis to these examinations. That's coming very quickly, and we're all very excited about that. So, in the next few years, you're going to see a transition from the current examiner-based opinion to more of an objective basis. But I will tell you this: you're going to lose some precision and some of the evidence by doing that, because you're going to take, as an analogy, a full picture of a human being, and it's going to turn into a stick figure because you're losing a lot of information when you're making it more objective.

It is going to be more objective, but there's a tradeoff. The richness, the dimensionality, the complexity of forensic evidence is so great that the expert can tell you it's very difficult to put that into an automated objective algorithm.

PROFESSOR CAPRA: So you're going to put ballistics examiners out of work? They will be replaced by machines?

MR. HUNT: No, ultimately they're going to be the ones who are going to sign the report, but a lot of the visual imaging is going to make this much, much higher resolution and is going to potentially compare certain points, and there will be a more objective foundation and basis for the conclusion. It's not going to put them out of work, but I think you're going to see more objectivity in terms of the automated repeatability between cases and examples coming forward. That is actually happening, and in the next few years, that's going to be coming online in certain crime labs.

PROFESSOR CAPRA: Judge Browning?

JUDGE BROWNING: Dan, a rule limiting overstatement raises two issues. One is whether there's a problem and then what the solution should be if there is a problem. I'm a little schizophrenic on it because I'm not sure I agree with there being that much of a problem out there, but I think the solution that's being proposed is good. One of the things that I think I'm increasingly seeing with juries is, American juries, you cannot tell them anything. They will not even take a pattern jury instruction anymore without quibbling over it, and so the idea of experts leading them by the nose I think is a wrong assumption in many cases. Many of the juries, when you talk to them afterwards, will just tell you they discounted and just didn't take into consideration the experts. So while we think of expert testimony as potent and critical evidence, jurors, I think, are looking very differently at it. I think they use experts to affirm the decision they've already made, and they are relying upon the fact witnesses, what they're hearing as far as facts, but they're very reluctant to just have somebody come in and tell them what to do.

57. See generally INT'L ORG. OF LEGAL METROLOGY, INTERNATIONAL VOCABULARY OF METROLOGY—BASIC AND GENERAL CONCEPTS AND ASSOCIATED TERMS (VIM) (3d ed. 2007).

So, I think that the problems may be more on paper than in a real courtroom where you have cross-examination taking place, and, like Judge Brimmer, I have a high degree of confidence in cross-examination in pointing out these problems, and I think jurors are fairly good about sorting it out.

On the other hand, the reality is that I'm rarely excluding an expert—it's just not what's happening. But what is happening is that judges are trimming their testimony along the way almost to the point they're scripting out what they're going to say. You take a highlighter and go through their report and say, "You can say this. You can't say that. You can't say that." You script it out, so by the time you get to trial, everybody knows what's taking place. I'm not sure I've seen in the rules that sort of authorization, but I think that's what's going on. They're trying to testify about things they shouldn't, they're telling juries things they shouldn't, and I think judges are trimming them out. And so if we want to put that in an overstatement category and make it express—that's what judges can do and should do—it's a little bit a validation, I think, of what we are doing.

PROFESSOR CAPRA: Yes. That's good. Thank you.

JUDGE O'MALLEY: I agree with everything Judge Browning just said, and especially about the trimming. I mean, judges have a whole bunch of tools. One is exclusion, but the other is to limit you to certain categories of testimony. The other is to say, "Well you can say this, but you can't go this far." I think judges have those tools and are using them, and maybe there's an education problem, but I do think that tools exist. But the only other point I wanted to make is that we put together a program for all the district court judges in patent-heavy districts.

And our judges, because we wanted to look at what technology might look like in the next five years and what kinds of things we're going to have to be dealing with, and—whether it is absolutely true or not—one of the academics that we had cited to several studies that said in the last two years science has advanced, and this is consistent with the facial recognition, more than it had in the twenty prior years and that it is exponentially changing and what we're going to see are things that we can't even anticipate.

So, I guess the problem is especially giving how long it takes to change rules and then to educate upon the changing of the rules. Do they become outdated quickly if science then goes into a whole different realm?

PROFESSOR CAPRA: Kathy?

MS. NESTER: I just wanted to note what we are seeing with forensic testimony in criminal cases. We call it "the *CSI* effect," where everyone watches *CSI* and *Law & Order*. Sixty million shows are out there, and jurors have an expectation that, "Oh, well, there's DNA. Done. Guilty." So we come in fighting an assumption that all forensics are amazing and reliable as soon as we walk in the door, and I think what we're all concerned about on this Committee, I would hope, is maintaining the province of the jury to make the decisions in a case and not to turn it into a place where you don't have to decide this because the AI has decided this face matches.

You don't even have to decide it, and the computer says this DNA matches, you don't even have to do anything. Just go back and fill in guilty, and I think that's what we're all concerned about. And I think that Judge O'Malley is right that the technology is just going to be, two years from now, completely different than what we're dealing with right now. But what I think we want to avoid is traveling toward a jury where you walk in, and you have the *CSI* effect on steroids where you have six computers who decided this, so you people don't need to decide that, and at the end of the day, what is then left for the jury to do?

And I think we just want to keep an adversarial system where we have the tools and the judges have the tools to allow us to challenge what you're saying because I was just thinking in my mind of some of the things that you've said about well, there's empirical evidence for comparison, source comparison. Well, there's also human error in source comparison, like a whole lot of human error, and I think the more we get the jurors into thinking well, it's a million to one that a human messed this up, then I think we're just getting further and further away from jurors doing what we constitutionally want the jurors to do.

PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: Yes. If I could just ask a question for our experts based on what Judge Browning said? In a recent trial before me, one of the experts was a cardiologist. It's a blood filter product defect case. The plaintiff proclaimed the blood filter that goes in the inferior vena cava is defectively designed because it migrates to the heart or the lungs, so I had a cardiologist who was opining that the filter was defective, and he had basically two grounds for that conclusion. One was a differential diagnosis.

Well, he said, "I looked at this plaintiff. I examined her history. I examined her condition. I looked at all of the scans, and I can find no explanation for the migration of this filter to the heart other than there was something wrong with the product," which I thought, that's fair game for a cardiologist. Then, he went on to say, "And as I looked at the filter, the collar anchors looked like they were weak. There wasn't enough radial pressure."

Well, on that point he's venturing beyond cardiology into engineering, and so my conclusion was that's an overstatement of the basis for his opinion. You can't give that opinion, and I did what Judge Browning does, and I limited the opinion. And I think judges do that, and I think that's fairly called for by 702. The question I have regarding overstatement when it comes to nonforensic experts was raised by another of his opinions.

He said, "Based on my experience, I am very confident that in the future this woman will develop cardiac arrhythmia and will require a pacemaker to be implanted in her." If the Rule says I can prevent overstatement, is it then fair for the defense to come in and say, "Judge, cardiology and his experience don't allow him to say he's very confident. They're only allowed to say it's probable, so you, Judge, should look to cardiology and tell this expert you can't say you're very confident based on your experience. You can only say it's probable." If we are going to prevent overstatement in the nonforensic

world, do we think that's fair game for judges to step in and start regulating the strength with which an expert can—

PROFESSOR CAPRA: Well, let me first ask what did you do?

JUDGE CAMPBELL: I allowed him to state the opinion. I mean, it seems to me it's based on his experience as a cardiologist, and they had a counter-cardiologist who came in and explained why there would be no risk of cardiac arrhythmia, and I didn't feel as a judge I could say well my view as a cardiologist is you can't be very confident.

JUDGE SCHROEDER: And what is the difference between a cardiologist who's 40 percent sure and one who's 60 percent sure except that one of them is more probable than not, right? I mean, so where do you draw the line?

JUDGE CAMPBELL: That's the problem I have with saying judges should regulate overstatement in a nonforensic environment unless it's overstatement based on basic *Daubert* principles. You don't have a basis as a cardiologist to say this collar anchor was too weak or this metal was fatigued.

PROFESSOR CAPRA: Well, I look at the collar anchor testimony as a question of qualification, not overstatement. He, as a cardiologist, is just not qualified to testify about what are engineering-related issues. Now, as to the confidence opinion, which could be a problem of overstatement, I guess what I would say is that the mere fact that it is disputed is not enough to find it is an overstatement. A judge could find the conclusion properly grounded by a preponderance, and that would mean that the dispute about the validity of the conclusion would be for the jury. But if the expert's level of confidence is in fact not supported by what his basis is, if it is speculative, then it is an overstated opinion that should not be allowed.

JUDGE SCHROEDER: What if your expert had said I'm 100 percent certain she's going to have a heart attack in five years?

PROFESSOR CAPRA: Right. That's just not supported by the expert's foundation or methodology. It is an overstatement.

JUDGE CAMPBELL: My concern about this is, or my question—and I'm interested in what others think—if there's a continuum we could come up with from where there's a reasonable debate and it sounds like a good opinion and all the way to the absurd, are we going to tell judges your job now is to get on that continuum and find the place and draw a line and say this expert can't go past this line? Or are we going to leave it to the adversarial process and let the opposing expert say, "No cardiologist could say you're very confident about that, and I'll tell you why," and give their reasons?

PROFESSOR CAPRA: Well, the whole idea of *Daubert* is you keep out expert testimony if it's not reliable—you keep it away from the jury because the adversary process would not be sufficient to root it out. I don't see why that wouldn't apply to an opinion that overstates what the expert can legitimately say.

PROFESSOR MUELLER: This is one of those times when I'm glad I'm a professor rather than a judge or a lawyer. I don't really see any difference in terms of the impact between "I am very confident that" and "it is highly

probable” or just “probable that she’s going to have this problem.” If I saw those two forms of order, then I knew I could police it because the Rule now says I can prevent overstatement. I think I would say my goodness, those two are almost equivalent in my mind.

JUDGE BROWNING: I think it’s a paper problem oftentimes rather than being in the real world. I don’t think a jury’s going to pick up that distinction you are trying to make.

PROFESSOR MUELLER: Yes, but the question is what about 100 percent certainty?

PROFESSOR CAPRA: Yes, what if they say “I’m absolutely certain?”

PROFESSOR MUELLER: Well, they can’t do that.

MS. WAGSTAFF: Right. So, I think this goes back to what Judge O’Malley said—that a prohibition on overstatement just doesn’t fit in 702. And I think that’s because the effect that it will have on the civil cases is that if you have two competing experts, well why should plaintiff or defense be punished because the other one didn’t bring in an expert to say exactly what they’re saying, and it’s well within his qualifications of a cardiologist to say, “Yes, I’m confident that he’s going to have a heart attack” or whatever the injury is, and that’s the way we talk in the real world as well. I mean, if an expert says, “I’m 100 percent confident that it’s going to happen,” I would think that the jury’s going to know that that’s not real. But maybe 100 percent is different.

JUDGE SCHROEDER: Would it make any difference if the rule were not “thou shalt not overstate” but the amendment was that the expert must “reliably and accurately state the conclusions drawn and the methodology used,” which is inherent, I think, in the Rule.

MS. WAGSTAFF: It’s already in it.

JUDGE SCHROEDER: But it would provide the opportunity as well for note material that would reinforce the point and put the parties on notice about the risk of overstatement.

PROFESSOR MUELLER: I think the overstatement prohibition language captures what people are worried about whereas the more positive statement of it would seem like just a repetition of the Rule itself, and if the real question here is experts going beyond their expertise or overstating their conclusions, then putting the word “overstate” in the rules conveys the message more clearly.

PROFESSOR CAPRA: Yes, Judy.

MS. SMITH: It seems to me that the concern isn’t so much the overstatement as the concern that the jury is going to believe it more than they would from other witnesses, right? So, we have lay opinion testimony, and lay opinions constantly are saying, “I’m 100 percent sure that’s the person that shot me,” right? And we don’t ask judges to limit that testimony.

PROFESSOR CAPRA: Correct.

MS. SMITH: And so the concern is we’re giving too much weight to experts, and my experience is just the opposite of the *CSI* effect, which is the jury expects that the FBI looks like it does on *CSI*, and if we don’t bring in

that evidence, then it's an acquittal. So it seems to me the instructions, and I agree with what Judge Browning has said that juries are supposed to follow their instructions, and whether they do or don't, I tend to think they do, at least that's been my experience, and the instruction is to not give the expert's testimony any more weight than any other, that just because they're testifying as an expert doesn't mean that you should overweigh their testimony.

PROFESSOR CAPRA: Well, then we would just need to rewrite *Daubert* because that's exactly what *Daubert* was all about. When lay witnesses come in and say something that gets filtered through the adversary system, but *Daubert* says when experts are being unreliable, they could have the potential to unfairly persuade—and you can't uproot that problem through the adversary system.

MS. SMITH: Absolutely, but that goes to the gatekeeping function, which in my experience has been rigorous in the ways that the judges have explained, so once the testimony has been filtered through that gatekeeping function, then it's deemed reliable.

PROFESSOR CAPRA: Yes, but the very question is whether you put a limitation on overstatement in the gatekeeping function. That's the question. The way I look at it is that the validity of the expert's testimony is a function of several factors—qualification, basis, methodology, and a conclusion supported by basis and methodology—and if you take one of those factors out of the gatekeeping function where all the other factors are related, haven't you fundamentally harmed the gatekeeper function? I guess that's the question we're talking about today.

JUDGE BRIMMER: I think one thing that attorneys should focus on is specific opinions, not the expert. I mean, every motion in limine is, "Throw out the expert." But when you're focusing on opinions, each opinion has got to be able to come in through 702. So, for instance, with Judge Campbell's case, the question would be: Is there a proper basis for the expert stating the opinion about the probability of developing future medical problems? And if there is, it comes in. If there isn't, it goes out, but you're focusing on it opinion by opinion, and that way you can do the type of editing, if you will, that Judge Browning was mentioning.

PROFESSOR CAPRA: Right. Judge Browning?

JUDGE BROWNING: If I could respond very quickly to Kathryn. I don't think any writing of a rule can address the *CSI* effect. In Albuquerque, some form of *CSI* is shown 117 times a week, so some people are watching—but I just read a stipulation on DNA, so this is what the two sides agreed for me to read, and I don't think I understood what I was telling the jury. And so I think we need to be careful, and I think sometimes we as judges are reading a stipulation that we barely understand what they're saying.

I don't think the jury just takes it to the bank. I think they penalize the prosecution when it doesn't do the work. That's what the *CSI* effect is. If they don't do the DNA test, they don't do the fingerprints, don't do the ballistics, then they're going to penalize the prosecution. If they do the tests, I think they put it to the side and listen to the fact witnesses, and I think we

are overestimating when we say the jury just takes the expert report and runs with it.

JUDGE SCHROEDER: One of the questions that we've had is to what extent is this overstatement issue a function of the witnesses testifying without sufficient notice to the defendants? In other words, the civil rules have extensive pretrial disclosures, and in a civil case, how many motions in limine did you have in your case, Judge Campbell?

JUDGE CAMPBELL: Eighteen.

JUDGE SCHROEDER: Right. In a civil case. And having been a civil trial lawyer for twenty-three years and becoming a federal judge, I'm relatively amazed at what information is not provided in a criminal case. You just get a lawyer's representation of what the expert's going to testify to. You don't get a report necessarily. Perhaps a *Daubert* review, and a limitation of overstatement, would be improved with better notice in criminal cases. Judge Dever's subcommittee of the Criminal Rules Committee is looking into that. If we're talking about a rule amendment on the one hand versus better discovery as a fix, to what extent would more discovery render a rule amendment unnecessary?

JUDGE DEVER: Right. The Criminal Rules Committee is going to have a meeting in Dallas in February where we're going to try and get input like this Committee's getting today. The proposal is to expand discovery of expert opinion in criminal cases in some way, but not to make civil and criminal discovery exactly the same. In civil cases *Daubert* hearings are frequent. But in the fourteen years that I've been a judge, I think I've maybe had five *Daubert* hearings in criminal cases. And so is it an information issue? Is this more a discovery issue in connection with criminal cases of how Rule 16 is currently written⁵⁸ and getting information to the lawyers, to the defense lawyers in particular? If they don't get the information, maybe that's why, as Rick Williamson says, they aren't moving for *Daubert* hearings.

JUDGE BROWNING: I wouldn't add more to Criminal Rule 16. It moves too fast. I just finished two long criminal trials, and you've just got experts, you know, they think they're going call them, and then they don't think they're going to call them. I just think that judges are massaging the situation and turning to the defendant and asking, "What do you need? What do you need to know? Government, tell them what the witness is going to say. Is that all they're going to say? Maybe send a letter."

I think that massaging and the quickness of the criminal trial is much more effective than starting to tinker with Rule 16—because sometimes you just have to allow an expert to testify, I mean, in a criminal trial. In civil, if they don't produce the reports, you kick them out and don't let them—they missed the deadlines, you pull the card. But for justice, sometimes in a criminal trial, if something comes up, they go down and drag a mechanic out of a garage,

58. Compare FED. R. CRIM. P. 16 (providing for limited discovery of expert opinions, for example, a lawyer's summary), with FED. R. CIV. P. 26 (requiring experts who are retained to submit extensive reports signed by the expert).

and what's he going to say? And so I'm a little reluctant to pull that formality over from civil cases.

JUDGE SCHROEDER: Would it be helpful in forensic evidence cases though to have a report from the expert as opposed to the lawyer's summary of what the expert would say?

JUDGE O'MALLEY: I've had a standing order before I left the district court requiring reports by experts in criminal cases, and where there were last-minute developments, then we could deal with those. But the government knows which experts they're going to be calling, and it made a big difference to have an expert report, and I made the defendants do the same thing. If they're going to call a counter-expert, they had to submit a report, and it didn't necessarily have to have all the details of a civil report, but a report from the expert I think, is critical.

JUDGE DEVER: And given how many cases are resolved by pleas, did you have those reports due, say, thirty days before a trial date? That's another issue that we've talked about on our subcommittee—the value of greater discovery given a 95 percent plea rate. And my second question is, did your standing order require a disclosure of the expert's prior testimony, as is required in a civil case? Civil litigators get that and are ready to go after an expert if he or she's deviating from something that they said in a previous case.

JUDGE BRIMMER: I only get that timing question in ineffective assistance of counsel cases because if the lawyer's good, he or she will ask for it, and then you file a motion. A good lawyer gets the information before the decision whether or not to plead.

PROFESSOR CAPRA: The prior testimony question as applied to criminal cases, wouldn't the ballistics expert say, "Yes, I identified that bullet, I identified that bullet and that bullet. I've got a thousand bullets." What good would that do?

JUDGE DEVER: Well, yes, although that's again one of the things that, when you look at what Rule 26 says, the question is how much you transfer to the criminal side.

JUDGE SCHROEDER: I think the goal would be you would have an idea of how they're going to articulate their opinion, and then you could say, "Judge, they can't say this anymore."

PROFESSOR CAPRA: And you could have a good cause exception for cases like Judge Browning is talking about.

JUDGE BROWNING: Well, you're going to sit on the government to do it, but they're going first. You're going to sit on the government and put that report out there, but oftentimes the defendant's scrambling to figure out whether they're going to respond at all, just let it go, or they're going to put a witness on to challenge a particular point, so I think some flexibility there is required.

I just do a pretrial conference, and I just say, "When are we going to have these reports? What do you need?" Just constantly asking questions about what do you need to get this done. Is all the discovery done? Are there going

to be *Daubert* issues? Just ask the question ten different ways and try to get people to put their cards on the table that close to trial.

PROFESSOR CAPRA: So, we could go on for probably two days on these issues about forensics and overstatements, but we need to move on. But thank you very much. That was very useful, and we're going to move on to the admissibility/weight question, and we're going to Eric, who co-wrote the article that apprised the Committee of the problematic cases that may not be applying Rule 702, as amended in 2000, in the way that the Committee intended.⁵⁹ Eric?

II. TOPIC TWO: RULE 702 AND PREPONDERANCE OF THE EVIDENCE

MR. LASKER: Sure, and I'd like to start off with some historical context because in writing my article, I looked back at the drafting history of the 2000 amendment to Rule 702,⁶⁰ and the priority of the Committee at that point in time was in looking at how courts had applied *Daubert*. The Committee determined that there were a couple of places where judges were getting tripped up, and it led to Rule 702(b) and 702(d)—that is, that the judge needs to assess the reliability of the factual foundation for an expert's opinions and also that a judge needs to assess reliability of how the expert is applying the methodology that they're purporting to apply. That was the driving force in the Committee's work—to put those admissibility requirements directly into 702, and they are now in 702.

What I discovered through my research is that the problem has persisted, that courts are not following the provisions of Rule 702(b) and (d), and there are a number of reasons for this. I think in part, though, it goes to confusion over language in some ways. 702(b) is talking about facts, right? And if you look at Rule 104(b), that's about facts. People think and judges think facts are for the jury, and that confuses the issue about what the reliability screen needs to be. There does need to be a reliability screen, but it's somewhat different and the fact that it's about facts I think leads to judges getting that wrong.

I think also with 702(d), when you're talking about an application of a methodology, that's a lot harder for judges to assess. It's also a lot harder for juries to assess, and that's why Rule 702 set up the language it did requiring the judge to do it. It's a hard job, but it's a necessary reliability screen. I also think judges sometimes end up, because it's so difficult, thinking that this is a credibility issue, which also then strikes them as a jury issue, which leads them to view this in a different way.

Aimee Wagstaff and I will have lots of disagreements about 702(c) as well, but I think judges understand methodology and trying to assess whether a methodology's reliable. So, the problem is with 702(b) and 702(d), and I

59. See generally David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Rule 702*, 57 WM. & MARY L. REV. 1 (2015).

60. See generally *Minutes of the Meeting of April 12–13, 1999*, ADVISORY COMM. ON EVIDENCE RULES, https://www.uscourts.gov/sites/default/files/fr_import/499minEV.pdf [<https://perma.cc/5JCN-A24V>] (last visited Feb. 12, 2019).

think the proposal to put 104(a) or the preponderance of the evidence standard into the Rule would be helpful. It's not an issue then of what type of testimony gets in or whether epidemiology is necessary or animal studies are reliable. That still is something the judge needs to determine as far as reliability, but it's making sure the judge is applying the proper standard at each step of the analysis.

And a particular concern that I have in reviewing the case law—and Judge Schroeder mentioned it—is that this is a mistake that's been made not only at the district court level but at the circuit court level, and that creates a real problem. Particularly, I think judicial education is a good step, but I don't think it's a solution when you have quick appeals.

One of the cases we cite is a Ninth Circuit case in which the court rejects the standard in *In re Paoli*,⁶¹ which talked about if any step in the analysis is unreliable, expert testimony needs to be excluded.⁶² The Ninth Circuit says that's not the standard.⁶³ Well, this Committee in amending Rule 702 expressly said that *is* the standard of Rule 702. It's actually in the Advisory Committee Note,⁶⁴ but if you're in the Ninth Circuit, and you're a Ninth Circuit district court judge, and you go through education on Rule 702, and the Ninth Circuit tells you that's not the case, education doesn't matter. You're still bound by Ninth Circuit law, so there's something more that needs to be done to address this, so I think a rule change will make a demarcation that there is now a new line where courts will say, "Well, the case law is preamendment, the amendment changes that case law." So, the problem of ignoring the Rule can be remedied because then you have this change in the Rule that makes it clear that this concern, which this Committee's had now, you know, it goes back before 2000, for this 702(b) and the 702(d) test can be addressed.

I think it's also important for attorneys to understand and to be able to recognize what the standard is because attorneys will cite to whatever case law is good for them, and if there are some cases citing the wrong standard, they're going to rely upon that.

In the cases I deal with which are on the civil side, we see lots of experts who are repeat players, and that is just the nature of it. There are some experts who testify a fair amount, and they understand their role in a courtroom is different, and they understand that there are certain standards that apply to their testimony, and I think having a clearer statement of the Rule will help improve the quality of expert testimony in the courtroom, which is part of the function of Rule 702.

If there is this sense that judges don't look at the factual predicate in the same way or they don't look at how a methodology has been applied in the

61. *In re Paoli* R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994).

62. *Id.* at 745 (“[A]ny step that renders the analysis unreliable . . . renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.”).

63. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1047 (9th Cir. 2014).

64. FED. R. EVID. 702 advisory committee’s note to 2000 amendment.

same way, then the experts won't be as focused on that in presenting their opinions, and those opinions won't be as strong as they should be and as *Daubert*, I think, wants them to be. So, I think there are a lot of benefits to be had from a change in the Rule that go beyond just judicial education, which I think is necessary given where we are and given some of the language in criminal appeals opinions that is just not consistent with what this Committee intended when it wrote the Rule in 2000.

PROFESSOR CAPRA: I hadn't heard that point about how the Rule might affect expert preparation. You really think that an expert says, "Well, I'm in the Ninth Circuit, so it's easy sailing, and I'll just wing it?"

MR. LASKER: I've literally had experts when we asked him what his opinion was saying, "Well, it depends on which courtroom I am in." Literally, I had an expert, and he would say—it's actually the case that Aimee and I are in—in which an expert was saying, well, in this circuit, this is what the Rule is, but in this circuit it's this, and there are also experts that tailor testimony to the circuit.

PROFESSOR CAPRA: Just like whatever you want me to be? Is that it?

MR. LASKER: I don't know that it's necessarily that—I mean, there are different ways you can view that.

PROFESSOR CAPRA: Of course.

MR. LASKER: But I think scientists also are in a different realm when they're in the courtroom, and so they understand that their testimony is being received under a different standard, and so part of what they're doing is saying, well, I have to provide expert testimony that is appropriate in the courtroom, and it seems that in certain courtrooms a certain expert opinion is appropriate and in other courtrooms it's not. I think that's another problem here. I mean, the rules are supposed to be applied equally.

One of the goals of the Federal Rules is that you have the same standard across courts. Now, obviously that can be difficult, but is it good that you have experts educating other experts as to what testimony will survive *Daubert* and what testimony won't survive *Daubert* in a particular court? You could say that's just because these people are professional experts, and you shouldn't believe them for anything, or you can say that scientists understand there's something different in the courtroom, and they don't quite understand what it is, and so they need to understand what testimony is appropriate in court and what testimony's not appropriate in court, so having a clear standard is important for that purpose as well.

PROFESSOR CAPRA: Aimee?

MS. WAGSTAFF: Yes, Eric and I just spent the last two years in a very intense *Daubert* struggle, so I had the Eric Lasker *Daubert* 101 class, but I think what he is complaining of won't be cured by this Rule. I don't think that this Rule is wrong. I think his main knock is that judges in appellate courts and district courts aren't applying it properly. I don't think that adding this preponderance of the evidence language to the Rule will help cure what he is complaining about. And I really never heard of my experts changing their testimony based on what court they're in.

MR. LASKER: I can tell you the name of the expert when we leave the room.

MS. WAGSTAFF: Okay. That being said, we'll move on. My point, what's happening now in these *Daubert* attacks is, as Judge O'Malley was talking about earlier, where if you give the courts too many rules or too much guidance, they almost feel like it's their job to weigh the evidence against each other and in the particular case that Eric and I were working on, it wasn't just the methodology of the expert that was attacked.

The expert relied on peer-reviewed literature, and it was the underlying literature that was attacked. And so we were actually almost second peer reviewing the peer-reviewed literature, and we were putting the judge, our MDL judge out in San Francisco, in a position where he was having to decide whether or not the peer-review process of an epidemiology study was reliable. When you start doing that, and you add this preponderance of the evidence standard, I think it's a really dangerous territory in that you're asking the judge now just inevitably to decide if the science is on trial.

You're asking him to decide if these peer reviewers actually did it by preponderance of the evidence. In this case there is an MDL and then there's a simultaneous state court consolidated proceeding out in Alameda County, which is in Oakland, and we were actually told that if the MDL judge struck all their experts based on the science being unreliable, not just the expert's application of it, that they were going to file a motion in the state case prior to us even designating any experts there because they thought there was no possible way the expert could ever apply this science reliably.

So, putting that preponderance of the evidence standard in when you get more sophisticated defense attorneys, and they start to attack the science, not just the application of it, I think really puts the judge in a difficult position. And, also, in a lot of these cases that were cited, I read them as well in this review material, it's unknown if they applied 104(a) or 104(b), and I think the biggest common area, Professor, that it looks like even when they were silent on which standard they applied, they came out with the right result.⁶⁵

So you would have to assume that they applied the right standard, and I just think it's a dangerous tool to put in judges' hands because for every case that's published and cited, there's hundreds that get it right. So I think judges are—especially federal judges are—the best and brightest attorneys, and they know how to do this, and they know how to apply these standards without putting that standard in there.

PROFESSOR CAPRA: Regarding the *Roundup* litigation,⁶⁶ the one in which you and Eric are involved: I'm not sure that this Rule would change anything that happened there, right? Because isn't the attack just about the *Daubert* peer-review factor and not about sufficiency of facts or data, or application of methodology?

65. See ADVISORY COMM. ON EVIDENCE RULES, *supra* note 5, at 175–94.

66. *In re Roundup Prods. Liab. Litig.*, No. 16-md-02741-VC, 2018 WL 3368534 (N.D. Cal. July 10, 2018).

MR. LASKER: Well, we could debate that back and forth. I mean, I think the interesting thing about that opinion that is clear is that Judge Chhabria in his opinion stated that his opinion might be different if he was in a different circuit.⁶⁷

PROFESSOR CAPRA: Okay.

MR. LASKER: And he pointed to the fact that the Ninth Circuit has a more liberal understanding of *Daubert* than other circuits.⁶⁸

PROFESSOR CAPRA: And he kept saying all the questions are “close, close, close, close.”⁶⁹

MR. LASKER: And then he cited to the *SQM North America*⁷⁰ case, in which the Ninth Circuit rejected in *In re Paoli*, which this court incorporated into Rule 702.⁷¹ Would that have made a difference? I honestly can’t say definitively, but I think it would have.

I want to clarify something because there are two separate issues. I don’t want to conflate them. One is what type of evidence is reliable and whether you need peer-reviewed science or whether you need epidemiology. That’s one dispute, and we’ll never agree on that, I’m sure, with the other side of the bar, but the issue for this Committee, I think, is different. It’s whether or not the Rule is clearly explained and what the gatekeeping function is. Once the judge is applying the gatekeeping function correctly, then there are debates about what’s reliable and what’s not reliable and whether it should be admitted, but that’s not the issue, I think, before this Committee.

The issue before this Committee is whether or not judges are actually applying the Rule, particularly on those issues of 702(b) and 702(d) where historically, going back before the amendments in 2000, there were problems, and the question of whether or not to put 104(a) into the Rule, which I think everybody agrees is a proper standard. I don’t see how that leads to problems in the application of the Rule. It is guiding judges as to how to apply the Rule correctly and right now we have case law that is just not clear on the point—I think Professor Capra did a very admirable job trying to determine whether or not it made a difference in one case versus another.

PROFESSOR CAPRA: I gave it a try.

MR. LASKER: But you’d never do that if you were instructing the jury on the burden of proof and you got the burden wrong. You’d never have an appellate court come back and say, “Well, yes the instruction was wrong, but I think the jury would have found it under the proper burden.” You need to

67. See *id.* at *5 (explaining that the Ninth Circuit has adopted a liberal gatekeeping test that allows for “more deference to experts in close cases than might be appropriate in some other Circuits”).

68. *Id.*

69. *Id.* at *1, *2, *23, *25, *27, *36.

70. *Id.* at *4 (citing *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043 (9th Cir. 2014)).

71. See *SQM N. Am. Corp.*, 750 F.3d at 1047–48.

have the correct standard to begin with, and if that's not happening, that's a problem I think needs to be fixed.

PROFESSOR CAPRA: Paul?

MR. SHECHTMAN: This proposal wouldn't, as I understand it, wouldn't add anything.

MR. LASKER: No.

MR. SHECHTMAN: It would just clarify. And so the question is, does it make sense to clarify here? And, as I said before, I think you could clarify elsewhere. I bet if you look at the 404(b) cases, many judges are applying 104(a). I think I would apply 104(a) because it really matters whether another crime comes in, and you'd want to make a threshold determination, but that's not what *Huddleston*⁷² says. It's a 104(b) issue.⁷³ I bet you could find other examples of rules where people applied 104(a) where it should be 104(b), and the question is, is that a worthy mission of going in and putting in what we all agree is the law into the law?

Judges know this is a 104(a) issue—good judges do. Why are we going into one individual rule and adding one thing?

PROFESSOR CAPRA: Well, I think pretty much without question this is the rule that's most often abused on the standard of proof.

MR. SHECHTMAN: You might just send a memo around.

JUDGE O'MALLEY: I agree that 104(a) is the standard. The problem is that if you have an amendment, unless you're very clear that the amendment was not intended to make any substantive change, I fear that what judges will think is what you're now doing is saying the judge's job is to look at the science and decide who's right.

PROFESSOR CAPRA: Does the Note say that in your opinion, the draft Note? I mean, I think it says it's only intended to refresh your recollection about a correct standard of proof.⁷⁴

72. *Huddleston v. United States*, 485 U.S. 681 (1988).

73. *Id.* at 690 (holding that proof that a defendant committed an act of uncharged misconduct is a question of conditional relevance governed by the prima facie standard of Rule 104(b)).

74. The draft Note being discussed here provides as follows:

Rule 702 has been amended to clarify and emphasize that the admissibility requirements set forth in the Rule must be established by a preponderance of the evidence. See Rule 104(a). Of course the Rule 104(a) standard applies to most of the admissibility requirements set forth in the Evidence Rules. See *Bourjaily v. United States*, 483 U.S. 171 (1987). But unfortunately many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are generally questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a), and are rejected by this amendment. There is no intent to raise any negative inference as to the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have ignored it when applying that Rule.

Of course some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds by a preponderance of the evidence that an expert has relied on sufficient studies to support an opinion, the fact that the expert has not read every single study

JUDGE O'MALLEY: Well first, you're not going to get the Ninth Circuit to fall into lockstep just because you change a rule. And, moreover, in studying a lot of these cases, one of the problems that we do have is the case of the overexclusion. In other words, some judges cannot resist the temptation to say, "I've been doing this *Daubert* stuff now for a week, and I know whose science is right, and that's the one that is going to come in or the other one gets excluded." And it's a real danger because *Daubert* itself makes clear that the reason 104 is the threshold is that all you're doing is saying by a preponderance of the evidence, is this reliable? Period.

So, it's a low standard, and all you're assessing is reliability. You're not assessing who's right, but the temptation is great to do so. When you're there, you listen to all these experts over and over and might say, "I get it, and I know who's right," and that's not what we're supposed to be doing.

MR. COLLINS: Did reliability requirements that are imposed by the rules sometimes in some cases require saying that science is wrong? Because if you have this notice in the rule that I can never question the science, then if a person has sufficient credentials their opinion goes in. At some point, does it require saying that the purported science is unsound?

JUDGE O'MALLEY: Absolutely. I think that it's in the rules, but as *Daubert* also says the point is to exclude junk science like ink dating. We can exclude junk science, but it has to allow for the inclusion of shaky but reliable science. So, in other words, even shaky science under *Daubert's* own terms is supposed to come in and go to the jury, so that's the problem. That's the fine line, and I think that some judges go too far in one direction by excluding things just because they look a little shaky, and others go too far the other way, which is let everything in and let the jury figure it out. But I think the way the Rule's written right now it's very clear.

Now, I don't have any problem with making it clear that Rule 104(a) applies to the Rule. The question is to make sure that it's very carefully done and not intended to imply that it is altering what judges have always had the tools to do and been required to do.

PROFESSOR CAPRA: It's a good question what "shaky but admissible" means. I don't think shaky but admissible means that a court can say, "I don't really believe it, but I think that I'm just going to give it to the jury because you'll cross-examine." Rather, the court needs to make a finding that the opinion is more likely than not reliable. And if the testimony just crosses that threshold, like 51 percent, that's shaky, but admissible. And then any argument that the expert failed to check a report or failed to complete all nine steps of application, that defect goes to weight, but I got to my 51 percent. Under 104(b), it's like you get to about 30 percent in a reliability determination, and then these much more serious objections would

that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis generally go to weight and not admissibility. Rather it means that once the court has found the admissibility requirement to be met by a preponderance of the evidence, any attack by the opponent will go only to the weight of the evidence.

nonetheless become “shaky but admissible.” It’s a big difference, where you start from in assessing questions of weight. Yes, Judge Browning?

JUDGE BROWNING: Well, the reason I would not incorporate Rule 104(a) into the Rule is that I don’t understand that the current Rule requires a preponderance of the evidence standard. That argument comes from footnote ten in the *Daubert* opinion that says it’s by a preponderance of the evidence.⁷⁵ I’ve always thought that’s odd because it cites to *Bourjaily*,⁷⁶ which, when we do a hearing for conspiracy, it makes sense to me at that point to say, “By a preponderance of the evidence, I find a conspiracy exists, and that defendant and that declarant were part of it.” But how do I use the preponderance of the evidence standard for the test of whether evidence is admissible? For example, how does it work in determining whether proffered evidence is relevant? Am I supposed to determine whether the evidence is more likely than not relevant?

That’s not a preponderance standard, so it’s weird to bring preponderance in, and so I think when we get to the *Daubert* issue, I don’t think I’m using the preponderance standard for a lot of the trimming that is going on. It’s just not coming into play. The preponderance standard comes in when you’re in equipoise, and you finally have to make a decision, that’s what you made it for, and you say, “Well, they didn’t prove it.” But that’s not typically what’s going on as you go through and trim out an expert’s report, so I wouldn’t incorporate it specifically into the Rule.

PROFESSOR CAPRA: Chris?

PROFESSOR MUELLER: It seems to me that it’s upon us to make this amendment because it is what the law is supposed to be, but I do think there is something to the point that we don’t add it in lots of other places in the rules in which the same kind of question arises. We don’t have any guidance for whether admitting a dying declaration allows the judge to decide whether the guy was about to die or not. I’m pretty sure that 104(a) applies there, too, but there are some cases that say no, that’s really for the jury to decide, and there are about five or six other examples that you can pull out of the air in which the rules don’t expressly say, and yet there is a right answer and wrong answer, and if we put it in here, there’s going to be all kinds of issues arising with those other provisions.

I agree with Judge Browning that when he trims, he’s not applying the preponderance standard. I think at that point it’s a question of law whether the statement overstates what the science is, and you don’t need to worry about whether the preponderance standard applies.

PROFESSOR CAPRA: I think that’s right because there are certain facts that you can easily determine by preponderance and certain ones that probably aren’t conducive to that. In Rule 804(b)(6),⁷⁷ when the Committee

75. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 n.10 (1993).

76. *Id.* (citing *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987)).

77. See FED. R. EVID. 804(b)(6) (“A statement offered against a party that wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending that result.”).

added that in 1996, the reason they added that is that they wanted to basically make it clear that forfeiture would be determined by preponderance and not by clear and convincing evidence or some other standard, and they actually say that in the Committee Note. And they cite 104(a)⁷⁸ because forfeiting conduct is a fact that can be proven in one way or another. But the question of relevance is more difficult, because it is a logical proposition, not a fact, that is being considered. I think maybe you really can't even apply the preponderance standard. It's a good point.

MR. LASKER: So, I think that this discussion highlights the difficulty that some judges have with Rule 702, and 702 is different. *Daubert* does state that 104(a) applies.⁷⁹ It does state that the judge must find that the methodology employed is reliable by a preponderance of the evidence, and that is a standard the Supreme Court has established,⁸⁰ and as I said before, I think that in some ways with some questions, that's a difficult concept for judges, and sometimes their instinct is that that's not the standard here and they don't understand that that's a standard that they should be applying under Rule 702.

It's not the case that the Committee needs to be changing every rule based upon the possibility that there are disagreements about what standard applies. Here, the Supreme Court has stated what standard applies,⁸¹ and we have a significant number of courts and opinions that are getting it wrong. When the next rule comes up, the Committee will have to assess how egregious the errors are, but with Rule 702, there is clearly a problem of error in application of the Rule.

I think that the Committee cannot say, well, we know nobody gets it, but it is in the Rule, so we'll just move on. I think there needs to be some attempt, at least, to have the Rule operate as was intended. I think Judge O'Malley is correct, that the Committee Note that accompanies the amendment would need to explain what's being done, and that what's being done is to make clear what the standard is. There's not a dispute, and there can't be dispute about what the standard is, and so the addition can only be corrective. I don't see how it hurts the situation.

PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: Yes, I'd like to follow up with a question based on what Judge Browning said. I struggle with the same issue that he's identified. By the way, this has been really helpful just even reading these materials and thinking about 104(a) and 702, and the discussion on the memos is very helpful. But if we look, for example, at 702(d), I have to decide by a preponderance of the evidence that the expert has reliably applied the principles and methods to the facts of the case.

Let's say I have a case where the plaintiff's expert says he has reliably applied the principles and methods to the facts of the case for these reasons,

78. *See id.* r. 804(b)(6) advisory committee's note to 1997 amendment.

79. *Daubert*, 509 U.S. at 592.

80. *Id.* at 592 n.10.

81. *Id.*

and the defense expert says the plaintiff's expert has not applied the principles. Can I admit both opinions?

PROFESSOR CAPRA: There are a couple of cases like that in the outline where the defendant says, "Well, this is what you had to do, and you didn't do it," and the plaintiff's expert says, "No, I did that."⁸² That becomes a credibility determination. That goes to the jury in my opinion.

JUDGE CAMPBELL: That's what I struggle with, and if the rule says explicitly that I have to decide by a preponderance of the evidence whether the expert reliably applied the principles and methods, and I say I think I believe the plaintiff's expert by a preponderance of the evidence, can I let in a defense expert? I can't say that I agree with the defense expert by a preponderance of the evidence.

PROFESSOR MUELLER: It seems to me you are supposed to decide which of those is right, but once you decide that the expert whose credibility or whose method are being challenged, you decided to believe him, and he did apply things, then you admit his testimony. Then, the other guy can offer his opinion that the expert is not doing it right—now it goes to weight, but you are supposed to decide by listening to two people who conflict.

JUDGE CAMPBELL: That's helpful, but let's assume that the plaintiff's expert is saying, "I think the accident caused this injury." Let's say the defense expert is saying, "I think the accident did not cause this injury." Can I let in both of those opinions if I have to find they're reliably applying the methodology by a preponderance of the evidence?

PROFESSOR MUELLER: But what you just described doesn't go to method. It's their final conclusion.

MR. LASKER: Yes, I think that's the point. Applying a methodology does not mean that you always reach the same result. People can apply a methodology and there is scientific judgment that comes into play in which there could be different conclusions. That's a separate question though than the gatekeeping, which is an expert saying this is my opinion based upon this methodology, and then you go back and you say but there are certain steps you have to take under this methodology, and the expert didn't take those steps.

In some instances, it's easier than others. Some methodologies have fairly standardized accepted steps you need to take, and if you miss one of those, it's easier to figure out the error. A lot of the time, like a groundwater model or something like that, it's easier. I grant that, but that's a different question.

82. See, e.g., *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 14 (1st Cir. 2011) ("We stress that it is up to the jury to decide whether to accept his opinion that exposure to benzene can cause APL—a proposition that plaintiffs must prove by a preponderance of the evidence."); *United States v. Gipson*, 383 F.3d 689, 697 (8th Cir. 2004) (distinguishing challenges to scientific methodology and scientific application, the latter of which should only be excluded by a judge in rare instances); *United States v. Lundi*, No. 17-CR-388, 2018 WL 3369665, at *3 (E.D.N.Y. July 10, 2018) (deeming a question of whether the expert properly used the ACE-V method for fingerprint analysis properly an issue of weight, not admissibility). For the complete case digest, see ADVISORY COMM. ON EVIDENCE RULES, *supra* note 5, at 175–95.

PROFESSOR CAPRA: Judge Campbell's question is, to take a hypothetical: there are four commonly accepted steps for employing a methodology. Now take two different examples. One is, "I didn't do steps two and three, but what the heck?" So that expert should be excluded; the error should not be left for the jury to weigh. But example two is, "I did do steps two and three, even though that other side says I didn't." That becomes a credibility determination for the jury I would think, right?

MR. LASKER: Yes, I mean, unless the guy's really, really off in his assessment that he did those steps.

JUDGE CAMPBELL: One more time with the question. Let's assume the defense expert says, "On these four steps you cannot apply steps two and three reliably and reach this conclusion." If I disagree and don't think that's shown by a preponderance of the evidence, I think you're saying that's still admissible?

JUDGE SCHROEDER: You're coming up with a rule that says the party bearing the burden of proof must meet all these steps, and that's the plan. Then, the defense expert says, "Well maybe you didn't do these steps." But now it comes into credibility.

MR. SHECHTMAN: Judge Campbell's question is a good one, because it shows how tough the problem is to figure out if one expert says, "You must do steps one, two, and three to get a reliable conclusion," and the other expert says, "All I need to do is steps one and two." Now, presumably if 104(a) applies, the trial judge has to decide whether you have to do steps one, two, and three *or* steps one and two, and if you find you have to do steps one, two, and three, out goes the witness who says there's one or two steps.

PROFESSOR MUELLER: I think in some cases that's probably going to be right.

MR. SHECHTMAN: But, on the other hand, if I say, "I did step three," and you say, "No, you didn't," that becomes a 104(b) question for the jury. But realize that if the answer is, "I think you have to do step three," and you find that, you're keeping out the expert in this case, and that's Judge O'Malley's concern, which is you're really controlling this case. That case is not going to the jury.

PROFESSOR MUELLER: Well, on the question of whether he performed step three, if you believe it's an essential step, and there's a conflict as to whether he did it, you have to decide that in order to allow this testimony. But if you decide that he did, the other guy can then say, "No, he didn't," and now it affects weight. That's different from admissibility.

JUDGE LIVINGSTON: So, are the two of you disagreeing? Did I hear you say it's 104(a) all the way down?

PROFESSOR MUELLER: If you admit the first expert for doing all the steps, you can still admit the opposing expert who says, "No, you didn't do step three" or "You didn't do it right" because Rule 104 says that just because it affects admissibility doesn't mean it also doesn't affect weight.

JUDGE O'MALLEY: I think part of the confusion is when we're talking about steps and whether those are necessary for methodology, you're not in

the last provision that Judge Campbell's pointing to. The last provision that Judge Campbell's pointing to is the fit question: Does it fit the facts? In other words, let's accept that the methodology is either acceptable with all three steps only or with two steps and get past that. The question then is how does it fit the facts? You can have the most brilliant types of science, but the facts of the case have to align with application of that science. That's what the last provision is about, and the fit question has always been the most difficult question under *Daubert*. In fact, there's case after case after case that says we don't even know what it means.⁸³

PROFESSOR CAPRA: Because the term "fit" doesn't really work there.

JUDGE O'MALLEY: Right.

PROFESSOR CAPRA: It's about whether you apply the methodology appropriately. Application is different from fit. Fit is essentially relevance.

MR. LASKER: Yes.

MR. COLLINS: Which is, if it doesn't fit, it doesn't help the trier of fact, and so it doesn't satisfy the basic standard of helpfulness under Rule 702(a). That's what that stands for.

MR. LAU: I would just remind the Committee that there was a guest earlier in our Boston University symposium mentioning synthetic drugs. And I think Judge Campbell's concern may really be important there, to determine whether the substance found on the defendant is substantially similar to a controlled substance. I think Judge Campbell's concern is going to be great, right? Everybody will be talking methodology: Is this substantially similar? One side says yes. One side says no.

MR. LASKER: Boy, you take that away from a jury in a criminal case and I don't care what circuit you're in, you're going to get reversed. That's a jury question.

PROFESSOR CAPRA: Okay. That was very fruitful, let's take a short break and go on to the next agenda item.

[Break]

PROFESSOR CAPRA: Before we proceed with other matters, Judge Livingston has a couple of observations with respect to experts.

JUDGE LIVINGSTON: Okay. Before we move on from experts, I would like to ask our panelists: If we decide not to go forward with the Rule change, what do you think of efforts in support of our judicial education in the application of Rule 702? I was thinking that several of the judges here that have made comments would be great for a panel for the FJC, or for webinars. I think maybe we should talk to John Cook, the new director of the FJC, and see if John would be willing to put a program and a panel together for the

83. See, e.g., *Joiner v. Gen. Elec. Co.*, 864 F. Supp. 1310, 1320 (N.D. Ga. 1994) (noting that "[f]it" is not always obvious" (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993))), *rev'd*, 78 F.3d 524 (11th Cir. 1996), *rev'd*, 522 U.S. 136 (1997); see also D. H. Kaye, *The Dynamics of Daubert: Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 VA. L. REV. 1933, 1961-62 (2001) (challenging the notion that "fit" is its own requirement, arguing instead that it falls within *Daubert*'s validity requirement).

next grouping of district judge training sessions. I think that would make a lot of sense.

MR. SHECHTMAN: And I might add that Judge Campbell's questions, they're real problems, really makes you work in this area, and so to the extent training includes those kinds of problems from real cases, I think it's really useful.

MR. REAGAN: I'm from the FJC, and I'm here for the particular question of how FJC can assist in judicial education on Rule 702. So, if you could reflect, particularly the federal judges in the room, on what sort of FJC education efforts you have personally experienced that you think are good models for what would be helpful here, that kind of indication would be helpful.

MR. LASKER: Yes, I guess, and I'm not sure exactly how the Committee can do that, but my concern, which I expressed previously, is that it's not only educating judges—there has to be a broader education of more other participants in this process. And I know that, for example, the Committee can't write a new note without amending the Rule, or that's just the practice, and I don't know what other tools you have at your disposal, but there has to be a broader education than just for the judges because of the reasons I stated. I don't have any recommendations because I don't know what tools you have.

PROFESSOR CAPRA: And all the education in the world doesn't change the Ninth Circuit law. I guess the Committee needs to camp out at the Ninth Circuit Judicial Conference, with a booth or something.

MR. LASKER: Right. Though I won't recommend that.

JUDGE LIVINGSTON: I'm not cutting off any other ideas about judicial education, but we had one other question, returning to forensics for just a moment and the problem of overstatement. The materials talk a lot about how we want to get away from using a reasonable degree of certainly, medical certainty, whatever type, and the holdup is the comparable way of quantifying or talking about expertise that's not quantifiable. Like the Department of the Army using the likelihood of observing this amount of correspondence in the context of fingerprints when two impressions are made by different sources, it's considered "extremely low."

My question was—I'm imaging the cross that would take place—my first question when I heard that is whether that's when you would be considered by tone, and then all considered among the community of forensic fingerprint examiners, of which I am a member, we would consider it extremely low. We would have some degree of confidence, assurance in our community, and that tailors very close to reasonable degree of the old standard, reasonable degree of certainty, so my question is, what does DOJ right now think in the context of putting on an expert that's an experiential forensic expert—will it be something like the Department of the Army's opinion or something else?

MR. HUNT: As to fingerprints, the Department of the Army is the only laboratory in the country that currently uses that description of "extremely

low,” and that’s based on a likelihood ratio,⁸⁴ which is not what is happening in forensics in the United States other than in DNA. In DNA, the first point that we spoke to was the number and how much more likely that number made the proposition, so, outside of DNA, there’s currently no validated cases other than this one system that they had at the Army for stating likelihood ratios.

I doubt that when you take that phrase and try to apply it in other areas it is going to be very helpful. That goes back to my point earlier when we talked about just taking a few points of comparison and then this is called a score-based likelihood ratio, and based on the score that these particular points build up in that algorithm, they correlate that with a statement of confidence. It’s done in DNA validly, but in fingerprints, what you’re doing when you do that, you are discarding an enormous amount of data to get to the objective basis that the examiner uses. This gets to my stick man analogy. You’re taking a photograph, turning it into a stick man for the purpose of trying to apply points. In so doing, you’re discarding again an enormous amount of data that is helpful to both identification and exclusion for that matter.

JUDGE LIVINGSTON: Making sure I understand you, can I take two minutes? So, the fingerprint expert is testifying with the expertise that is like an art expert in some ways who says, “I’ve been studying art history forever. I can tell a Picasso. This is a Picasso based on my experience, based on all the identifications of Picassos I’ve done in the past and based on my comparison.” So, I understand you’re stripping out quantification, and it’s an overstatement if the fingerprint expert then goes on to say, “I’m 60 percent sure,” “I’m 90 percent sure,” because he doesn’t have the empirical studies to back that up. But he or she will say based on my experience, it’s a match to a reasonable degree of assurance?

PROFESSOR CAPRA: They can’t say to a reasonable degree of certainty. Under your guidelines, they’re not allowed.

MR. HUNT: Right. They’re going to say that “I identified the questioned print to the known print.” Again, that’s an experience-based statement. It’s not an empirical claim. We make that clear in the document, and the basis for that again is the fact that that examiner, before they’re qualified to do this in a case, has done that hundreds of thousands of times successfully, and that’s the basis, but we’re not saying that latent print is unique. We’re not saying that they have individualized that print. All we’re saying is that they match, and—well, we’re not saying that they match, but that’s the word—so you’re right.

84. See Def. Forensic Sci. Ctr., Dep’t of the Army, Information Paper on Use of the Term “Identification” in Latent Print Technical Reports (Nov. 3, 2015), http://onin.com/fp/DFSC_LP_Information_Paper_Nov_2015.pdf [<https://perma.cc/K4TP-FQPU>].

III. TOPIC THREE: RULE 106

PROFESSOR CAPRA: Thank you all very much. We now move to Rule 106, the rule of completeness, which is a very important part of the agenda because, at least in my opinion, it's an important change. The Committee is currently considering a proposal that would do the following: (1) specify that completion is allowed only if the initial statement admitted is misleading and the remainder would correct the misimpression; (2) allow a completing statement to be admitted even though it is hearsay; (3) allow oral, unrecorded statements to be introduced; and (4) allow the court to determine the proper timing for completion.

Proposed Rule 106 Addressing the Rule of Completeness:**Rule 106. Remainder of or Related ~~Writings or Recorded~~ Oral or Written Statements.**

If a party introduces all or part of ~~a an oral or written writing or recorded~~ statement *that is misleading*, an adverse party may require the introduction, ~~at that time~~, of any other part—~~or any other oral or written writing or recorded~~ statement *by the same person—that in fairness ought to be considered at the same time, that corrects the misleading impression, even if it would otherwise be inadmissible under the rule against hearsay. Timing of the completion is within the court's discretion.*

The draft Committee Note provides as follows:

Rule 106 has been amended to provide that if evidence is found necessary to complete under the strict requirements of the Rule, then that completing evidence is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly admissible under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates the misimpression can object to the completing evidence on hearsay grounds. For example, assume the defendant in a murder case admits that he owned the murder weapon, but also states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership is misleading. The adverse party, who has by definition created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. The adverse party can fairly be said to have waived its right to object to hearsay that would be necessary to correct a misleading impression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The Rule clarifies that it is triggered by a misleading presentation that will be corrected by the completing statement. The Committee determined that it would be useful to set forth more specific criteria than the “fairness” standard set forth in the original Rule.

The Rule has also been amended to cover oral statements that have not been recorded. The original Advisory Committee Note cites “practical reasons” for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. The trial judge, under Rule 403, can take into account the nature and

difficulty of the dispute over the content or existence of the completing statement in deciding whether it should be admitted. In any case, many courts have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. The amendment brings all rule of completeness questions under one rule.

The amendment clarifies that the source of the completing information must be the same as the source of the misleading information. Completing through third party statements could lead to significant disruption. Moreover, if one person's statement is misleading it will rarely if ever be sufficiently clarified by statements or writings of other persons.

The original Rule provided for completion at the time that the initial statement is introduced. But courts have understandably found that trial courts should have discretion to determine when the completion may occur. The amendment provides that the court has discretion to require contemporaneous completion or to allow a delay in the introduction of the completing evidence. It is contemplated that completion will be contemporaneous in most cases, because of the "inadequacy of repair work when delayed to a later point in the trial." Adv. Comm. Note to Rule 106.

The amendment does not give a green light of admissibility to all excised portions of writings, recordings and statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party makes a partial, misleading presentation of a person's statements, and the adverse party proffers other statements of the same speaker that will in fact correct the misimpression.

We're going to call on Paul to take us through quickly.

MR. SHECHTMAN: Not very quickly.

PROFESSOR CAPRA: Super quickly, some of the hypotheticals he's developed about how this Rule might be applied or not applied. We will state the hypotheticals as we go through them.

MR. SHECHTMAN: I teach Evidence at Columbia. I've never spent much time on this Rule or thought very much about it until I was invited here, and I'll just take you through these hypotheticals quickly.

The first one says, after a murder, a police officer confronts X about a gun found in the bushes near the crime scene. X says, "The gun is mine, and it was stolen from me six months ago." The government offers the first part of the statement, which is admissible as a party-opponent statement.⁸⁵ The defendant offers the second part, but the government objects on hearsay grounds.

This is Judge Grimm's hypothetical.⁸⁶ It's the problem of completing with hearsay in its purest form, where the first half without the rest is misleading and selective. Usually, the reason this problem arises is you have a rule of evidence that's asymmetrical. Rule 801(d)(2)(A) allows a hearsay statement to be admitted against the party who made it, but not in that party's favor.

85. See FED. R. EVID. 801(d)(2)(A).

86. *United States v. Bailey*, No. PWG-16-0246, 2017 WL 5126163, at *2 (D. Md. Nov. 6, 2017). Judge Grimm requested that the Advisory Committee consider amendments to Rule 106 that would allow a remainder to be admitted over a hearsay objection *and* cover unrecorded oral statements. *Id.*

So, your possible solutions here are to fall back on the common law. That's not a very happy one for me. Or to use 611(a).⁸⁷ I don't like that very much.

It's not a solution to say that the second part of this can come in for context but not for its truth. If you take that seriously, you need a limiting instruction, which no one can understand.

PROFESSOR CAPRA: It's not useful for context unless it's true. The only way the statement about selling the gun puts the first part in context—corrects the misimpression—is if he actually sold the gun.

MR. SHECHTMAN: Totally right. And in any event, the Committee in its recent past—especially in the 2014 amendment on prior consistent statements⁸⁸—has sort of tried to move away from limiting instructions that can't be followed, so this has two problems: (1) it's oral, so we're going to speak to that; and (2) if the defense counsel's trying to put it in, he can't because it's hearsay, so you need a solution. This can be resolved actually by—I don't know what the word is, un-genderizing or going back to where you were when the Rule was initially written, which provided that the party who offered the misleading portion can be required to put in the remainder. Under that language, the government's putting it in, and so, with respect to the defendant, it is technically a statement offered by a party-opponent and so arguably admissible under Rule 801(d)(2)(A) even though the defendant made the statement.⁸⁹ So that's arguably a simple solution to the purest case.

Hypothetical two is a little more complicated. It says, after a murder, a police officer confronts X about a gun found in the bushes. X says, "The gun is mine." Then the next day X calls the officer and says, "I just remembered the gun was stolen from me six months ago." If the prosecution offers the first part, should the defendant be permitted to offer the second?

Until this meeting, I didn't realize that this Rule applies to other statements and not just to a portion of the original statement offered. I've never seen a case or thought about a case where there are statements, and one could say, "Look, the first statement here is not misleading. Therefore, the second statement is not admissible because there is nothing to clarify." In any event, hypothetical two highlights that as the Rule's currently drafted, it cuts across statements and that surprises me to some extent.

In the third hypothetical, the difference is that the defendant speaks to a different police officer the next day and says he forgot to tell Officer Number One that he sold the gun. If you think it comes in, there is a problem of proof because you can't say to Officer Number One on the witness stand, who related the first statement, "What did the defendant say the next day?" because he doesn't know what was said the next day. And so this problem,

87. See FED. R. EVID. 611(a).

88. See *id.* r. 801(d)(1)(B) advisory committee's note to 2014 amendment.

89. For Rule 106 as originally enacted and the gender-neutralizing amendment from 1987, see RICHARD D. FRIEDMAN & JOSHUA DEAHL, *FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY* 27 (2016). The gender-neutralizing amendment changed "an adverse party may require him at that time to introduce any other part" to "an adverse party may require the introduction at that time." *Id.*

if you think this statement should come in, you're going to have to call Officer Number Two in the defense case. Even if the hearsay objection is overcome by a rule change, there may be issues particularly because you're talking about statements where the completeness doctrine requires a timing modification. Ordinarily completion, when justified, is done at the time the misleading portion is offered. But that cannot be done when two statements were heard by different police officers. It's not always possible for completion to be contemporaneous.

The fourth example is, the government admits the statement from X that "the gun is mine" and X says, "Well, I also told you it was stolen from me six months ago, so the statement needs to be completed." But the police officer says, "You never said that." Now, this is what the Advisory Committee Note to Rule 106 means when it says there are practical problems with oral, unrecorded statements⁹⁰ because there can be a dispute about whether they were ever made. Then, the question is, what do you do? You can't get completeness from the testifying police officer because he contends that the completing statement was never made.

He's not going to say it. He doesn't believe it, and so what is the alternative? One alternative is that the defendant could testify. He could, of course, testify that he sold the gun. Should he be able to testify to his prior statement, about what he says he told the police officer? My view is no judge in the world is going to prevent him from saying, "And I told the cop that I sold the gun," even though it is hearsay.

But this is what the Rule means by the practical problem because if it is a disputed oral statement, there's a problem when there is a dispute about the prior statement having been made.

PROFESSOR CAPRA: But what if the defendant disputes the first part of the statement? Isn't that a problem?

MR. SHECHTMAN: Well, no because that's why they're charged.

PROFESSOR CAPRA: But how do you know that statement was made? And why is there a difference in disputability, and practicality, between the first part of the statement and the second? My view is that the Advisory Committee saw a "practical problem" as to oral, unrecorded statements in this one area only, whereas there is a problem of disputability with every unrecorded, oral statement ever offered. And we don't exclude proof of any other oral statements due to this "practical problem." We let the jury decide whether the statement was ever made.

MR. SHECHTMAN: Well, I think that we have to be careful with opening up the rule of completeness to all oral statements.

The next hypothetical is, X is overheard on a wiretap telling Y, "Z is going to drive the getaway car for our bank robbery next week." Z is on trial for the robbery, and the prosecution offers X's statement under the coconspirator

90. See FED. R. EVID. 106 advisory committee's note.

exception to the hearsay rule.⁹¹ The defense seeks to introduce another call, overheard the next day, in which X tells Y, “Z can’t do it. W is probably going to be the getaway driver.”

Realize, again, we think about this Rule in the statements of a defendant, but the same problem occurs with coconspirator statements. It’s true anywhere you have some asymmetry, and you have asymmetry in coconspirator statements because they cannot be admitted in a defendant’s favor, only against him.

You have hearsay problems if the defendant tries to offer the second statement. It’s a little unfair to let the first statement in but not allow the second statement to come in.

I had this issue this summer in a trial, and I was happy the prosecutor never noticed that I was offering it for my client. My view is most prosecutors won’t object because they don’t realize that the coconspirator exception is a one-way ratchet. This is an example where if you wanted to get the second statement in for the defendant, the only way to do this is through the rule of completeness, if you’re going to be a true evidence scholar.

In the next hypothetical, there is a slight change from the previous one. The second statement is a call in which Y tells X, “I just spoke to Z and he can’t drive the getaway car next week. We should use W.”

Now, this is here because if you think the previous one comes in for completeness, then this should come in for completeness as well, but note that you have a different speaker here, and that gets to the question whether the rule of completeness should work with statements not made by the original speaker. There might be a question of how broad the Rule should be.

The last hypothetical is based on a case called *Woolbright*.⁹² In the hypo, the defendant’s girlfriend walked out of a hotel room and into the arms of police officers who received a tip that the couple was carrying a suitcase which contained clothes and drugs.⁹³ At the precinct, W told the police, “The suitcase is mine, but the drugs belong to X; he put them in without my permission.” At X’s trial, his lawyer introduces a portion of W’s statement—“the suitcase is mine”—as a declaration against interest.⁹⁴ But the statement accusing X is not against interest because she is shifting blame. It’s hard for me to think that any judge would keep out the second part of the statement because the initial statement seems misleading without that qualifier. But the court in *Woolbright* did exactly that.⁹⁵

91. See *id.* r. 801(d)(2)(E) (permitting opposing party statements made by a “coconspirator during and in furtherance of the conspiracy”).

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

93. *Id.* at 1391–92.

94. See FED. R. EVID. 804(b)(3).

95. *Woolbright*, 831 F.2d at 1395. (“Neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611, which allows a district judge to control the presentation of evidence as necessary to the ‘ascertainment of the truth,’ empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a

PROFESSOR CAPRA: This last hypo indicates that it is not only the criminal defendant who needs the rule of completeness to overcome a hearsay objection; the government sometimes needs it as well.

MR. SHECHTMAN: I would say there are occasions where the government can be the beneficiary of this Rule, but having said that, once you appreciate that, in most instances any expansion of the completeness doctrine will favor a defendant because the great bulk of the cases will be admission cases, either simple ones or coconspirator ones.

I drafted a proposed rule that we might consider.⁹⁶ It covers oral statements “the contents of which are not substantially in dispute”—because I do think if they’re substantially in dispute, I don’t know how you have this rule because the officer says that the statement was never made.

My draft would provide that the court “may require the introduction of any other part of the statement that is necessary to correct a misleading impression.” The completing statement would be admissible if it is hearsay. And finally, the timing of completion should be in the court’s discretion but should be contemporaneous if practicable.

PROFESSOR CAPRA: One more thing. That *Woolbright* case you brought up, that’s not solved by the return to the original rule that required the party that proffers the misleading part to also admit the completing part because, in that case, it is the defendant offering the misleading part,⁹⁷ and we can’t force him to offer the remainder. Right?

MR. SHECHTMAN: No, that’s not solved by returning to the original Rule. You can’t just fix that by going back and saying the proponent is required to offer the completing statement.

PROFESSOR CAPRA: Right.

MR. SHECHTMAN: So that simple fix won’t work, and the question is sort of how much of a problem is it? Is it worth fixing? But when you think about it, like most things in evidence law, it’s more complex than you first think.

PROFESSOR CAPRA: Judge Schroeder has a question.

JUDGE SCHROEDER: What does the phrase “the contents of which are not substantially in dispute” mean if it’s the situation where it’s just the officer’s testimony that the defendant said something and the defendant denies it?

MR. SHECHTMAN: Even if the defendant denies it, it’s coming in, right? And you don’t need the rule of completeness to do it. It’s the opposite

defined hearsay exception.”). Instead, the court relied on Rule 804(b)(5), the “catchall” hearsay exception now found under Rule 807, to admit the statement in question. *Id.* at 1396.

96. Mr. Shechtman’s proposed Rule 106 provides as follows:

If a party introduces all or part of a written or recorded statement, or an oral statement the contents of which are not substantially in dispute, and that statement is misleading, the court may require the introduction of any other part of the statement that is necessary to correct a misleading impression, even if it would be otherwise inadmissible under the rule against hearsay. Timing of the completion is within the court’s discretion, but should be contemporaneous when practicable.

97. See *Woolbright*, 831 F.2d at 1395.

situation that the language would cover, where the police officer denies that the defendant made a completing statement.

Where I'm concerned, Judge, is the police officer says, "All he said to me is 'that's my gun.' He never said a darned thing about he sold it," right? Now, if you expand this Rule to all oral statements, what do you do in that situation? Perhaps someone else can get on the witness stand. I mean, assume there was somebody else in the room. That person in the defense case can get on the stand and say, "He also said this." Normally, we would think that's hearsay, right? You can't put a witness on to say what the defendant said.

JUDGE O'MALLEY: Does that mean though that your "not substantially in dispute" language is in the wrong place?

JUDGE SCHROEDER: It sounds like it modifies the statement that comes in initially as opposed to the completing statement.

PROFESSOR CAPRA: No, that's a good point.

MR. SHECHTMAN: That's a good point. Yes, yes. No, I tell my students it's hard to draft. The "substantial dispute" language should be tied to the completing statement, not the original one.

PROFESSOR CAPRA: Judge O'Malley, you had a couple of comments about a possible amendment to Rule 106.

JUDGE O'MALLEY: Yes, I think the same person limitation—that the completing statement must be made by the same person who made the original statement—is a real problem because if the statement is in response to a question, and the way the question was phrased makes the statement mean something totally different or at least arguably means something different, then the question should be admitted for completion. Or what if you're in a meeting, and something's said, and the very next comment makes it clear that everyone understood it to be a joke? Shouldn't that comment be admissible to correct a misimpression, even if it is made by a different person?

So, I think that you shouldn't have a same person limitation, and that was one of the things that I was concerned about. Then, the other piece was I actually didn't know if we should limit it to completion that would otherwise be hearsay. I liked your proposal that maybe to say "it otherwise be admissible under these Rules" and not just limit it to a hearsay problem, because if it's fairness, it's fairness, and I think the judge could figure out whether it should come in under the fairness rubric.

PROFESSOR CAPRA: Right.

JUDGE O'MALLEY: And then the third piece was, and I think it's solved by this suggestion, which is, I think, that 90 percent of the time it should be contemporaneous because that makes the correction better, but I agree that the judge should have some discretion. I just think the fallback could be contemporaneous, if possible.

PROFESSOR CAPRA: Okay.

MR. SHECHTMAN: And I would only add the point about limiting it to hearsay is that all the cases that come up are hearsay cases, and I don't know

what else is out there, but I would be wary about limiting the protection only to hearsay.

PROFESSOR CAPRA: It seems to me if the Committee has learned anything, it is that the vaguer the provision, the less likely it's going to be followed. And so if the basic problem is hearsay, then the Rule should say that the completing statement is admissible even though it is hearsay.

MR. WILLIAMSON: Those are words to live by.

PROFESSOR CAPRA: Well, you know, you get simple after twenty-three years in this job. I get the point that covering only hearsay might be underinclusive. I think, though, that I looked at every reported federal case, and I couldn't find one that dealt with completion that was barred by anything other than hearsay, but I can't say that would never happen. Judy, you had a comment about Rule 106.

MS. SMITH: Well, the hypotheticals are fascinating. One of the things I was going to say is that from a strategic standpoint looking at these rules that allow self-serving hearsay, as a prosecutor in hypothetical one,⁹⁸ I think we wouldn't object, and I hope that was the state of mind with the prosecutor in your case.

PROFESSOR CAPRA: And that's an argument for doing nothing in the sense of, what prosecutor's going to present a misleading statement and then object to a remainder that remedies the misimpression?

MS. SMITH: Hopefully not, right?

PROFESSOR CAPRA: Well, the answer seems to be some, according to the cases.

MR. SHECHTMAN: Yes.

MS. SMITH: But that's hopefully—it's a training issue, right? Routinely we have statements and it's considered from a strategic standpoint in our office where we don't offer incriminating parts of statements because we're concerned about the rule of completeness, and we have judges that let all the self-serving statements in.

MALE VOICE: Yes, because that's the law.

MS. SMITH: Well, but no, because sometimes we have statements that are not misleading, but we decide not to admit them because the trial judge will automatically admit the defendant's self-serving hearsay as "completion," making it not worth it to admit the first part. Adequate cross-examination, so—

PROFESSOR CAPRA: You are saying that there are a lot of instances of judges saying it's not misleading, but I'm going to allow completion with the defendant's hearsay anyway? Even though the first part is not misleading?

MS. SMITH: I don't know that it's a lot, but it's one of those things that I've experienced.

98. X says, "The gun is mine, and it was stolen from me six months ago." The government offers the first part of the statement, which is admissible as a party-opponent statement. The defendant offers the second part, but the government objects on hearsay grounds.

JUDGE SCHROEDER: No, no. What this Rule says is completion is allowed only if it's to correct a misleading impression, so it's self-limiting, right?

MR. SHECHTMAN: Yes, which is what I thought.

MS. SMITH: Correct, but I guess what I'm saying is it goes to the issue of what we've been talking about, which is not all rules are properly followed.

MR. WILLIAMSON: I had a case fairly recently which was in trial for seven weeks, and the government filed a motion in limine under Rule 106 saying don't let Williamson try to introduce this other stuff, which shouldn't fall under a hearsay exception, under the doctrine of completeness. In fact, they said to the district court judge, "Don't be misled." I said, "I've won. I don't have to say anything." Never tell a district court judge that he would or she would be misled by the evidence. In any event, there was an effort right up front to deal with the "problem" of introducing something that would otherwise would be hearsay.

PROFESSOR CAPRA: They wanted to put in a portion, and they moved in limine that you couldn't complete with hearsay.

MR. WILLIAMSON: Right. But the other interesting part about that was the order of proof issue, so when do you do it? So the government was going to introduce some incriminating statement, which comes in, but there is other stuff maybe in the same statement or in our case in another conversation involving the same parties and the same subject matter but on a different date, and the point that we made was we should be able to pop up right in the middle of your case in chief after you've offered this—these are recorded phone conversations—and play our tape. Right now. And the judge agreed.

PROFESSOR CAPRA: Well, that's right. That's what the Rule says: completion at the same time.⁹⁹

MR. WILLIAMSON: I get it. So, there is that interesting element of tension, too. Maybe we want to wait. Maybe we might want the defendant to testify to complete, but the defendant doesn't have to decide whether he or she will testify until the government's case is over.

MR. SHECHTMAN: But be careful in the following sense. The statement "the defendant doesn't have to testify" proves too much. I mean, assume a case in which the issue is whether the perpetrator is left-handed. The defendant tells the cop in the precinct in response to pedigree information that he is right-handed, and they wanted the police officer to testify to it, and the answer is that the police officer couldn't testify to that.

That's hearsay. It's not a party-opponent statement because it's not offered against the defendant. If you want to say what hand you are, get on the witness stand, and that's always struck me as right. The government has a right to cross-examine as well, so the answer that forces him to testify

99. See FED. R. EVID. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered *at the same time*." (emphasis added)).

proves too much because sometimes if you want to get something in, you've got testify.

PROFESSOR CAPRA: Well, it proves too much except in the situation where the government is introducing misleading evidence.

MR. SHECHTMAN: Except when it's misleading. Totally right.

JUDGE SCHROEDER: One thing that this proposal doesn't do is revise the previous iteration, which I think put the burden on the proponent to also introduce the completing evidence. It used to be that if the prosecutor is introducing a misleading statement and there was this additional information necessary to correct the misimpression, you then require the prosecutor to put in the rest of the information as part of the prosecutor's case, and then when it got gender-neutralized, that part I think I lost in the Rule.

MR. SHECHTMAN: I think that's right.

JUDGE SCHROEDER: And so now under the working draft, it just says the completing statement is required to be put in, which means the defense lawyer, I guess, could stand up and say, "Wait a minute, Judge. We want to put that in." And then you—I don't know what you—well, I can ask the question or how does it work?

MR. SHECHTMAN: I think you can ask the witness who brings in the misleading statement on cross-examination about the completing one. It seems to me it'll all get worked out in the courtroom, and as long as the judge knows it has to come in and there's no hearsay objection to it because it's a completeness statement—it'll get in either on direct or cross of that witness.

PROFESSOR CAPRA: Right.

MS. NESTER: Professor Capra?

PROFESSOR CAPRA: Yes.

MS. NESTER: We're a little bit concerned about the language "not substantially in dispute" mainly because I'm not exactly sure what "substantially" means. Also, because it seems like an easy out then for every prosecutor or police officer to just say yes, we dispute the facts, really the statement, and then completion is out. It seems to me that there's a basic reliability function that every court has that's already in the rules, so if there's a party that thinks it's not in dispute, I mean, that it's so substantially in dispute that it's unreliable, then just move that it's unreliable and it shouldn't come in under that, or too prejudicial and not probative.

MR. SHECHTMAN: But my sense here is the original Advisory Committee was right in saying there's a practical concern with oral statements because if that police officer says he didn't say it, then, what does it mean "I get to complete it" because I certainly can't ask the police officer.

PROFESSOR CAPRA: The original Advisory Committee's position is overkill. So, the solution in the proposed Committee Note¹⁰⁰ to the working

100. The passage in the draft Committee Note being referred to is as follows:

The Rule has also been amended to cover oral statements that have not been recorded. The original Advisory Committee Note cites "practical reasons" for limiting the coverage of the Rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded

draft is to say that the question about the difficulty of proof is a Rule 403 question.

MR. SHECHTMAN: I hear you, but I don't think of that as what 403 is about.

PROFESSOR CAPRA: It's the probative value of the completing statement, and the amount of time it would take to prove it. If it substantially outweighs that probative value, then the oral statement is excluded.

MR. SHECHTMAN: To say this is 403 seems to me, respectfully, like the last refuge of somebody who needs a place to go to find the solution. I don't think it's a 403 question. I think if it's not in dispute, treat it like a written statement. The reason we make a distinction between written and oral here is written is never in dispute.

PROFESSOR CAPRA: That's right.

MR. SHECHTMAN: Oral is, and so if the oral isn't in dispute, treat it like a written statement.

PROFESSOR CAPRA: Unless he says, "That's not my handwriting on that statement," for example. Then what? Then would that raise a substantial dispute even as to a written statement? Or as to a recording: "It isn't my voice"?

PROFESSOR MUELLER: I found Paul's examples absolutely fascinating and his proposed change is certainly very, very interesting. It seems to me that he's trying to pack into the rule of completeness a whole lot of stuff that really just can't fit into that rule. I don't think we can fit into the rule of completeness a statement that's made a day later by the same guy that's not part of the same statement, and I don't think we can fit a statement made by somebody else just because it conflicts with the earlier statement, and if you do that, you're sort of putting into Rule 106 practically the whole trial, and it's going to be the gorilla on the block.

PROFESSOR CAPRA: It's only the gorilla on the block if the proponent is making a misleading presentation, so that's a pretty small gorilla.

PROFESSOR MUELLER: Well, I don't think it's misleading to offer a statement that says, "I own the gun" if two days later he said, "Well, I gave it away."

PROFESSOR CAPRA: I agree with that.

PROFESSOR MUELLER: That's not misleading.

PROFESSOR CAPRA: But this Rule would not make it so; it would not make the second statement admissible.

PROFESSOR MUELLER: No, Paul's proposal would.

statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the Rule. The trial judge, under Rule 403, can take into account the nature and difficulty of the dispute over the content or existence of the completing statement in deciding whether it should be admitted. In any case, many courts have found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. The amendment brings all rule of completeness questions under one rule.

PROFESSOR CAPRA: I don't think so. If you're saying it's not misleading, then it is not admissible. The first statement, on its own, must be misleading, or there is no right to completion.

PROFESSOR MUELLER: I see what you mean. But you can argue that it's misleading in the sense that the guy's position has not been fully presented, so in any event, if you expand the Rule to reach statements made on completely different occasions, the next day, for different people, or to others, that's really going, I think, a little further than this Rule is designed to go.

MR. SHECHTMAN: I would just say that I agree with Chris. If I'm doing this from the get-go, I would say next-day statements are out because it doesn't strike me that what you're saying the next day, I don't think they have the same potential to mislead, but this Rule as written speaks to other statements as well as parts of an initial statement.

PROFESSOR CAPRA: Judge Browning?

JUDGE BROWNING: Well, I would offer sort of a practical problem. Most of these statements are, the cops show up at the scene—they get one statement that the government wants to get in and one that the defendant wants to get in. That's what you're typically doing. And so you usually say that if the defendant wants to get that statement in, they should have to get on the stand and say the same thing here, so it could be cross-examined.

When you're getting ready for a trial, you usually have a slew of motions in limine. Here's the one you never get. You don't get those completion ones, and so you're sitting on the stand, and boom, somebody says there's more to this statement in an oral statement that ought to come in, and the question is, what do you do? Do you take it now? Do you take it later? Do you let it in? The hearsay objection, which is real from the government's standpoint in almost all these cases, is a strong check on letting that completion take place, and so I think if you change the Rule to oral statements, I think what you're going to do is you're going to get a lot of hearsay in that shouldn't be in.

You're going to be signaling to judges that through the rule of completeness, making quick decisions, you're going to end up letting in hearsay that shouldn't be allowed, and that's the reason I wouldn't expand it beyond the written documents, even the recorded statements that we allow.

MS. LOVITT: Can I ask sort of a threshold question? As noted in the *Bailey* opinion, in 2002 and 2003 this Committee unanimously rejected a proposal to consider oral statements and otherwise admissible evidence because any problems under the current Rule were being well handled by the courts and the cost exceeded the benefits.¹⁰¹ Do we have anything that suggests that it has changed?

PROFESSOR CAPRA: You asked the same question at the last meeting, and I will give the same answer. The answer is yes, the case law has changed.

101. *See* *United States v. Bailey*, No. PWG-16-0246, 2017 WL 5126163, at *4 n.3 (D. Md. Nov. 6, 2017).

In 2006, the Sixth Circuit held that a statement even though the government cut up a statement to be misleading, there was no remedy because the defendant's statement was hearsay.¹⁰² The court regretted the fact that the government was allowed to elicit misleading statements and said maybe we should consider this en banc,¹⁰³ which they never did. And there are other cases where this has happened. And, moreover, there are now cases holding that completion is never required if the statement is oral and unrecorded,¹⁰⁴ whereas previously most courts allowed oral statements to complete¹⁰⁵ under a different Rule, Rule 611(a).¹⁰⁶ So, yes, the situation has changed since sixteen years ago.

MS. NESTER: I agree. And what is the harm of expanding a rule to stop a jury from clearly being misled? I think the objections on the opposite side are well taken, but you're talking about actually tricking a jury into thinking they said something when everyone that's in the courtroom knows they also said something else that's wholly inconsistent, and so it's a false impression. I mean, the core is the misleading.

PROFESSOR CAPRA: Judge Campbell?

JUDGE CAMPBELL: Well, on that point getting back to the discussion Chris and Paul had, maybe we need to think about what is misleading. Is it a misleading presentation of the statement? In other words, is the statement incomplete? Or are we saying it's a misleading impression of what that side knows because they got a call the next day, and they're not telling you about that? If we're stepping beyond a misleading statement or a misleading representation of what the statement was, then we may be stepping beyond 106.

PROFESSOR CAPRA: I would agree with that, and I think the Rule has to say what the misleading part is, the statement, not about what everybody knows, because that's what you're getting into trying the entire case in the direct.

JUDGE BROWNING: But then take Paul's first example there: "The gun is mine." The next sentence says, "It was stolen from me six months ago." Don't you think it's misleading to not allow that second statement in?

PROFESSOR CAPRA: Yes.

102. *See* *United States v. Adams*, 722 F.3d 788, 827 (6th Cir. 2013) (holding that Rule 106 does not operate to admit hearsay even if admission is necessary to prevent an unfair result, and further holding that the defendant had no relief under Rule 106 even though the government offered a misleading portion).

103. *Id.* at 826 n.31.

104. *See, e.g., United States v. Castro*, 813 F.2d 571, 576 (2d Cir. 1987) (requiring completion of an oral statement under Rule 611(a) and explaining that "whether we operate under Rule 106's embodiment of the rule of completeness, or under the more general provision of Rule 611(a), we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties").

105. *See, e.g., United States v. Gibson*, 875 F.3d 179, 194 n.10 (5th Cir. 2017) (refusing to allow completion with an unrecorded oral statement, stating that "Rule 106 applies only to written and recorded statements").

106. *See* FED. R. EVID. 611(a).

JUDGE BROWNING: I think that's a misleading representation of what the defendant said to the police officer.

PROFESSOR CAPRA: Because the inference that the jury is going to draw from the first part of the statement is that that he still has the gun.

JUDGE BROWNING: No, the statement is, "The gun is mine," which is a true and correct statement.

JUDGE CAMPBELL: Right, but it's a misleading impression of what the police officer was told. He was told more than that.

PROFESSOR CAPRA: Yes.

JUDGE BROWNING: And whereas if they call back the next day and speak to another police officer, then it's a misleading impression of what the government knows, and I'm not sure that we want to go that far.

JUDGE CAMPBELL: Particularly in a felon-firearm case, which is possession, not ownership.

PROFESSOR CAPRA: Right.

JUDGE SCHROEDER: Right. I agree with that.

MR. COLLINS: But the current Rule, with respect to recorded statements, does go to other statements that are given at different times.

PROFESSOR CAPRA: It does. Yes, it can, but there are limitations imposed by the courts. So, in one case there was a recorded statement by the defendant, but he argued that there's all this other TV activity that will put my statement in context. I'm going to look at like nighttime TV and look all over the place. That goes too far, to admit dozens of unrelated statements by unrelated people.¹⁰⁷ But in some situations, maybe a defendant's statement clarifying a previous statement, it could actually be useful to correct the misleading question. That would depend on the circumstances.

MR. COLLINS: Are we suggesting removing that same speaker limitation that is in the draft?

PROFESSOR CAPRA: Well, it's a good question that the Committee has to think about as to whether completion should be limited to a statement from the same speaker or that limitation should be added, but, currently, it's not in the Rule, so the case that's kind of interesting is an intercepted conversation between the defendant and a government informant. The government makes a lot of the fact that the defendant had known something when he gets into that meeting. But there's a prior conversation between the two in which the knowledge is actually imparted to the defendant from the informant himself. And without that prior conversation, the jury will think that the defendant had guilty knowledge, when in fact the knowledge was planted in him by the government. So, I don't see how you can't admit that prior conversation, even though in one conversation the speaker was the defendant and in the other it was the informant.

107. See *Lambert v. Fulton County*, 253 F.3d 588, 596 (11th Cir. 2001) (finding that a supposedly out-of-context statement cannot be completed by a different witness's separate interview under Rule 106).

MR. SHECHTMAN: So, remember, there you'll get that completing conversation in because you won't have a hearsay problem. It will just be he was told. He was on notice, so it's going to come in anyway.

MR. COLLINS: So, it's not hearsay?

MR. SHECHTMAN: It's not hearsay. It's just he was informed.

PROFESSOR CAPRA: I wonder about that, but okay, if that's true. But you need the rule of completeness at that point to admit the completing portion contemporaneously at least.

JUDGE CAMPBELL: But the concern I have is that anytime the government wants to put—and we're talking criminal cases—a statement to prove its point, the defense can say that that's misleading if there is any other evidence in the case that contradicts it. That statement is misleading unless we get in the rest of the story, and that's not the intent of the rule of completeness, to be that broad.

PROFESSOR CAPRA: No, that's not.

JUDGE LIVINGSTON: If it is that broad, it essentially dissolves a lot of the rest of the rules. We created the rules so the judge doesn't just have discretion to say, "It's relevant," "It's not relevant." You conceivably inject a lot of uncertainty if the statement is important, and not just in criminal cases, in civil cases, too. The determination of this question, which is often made during trial, might be determinative of the case for one party or the other, so having some structure to this is necessary.

PROFESSOR CAPRA: "Some structure," meaning?

JUDGE LIVINGSTON: Meaning is it hearsay, all the other rules. The judge has a lot of discretion, but it's mediated by the rules.

PROFESSOR CAPRA: Well, there are several courts now who have this rule of completeness that's being proposed. In other words, the D.C. Circuit has such a rule,¹⁰⁸ and I've looked at all the published cases in that circuit. It doesn't look like there's rampant change in orders of proof in circuits like that, and the circuit said they would be very confident that given the fact that it has to be triggered by a misleading statement that this wouldn't be like opening the floodgates, and I think that's borne out by the case law. And that's not only in the D.C. Circuit.¹⁰⁹

MR. SHECHTMAN: I think most judges take the view that it's that statement, and if I said the gun is mine, you're not getting in then what he said the next day.

PROFESSOR CAPRA: That's true.

108. *United States v. Sutton*, 801 F.2d 1346, 1369 (D.C. Cir. 1986) (holding that Rule 106 allows completion with hearsay where necessary to correct a misleading statement and stating that "[i]n almost all cases we think Rule 106 will be invoked rarely and for a limited purpose").

109. *See, e.g., United States v. Adams*, 722 F.3d 788, 827 (6th Cir. 2013) ("[T]he district court did not abuse its discretion in excluding defendants' exculpatory statements."); *United States v. Garcia*, 530 F.3d 348, 354 (5th Cir. 2008) (finding that the district court did not abuse its discretion in declining to admit the defendant's statement under Rule 106); *United States v. Houlihan*, 92 F.3d 1271, 1284 (1st Cir. 1996) ("[W]e conclude that the lower court acted within the realm of its discretion in refusing to invoke Rule 106.").

MR. SHECHTMAN: In general, you're not getting in what he said the next day.

PROFESSOR CAPRA: Anybody else on the 106 issue? Yes, Betsy.

MS. SHAPIRO: When Judge Grimm first wrote about this, he talked about how rare it is that there's actually a real use—an appropriate use of 106—that I think of the predicate for 106 as being something that is malfeasance on the part of the offering attorney. You shouldn't be misleading, intentionally misleading the jury, so this should be exceptionally rare.

It's misleading, meaning that there's something that contradicts the first statement. But you can't just say that there's an inculpatory statement and it's misleading because later on in the statement there's an exculpatory part. That's not misleading.

PROFESSOR CAPRA: But there are tons of cases that say exactly that: the statement is not allowed for completion simply because it provides exculpatory information.¹¹⁰ Like where the defendant says, "I did it, but I'm really sorry. I did it, but I'm sorry I hurt the victim." Those exculpatory portions have never been admissible under 106 because the statement "I did it" is not misleading.

MS. SHAPIRO: Well, I just am concerned that once we start adding to the Rule that people are going to latch onto it as a real tool to expand Rule 106 beyond the very limited circumstance where it really is appropriate, and I personally have seen that because Rule 106, I think in sort of the circumstance that Mr. Williamson referred to, you're playing a recording, a wiretap, and A comes in, and then there's a 106 objection. Well, we need to play, you know, the rest of this.

More often than not, it comes in, and the purpose of making all those 106 objections is to disrupt the presentation on direct exam and get lots of stuff in that's not otherwise admissible, so I fear that it's subject to abuse and that we're expanding the notion of what actually constitutes misleading. It's something that should be extraordinarily rare.

MS. NESTER: But don't you think the opposite is true? That it also opens the door for abuse of the government if you allow the government to say, we're just going to take that one little statement and leave out the last three words of it, which completely changes the meaning of the statement, and the defendant can't do anything about it?

MS. SHAPIRO: I think that if it was done to purposely mislead, then yes, then I think that's what 106 is for, but I don't think that that happens all that often. I think more often it's more a contextual thing, like we heard that the defendant said something that contradicts what the first statement was, but that's exactly what's deemed by the rules to be not reliable.

PROFESSOR CAPRA: So, the Advisory Committee should let this conflict in the case law just fester?

110. *See, e.g.*, *United States v. Mehmood*, 743 F. App'x 928, 945 (6th Cir. 2018); *United States v. Quinones-Chavez*, 641 F. App'x 722, 733 (9th Cir. 2016).

MS. SHAPIRO: Well, I think the conflict in the case law and the part of the case law that we're not seeing is all of those times when the information just comes in because it would be more fair for it to come in, and so loads of stuff comes in now. I think those results probably swamp the case law on the other side, and we never see those cases admitting all sorts of hearsay because there are never appeals from those.

MR. SHECHTMAN: What's the government's view on the trial where it is a coconspirator statement that says he's going to be the getaway driver, and the next day I have a statement in which it says, "Z can't do it. We're going to get somebody else." Now, if you can't get that in under the completeness doctrine, I don't think that tape is coming in.

PROFESSOR CAPRA: It's not.

MR. SHECHTMAN: Because it's not going to be a coconspirator statement, but I'd like to think the judge would have let it in.

MS. SMITH: At least from me, I would let that in and probably introduce it in direct, actually.

JUDGE O'MALLEY: Can I ask a question? This draft seems to be a tighter Rule than just general notions of fairness. The current Rule is all about fairness. I would think that this would be better for the government to include the misleading impression language.

PROFESSOR CAPRA: Yes. Well, that was the government's suggestion.

MS. SMITH: And the oral part, I think, the government is never going to agree to.

JUDGE O'MALLEY: Right.

MS. SMITH: It's going to be a nonstarter I'm sorry to say, but—

PROFESSOR CAPRA: Twenty-five states have oral completeness, but we can't. Well, I think we've run the course there.

IV. TOPIC FOUR: RULE 615

PROFESSOR CAPRA: Does anybody want to spend the next ten minutes talking about Rule 615 and sequestration, which is pretty cool? We could use judges' opinions on that actually. Okay.

As we all know, Rule 615 provides for exclusion of trial witnesses, upon motion of a party, until they testify.¹¹¹ The Committee got an email from Judge John Woodcock, who is a former member of the Advisory Committee.

111. The Rule states:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person authorized by statute to be present.

FED. R. EVID. 615.

He encountered the issue of what we might call a midstream invocation of the Rule, after some witnesses had already testified, and he wondered whether there should be some timing mechanism in the Rule. He also wondered whether the Rule should change to discretionary as opposed to mandatory. Finally, he wondered whether there should be a specific exception from exclusion for expert witnesses—experts are currently excepted from exclusion on a case-by-case basis depending on whether they fall within the exception for witnesses “whose presence a party shows to be essential to presenting the party’s claim or defense” under Rule 615(b).

Those are Judge Woodcock’s three questions. When I was looking at all the sequestration cases, a fourth issue is the one that seemed most intriguing to me, and that is what’s the extent of an order under Rule 615? There is a dispute in the courts about this question. The First Circuit says we read the Rule the way it’s written, and that is to say that sequestration means only excluding from the courtroom.¹¹² And if the judge wants to do anything else that would protect against disclosure of trial testimony to prospective witnesses out of court, the judge has to issue a separate order beyond Rule 615. But most of the case law, the most recent of which is *United States v. Robinson*,¹¹³ says no—in order for sequestration to be useful, it must apply to prevent disclosure to prospective witnesses outside of court.¹¹⁴ So some

112. See, e.g., *United States v. Sepulveda*, 15 F.3d 1161, 1175–76 (1st Cir. 1993) (“[W]hile the common law supported sequestration beyond the courtroom, Rule 615 contemplates a smaller reserve; by its terms, courts must ‘order witnesses excluded’ only from the courtroom proper.” (citation omitted)). It follows, under this construction, that nothing in Rule 615 prevents witnesses from talking to each other outside the courtroom, or prevents a prospective witness from reading the courtroom testimony of another witness. The court, though, continued:

This is not to say, however, that sequestration orders which affect witnesses outside the courtroom are a rarity. As a practical matter, district courts routinely exercise their discretion to augment Rule 615 by instructing witnesses, without making fine spatial distinctions, that they are not to discuss their testimony. Indeed, such non-discussion orders are generally thought to be a standard concomitant of basic sequestration fare, serving to fortify the protections offered by Rule 615.

Id. at 1176.

113. 895 F.3d 1206 (9th Cir. 2018).

114. *Id.* at 1214. The court explained:

In our view, an interpretation of Rule 615 that distinguishes between hearing another witness give testimony in the courtroom and reading the witness’s testimony from a transcript runs counter to the rule’s core purpose—“to prevent witnesses from tailoring their testimony to that of earlier witnesses.” The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript. An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing. Therefore, we join those circuits that have determined there is no difference between reading and hearing testimony for purposes of Rule 615. See *United States v. McMahon*, 104 F.3d 638, 642–45 (4th Cir. 1997) (affirming the district court’s conclusion that a witness violated a Rule 615 exclusion order by reading daily trial transcripts); *United States v. Friedman*, 854 F.2d 535, 568 (2d Cir. 1988) (recognizing that “the reading of testimony may violate an order excluding witnesses issued by a district court under Rule 615”); *United States v. Jimenez*, 780 F.2d 975, 980 n.7 (11th Cir. 1986) (concluding that a witness violated a Rule 615 exclusion order by reading the

courts are reading the Rule the way it's written. Some courts are reading it the way it probably ought to have been written. I'd like know from our judge panel, how you do the Rule? What does your order say? Does it explicitly extend to out-of-court contacts and the like?

JUDGE BROWNING: Well, to avoid the timing issue, I ask, as soon as they're about to make their opening arguments, "Does anyone want the Rule invoked?" So, that solves the timing problem. I put that burden on myself. I get their position, invoke the Rule. I tell the jury it applies to the witnesses—the witnesses who will be excluded from the courtroom—that they have to stay outside so the jury understands what's taking place. They've got to stay outside and that they cannot discuss their testimony with each other but they may discuss their testimony with the attorneys. This takes care of a lot of the problem.

PROFESSOR CAPRA: So, you go beyond the words of 615 to explicitly say that out-of-court contacts are prohibited.

JUDGE O'MALLEY: I had a standing order to that effect, that it applied outside the courtroom as well.

PROFESSOR CAPRA: Judge Brimmer?

JUDGE BRIMMER: Yes, I do it even earlier than Judge Browning—in the trial preparation conference. Any party request sequestration? Boom, so you could get the timing.

PROFESSOR CAPRA: And you also explicitly state that it governs out-of-court contacts as well?

JUDGE BRIMMER: No, I don't go into that. I don't go into that, no.

PROFESSOR CAPRA: Okay. Anybody else?

MS. SMITH: Well, from a practice standpoint, that's how it's applied. Once a sequestration goes into effect, at least in our office, we're very careful not to contaminate the testimony outside of the courtroom.

PROFESSOR CAPRA: And yet you have cases where witnesses get trial transcripts and everything, so there are cases like that.¹¹⁵

JUDGE O'MALLEY: That's when I changed my standing order, when we started getting those transcripts you could get that day in real time, so witnesses would go home and read in the transcript and possibly tailor the testimony. My standing order prevented that.

MS. NESTER: So, one of the concerns, this actually happened to me with one of our judges. I had moved from another district and didn't realize that he had a different practice. We ended for the day while a government witness

testimony of another agent witness from a prior mistrial); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373–74 (5th Cir. 1981) (holding that providing a witness transcribed portions of another witness's testimony in preparation for his court appearance constitutes a violation of Rule 615). A trial witness who reads testimony from the transcript of an earlier, related proceeding violates a Rule 615 exclusion order just as though he sat in the courtroom and listened to the testimony himself.

Id. (quoting *Larson v. Palmateer*, 515 F.3d 1057, 1065 (9th Cir. 2008)).

115. *See, e.g., id.* (rejecting a literal interpretation of Rule 615 when a sequestered witness received a trial transcript before testifying).

was still under cross, and I asked the judge, “Would the court please instruct the witness that they’re on cross and that they can’t speak with the government attorneys over the break?” And the judge asked, “What authority do you have for that?” And I was like, wow, I never I knew I had to have authority for that prohibition, but then I had to go back and research and figure out what the authority for that actually was. And I did find something in Wigmore’s *Evidence*,¹¹⁶ but Rule 615 technically doesn’t address that kind of contact because the witness is not being exposed to trial testimony. It’s my position that it seriously impacts your Sixth Amendment right to cross a witness if in the middle of your cross, the witness can go back and the government can say okay here’s how you fix all that, and then when you do your cross the next day, they’ve been completely rehabilitated.

And to me there is a devastating impact on our Sixth Amendment right to cross, and I did actually convince the judge to instruct the witness he couldn’t talk to the government overnight, but I did not realize until it happened that there wasn’t actually a real rule that says that.

PROFESSOR CAPRA: There isn’t a rule on that.

MS. NESTER: Which, you know, I did find a biblical reference, if you need to—and I cited it, but it was very upsetting to me. Well, there’s a trial in the Bible where two people are testifying, and they make one of the men step out—

PROFESSOR CAPRA: That’s Susanna and the Elders.¹¹⁷ But it doesn’t involve a lawyer coaching a witness in the middle of cross-examination. It involves sequestration that prevented one elder from tailoring his testimony based on the other elder’s testimony.¹¹⁸

MS. NESTER: Yes, okay. Sorry.

JUDGE BROWNING: But I think a judge would be on shaky grounds to do anything more than probably what we’re doing, and it may be extending the sequestration rule farther than what we’re actually doing. What I try to do in those situations is get agreement of the parties because usually it will be to everybody’s benefit to have a rule early on that we’re just not going to have attempts to influence witnesses. It is important to try to get some agreement among the parties.

MR. SHECHTMAN: Yes, I have cases where the witness has a lawyer, and so I made a motion simply to say he couldn’t talk to his own lawyer once he’s on cross-examination, and that was not well received either by the court or by my friends in the defense bar, but it’s the same concern that your own lawyer’s going to be the one to rehabilitate, but the rules don’t speak to it.

This is like 106 in the sense of, who knew these issues existed? The other night in class, I gave four hypotheticals, which are the transcript, the opening

116. See generally JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, INCLUDING STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA (3d ed. 1940).

117. *Susanna* 1:1–64 (New Oxford Ann. Bible).

118. *Id.* at 1:51. Here, Daniel orders that two elders be separated to uncover whether they had provided false evidence against Susanna.

statement, and I said to a student, “Now here’s what I want you to do: Just read Rule 615 and answer the question. Don’t apply any common sense or any judgment. Is there anyone prepared to do that?” And all hands went up in the classroom. No hand ever goes up. And he answered them all literally, and, literally, you get every one of them wrong. You get opening statement wrong, you get transcript wrong, you get discretion wrong, and then you say, “Well, how would you do it using common sense?” And they come out differently.

I don’t know that that’s a reason to change this Rule because the world doesn’t seem to be falling apart with our current Rule, but our current Rule does—if you apply it literally—get you results that are probably wrong.

PROFESSOR CAPRA: Anything else?

MR. SHECHTMAN: Well, is there anything in the Rule we’re not addressing? Would an amendment be filling in and we’re adding to the Rule?

PROFESSOR CAPRA: Right. It’s filling in. And some courts don’t fill in—they don’t explicitly go beyond the language of the Rule—and that’s actually the issue because if every court was filling in, then there’d be no need to have an amendment.

MR. SHECHTMAN: And it’s where certain stipulations are beyond the Rule because you’ve got agreement, but I was surprised that opening statements weren’t covered by the Rule because I don’t want the cooperator sitting in the back when I’m going to say, “Here’s how I’m going to prove my case,” so I thought he was excluded during opening statement, but, you know, you have to have a good judge to say I’m going beyond the Rule.

PROFESSOR CAPRA: Yes. Anything further? Okay. I’d like to thank you all personally for being here, and it was just a great conversation that I think will help the Committee tremendously. I want to turn it over to Judge Livingston for closing remarks.

JUDGE LIVINGSTON: Okay. What I will say on behalf of everybody involved in the rules process, this has been really helpful. Thank you to those of you who came and showed us your experience. It’s invaluable the perspective that you bring and what you told us will continue to educate us as we work through these issues.

Thank you so much for being here, and we will now adjourn.