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### Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative

Daniel Capra

Fordham University School of Law, [dcapra@law.fordham.edu](mailto:dcapra@law.fordham.edu)

Liesa L. Richter

University of Oklahoma College of Law, [liesarichter@ou.edu](mailto:liesarichter@ou.edu)

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## ARTICLES

### POETRY IN MOTION: THE FEDERAL RULES OF EVIDENCE AND FORWARD PROGRESS AS AN IMPERATIVE

DANIEL J. CAPRA\* & LIESA L. RICHTER\*\*

*“Without continual growth and progress, such words as improvement, achievement, and success have no meaning.”—Benjamin Franklin*

#### ABSTRACT

*This Article dives into the long-standing debate about the propriety of altering the time-honored Federal Rules of Evidence. Noted authorities, such as the late Chief Justice Rehnquist, have eschewed any modification to the Rules, claiming that they must remain essentially fixed in their original form to maximize their utility to trial advocates and to avoid wasteful dislocation costs that accompany updates. Unlike the many scholarly works examining the merits and demerits of particular evidence rules, this Article shines a light on the lesser examined process of amending the Federal Rules of Evidence, revealing a taxonomy of evidentiary circumstances or trigger points that justify and, indeed, demand a change to the Rules. It demonstrates that amendments are imperative when the Rules may be subject to an unconstitutional application as written; when the Rules are plagued by irreconcilable conflicts in their interpretation and application among circuits; when tectonic shifts in technology, trial practice, or society render the Rules obsolete, unfair, or ill-equipped for the task they were designed to perform, and when amendments will enhance the simplicity and brevity of the Rules and make them easier for judges and litigants to deploy. Rather than debating the risks inherent in rule changes generally, rulemakers can utilize this taxonomy to distinguish a necessary amendment from wasteful tinkering. To illustrate these trigger points, the Article highlights recent and*

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\* Philip Reed Professor of Law, Fordham Law School; Reporter to the Judicial Conference Advisory Committee on Evidence Rules. All views expressed in this Article are those of the authors and do not represent the official views of the Advisory Committee on Evidence Rules.

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\*\* William J. Alley Professor of Law, University of Oklahoma College of Law; Academic Consultant to the Judicial Conference Advisory Committee on Evidence Rules.

*pending amendment proposals and analyzes the amendment process for the Federal Rules of Evidence since 1992, when the Advisory Committee on Evidence Rules was reconstituted. Further, the Article acknowledges the barriers to progress that exist even in these contexts, exploring the deference owed to congressional compromises embodied in the Federal Rules of Evidence, the impact of Supreme Court precedent interpreting existing Rules, and the U.S. Department of Justice's role in the rulemaking process. Finally, the Article highlights some of the most fundamental principles and practices that may be employed to overcome these barriers and to craft optimal amendments to the Federal Rules of Evidence to ensure their forward progress.*

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## INTRODUCTION

Chief Justice William Rehnquist was known to say of the Federal Rules of Evidence that they should rarely, if ever, be altered.<sup>1</sup> In counseling against efforts to polish the Rules to perfection, Chief Justice Rehnquist gave voice to a valid and enduring principle: the Federal Rules of Evidence are purposely concise and were designed to be nimble. Practitioners can commit them to memory for instant deployment in the quick-draw contest that traditionally has been the American trial. Think seasoned trial titans like Clarence Darrow cross-examining William Jennings Bryan in the groundbreaking *Scopes* case in the hot Tennessee summer of 1925.<sup>2</sup> Excessive tinkering with evidence rules would impose significant dislocation costs on both judges and courtroom advocates, who would be required to adapt constantly and to expend resources litigating new language injected into long-standing evidentiary doctrines. Incessant amendments would also raise the specter of unintended consequences, disrupting the settled operation of the Rules around them. Chief Justice Rehnquist's admonition was rooted in these traditional assumptions about the use of the Evidence Rules and in the inefficiencies that imprudent and excessive reform efforts would generate.<sup>3</sup>

But the rigid rejection of efforts to modify the Rules also poses significant risks to the trial process. Reform is an important ingredient in any healthy body of rules and the Federal Rules of Evidence must continue to evolve to retain their utility and contemporary viability. Allowing the Rules to become fixed in their 1975 iteration threatens to undermine the goals of uniformity, fairness, and simplicity that they were designed to foster. Amendments to the Evidence Rules are thus imperative to protect the uniformity the Rules were designed to achieve, to ensure the contemporary relevance of evidentiary standards enacted in 1975, to resolve ambiguities, and even to prevent genuine injustice. Not every amendment designed to achieve these goals will thwart the settled expectations of experienced trial lawyers. When drafted carefully and vetted thoroughly, amendments to the Evidence Rules should make them clearer and easier to apply than their ancestors. By resolving conflicts in the case law, amendments can reduce the costs inherent in applying the Rules in individual cases.

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<sup>1</sup> See, e.g., Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817, 829 (2002) ("The Chief Justice has made it clear to new chairpersons that he does not want the Committee to engage in law reform . . ."); Paul R. Rice, *Back to the Future with Privileges Abandon Codification, Not the Common Law*, 38 LOY. L.A. L. REV. 739, 754-55 (2004) ("Chief Justice Rehnquist has given clear instructions to all of the chairpersons he has appointed that revisions should be minimal—only those necessary to correct pressing problems.").

<sup>2</sup> See Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503, 519 (1999).

<sup>3</sup> See Symposium, *The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733, 739 (2002) (noting that evidence rulemaking is "inherently conservative" and "resistant to change").

Furthermore, the traditional assumptions about applying the Rules of Evidence “on the fly” may be somewhat anachronistic in the world of contemporary litigation. The phenomenon of the vanishing trial has been widely reported.<sup>4</sup> Given the paucity of trials, evidence rules are far more often applied in the context of summary judgment and as part of the compromise of civil and criminal cases than they are in the courtroom. Even in the trial context, significant evidentiary issues—such as the admissibility of “other crimes” evidence, the admissibility of prior convictions, and the admissibility of expert opinion testimony—are frequently presented before trial in *in limine* motions. Judges and lawyers can and should consult the rule book for updates in these situations in which the Rules are not being applied “in the heat of battle.”

Allowing any set of rules, even trial rules like the Federal Rules of Evidence, to calcify and become frozen in place presents a grave danger to their efficacy and fairness. Indeed, this risk became apparent after the Advisory Committee on Evidence Rules was disbanded following the enactment of the Rules in 1975. With no body tasked with oversight of the Rules and with no ready mechanism for modification, commentators grew increasingly concerned about the conflicting interpretations in the courts and about the Rules’ long-term viability.<sup>5</sup> Amid calls for reform, the Advisory Committee on Evidence Rules was reconstituted in 1992 to oversee amendments to the Rules to avoid such a stale state of affairs.<sup>6</sup>

Change is notoriously hard and potentially risky, but it is sometimes necessary. Responsible oversight of the Federal Rules of Evidence thus demands that rulemakers balance the competing considerations of disruptive dislocation costs potentially lurking within certain reform proposals and the need for continuing constructive improvement and advancement of evidentiary standards.

Unlike the many scholarly works examining the merits and demerits of particular evidence rules, this Article shines a light on the lesser-examined theoretical underpinnings of rulemaking in the context of the Federal Rules of Evidence, offering insights into the principles and practices that ensure a proper balance of these competing considerations. It reveals the often hidden factors

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<sup>4</sup> See generally, e.g., AD HOC COMM. ON THE FUTURE OF THE CIVIL TRIAL, AM. COLL. OF TRIAL LAWYERS, THE “VANISHING TRIAL:” THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM (2004), reprinted in 226 F.R.D. 414 (2005) (noting that civil justice system has experienced “litigation explosion and trial implosion” over past four decades).

<sup>5</sup> See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 862 (1992) (advocating for reconstituted Advisory Committee on Evidence Rules to propose amendments to address court splits on meaning of many Federal Rules of Evidence).

<sup>6</sup> See *Judicial Conference of the United States: Committees (Chronological)*, FED. JUD. CTR., <https://www.fjc.gov/history/administration/judicial-conference-united-states-committees-chronological> [<https://perma.cc/CN7V-PCME>] (last visited Sept. 21, 2019).

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that inform amendment proposals of many stripes and offers an insider's perspective on the mechanics, substance, and politics that inform rulemaking. In particular, this Article evaluates the rulemaking process since 1992, when the Advisory Committee on Evidence Rules was reconstituted. The lessons learned from that history can and should be applied to achieve optimal future rulemaking, not just for the Evidence Rules, but for all rules of procedure.

This Article will identify and examine the factors that animate sound evidentiary rulemaking in three parts. Part I will explore the trigger points sufficient to overcome concerns like those articulated by Chief Justice Rehnquist and that warrant amendments to the Rules. Moreover, Part I offers rulemakers a helpful taxonomy of evidentiary circumstances that they may utilize to distinguish needed amendments from wasteful tinkering. When these circumstances are present, the transaction costs inherent in rule changes become justified. Utilizing recent and pending amendments as examples, Part I illustrates when modifications to the Rules are necessary to address constitutional concerns, to resolve conflicts in federal precedent, to ensure the currency and contemporary relevance of the Rules, and to rectify irrational or needlessly complex evidentiary standards. Part II acknowledges the barriers to progress that exist even in these contexts and explores the deference owed to congressional compromises embodied in the Federal Rules of Evidence, as well as the impact on the amendment process of Supreme Court precedent interpreting existing Rules. Part II also examines the role of the U.S. Department of Justice ("DOJ") in the rulemaking process and the effect the DOJ can have on proposed amendments. Finally, Part III highlights some of the most fundamental principles and practices that rulemakers may employ to overcome these barriers and to craft optimal amendments to the Federal Rules of Evidence.<sup>7</sup> Adhering to these principles and practices allows rulemakers to maintain the integrity of the Federal Rules of Evidence while steering clear of the wasteful dislocation costs that Chief Justice Rehnquist feared.

I. A CHANGE WILL DO YOU GOOD:  
WHEN AN AMENDMENT IS WARRANTED

The perfect is often the enemy of the good. And efforts to perfect the Federal Rules of Evidence through endless amendments may do more harm than good. To take but one example: it makes little sense that the Rule 803 hearsay exceptions are styled as number after number, such as Rule 803(1), when other

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<sup>7</sup> Although this Article explores some of the most fundamental mechanisms used to develop optimal amendments to the Federal Rules of Evidence, it does not identify all principles that have proved valuable. For example, reliance on state evidentiary practices can be very helpful in crafting solutions to federal evidentiary problems. A full exploration of the role of the states as laboratories for alternative evidence provisions is beyond the scope of this Article.

Rules combine numbers and letters to demarcate subsections clearly.<sup>8</sup> Still, this numbering is not substantive and is not causing confusion for lawyers or judges using the Rule. And to “fix” the numbering would seriously disrupt electronic research into the Rule 803 exceptions. The Advisory Committee is therefore wise to leave such problems well enough alone.<sup>9</sup>

There are other, more foundational irregularities in the operation of the Rules that cannot be ignored, however. When the Evidence Rules are subject to unconstitutional application, when the federal courts are split as to their proper interpretation, or when old rules are ill-suited to contemporary litigation or are needlessly complex, amendments should be pursued.

A. *The Elephant in the Room: Drafting in the Shadow of the Constitution*

The Federal Rules of Evidence are designed to govern the admissibility of an array of potential information that may be offered into evidence in a wide variety of cases. These Rules operate independently of the U.S. Constitution, which may also require the admission or exclusion of certain evidence based upon rights and principles that the Bill of Rights articulates.<sup>10</sup> Perhaps the clearest circumstance in which the Evidence Rules should be amended occurs when the Supreme Court has specifically determined that a particular rule is subject to unconstitutional application.

Allowing a Rule to remain on the books that may violate a litigant’s constitutional rights when applied as written undermines the goal of the Evidence Rules to ascertain truth and secure just determinations.<sup>11</sup> Further, retaining rule text that is capable of unconstitutional application plants a trap for the unwary within the body of the Rules. Especially when lawyers apply the Rules in their most traditional sense—in the heat of trial—they may not consider the need to consult constitutional doctrine. A lawyer may justifiably presume

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<sup>8</sup> Compare FED. R. EVID. 803 (utilizing numbers to denote subsections), with FED. R. EVID. 801, and FED. R. EVID. 804 (utilizing letters to denote subsections).

<sup>9</sup> See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 23-24, 2009, at 11 [hereinafter Meeting Minutes of April 23-24, 2009], [https://www.uscourts.gov/sites/default/files/fr\\_import/EV04-2009-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/EV04-2009-min.pdf) [<https://perma.cc/34D6-ZVBG>] (noting Committee rejection of proposal to alter number after number structure of Rule 803 “because it would disrupt electronic searches and impose transaction costs that far outweighed any benefit”).

<sup>10</sup> See generally Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (protecting criminal defendants’ constitutional right to fair trial under Sixth Amendment by mandating admission of post-verdict juror testimony regarding racially discriminatory statements affecting juror deliberations); Holmes v. South Carolina, 547 U.S. 319 (2006) (barring evidence rules that unreasonably prevent criminal defendants from presenting materially exculpatory evidence); Crawford v. Washington, 541 U.S. 36 (2004) (prohibiting admission of testimonial statements against accused unless declarant is unavailable and defendant has had prior opportunity to cross-examine pursuant to Sixth Amendment Confrontation Clause).

<sup>11</sup> FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).



that applying the provision as written could pose no danger of constitutional error. Therefore, it is critical to change the Federal Rules of Evidence to reflect evolving constitutional doctrine.<sup>12</sup>

When the potential for unconstitutional application of the Rules rears its head, concluding that an amendment is needed may be the only straightforward part of the analysis. The more difficult question is *how* the rules should accommodate constitutional limitations. Adding to an evidence rule language that tracks the precise factual scenario presented by a relevant Supreme Court opinion may prove too narrow to capture the full panoply of constitutional risks, resulting in a rule that may need to be modified again to account for emerging doctrine. And fact-specific rules may become verbose and unwieldy.

The 1994 amendment to the rape shield provision in Federal Rule of Evidence 412 offers an example of an ideal solution to this constitutional conundrum. Rule 412 limits evidence of a victim's sexual history or predisposition in cases involving alleged sexual misconduct.<sup>13</sup> This prohibition on proof of a victim's sexual activity might in some cases conflict with a criminal defendant's right to an effective defense. In *Olden v. Kentucky*,<sup>14</sup> for example, the Supreme Court held that a defendant in a rape case had the right to cross-examine his victim about her cohabitation with another man in an effort to show her bias.<sup>15</sup> Recognizing that a rigid prohibition on evidence of a victim's past acts could be unconstitutional in some cases, the Advisory Committee added an open-ended exception to the text of Rule 412 that allows such evidence if excluding it "would violate the defendant's constitutional rights."<sup>16</sup>

One might argue that the language is superfluous because the Constitution automatically trumps any contrary provision; Rule 412 cannot exclude evidence of a victim's sexual history if the Constitution forbids it. But the amended language is useful for two reasons: (1) it avoids damage to the credibility of the Rules caused when a rule is subject to unconstitutional application; and (2) it operates as a red flag for unwary litigants, directing them to a source of law beyond the rule itself. One might also argue that an amendment specifying the

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<sup>12</sup> Relatedly, the Rules sometimes need to be updated to reflect Supreme Court precedent that is not constitutional in nature. For example, the 1997 amendment to Rule 801(d)(2) reflected the Supreme Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987), and the 2000 amendment to Rule 702 reflected the holdings in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

<sup>13</sup> FED. R. EVID. 412(a); *see also* FED. R. EVID. 412 advisory committee's note to 1994 amendment (explaining that amended Rule "aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process").

<sup>14</sup> 488 U.S. 227 (1988).

<sup>15</sup> *Id.* at 232 (reasoning that defendant's constitutional right to confrontation outweighed potential prejudicial impact of cross-examination).

<sup>16</sup> FED. R. EVID. 412(b)(1)(C).

type of evidence that courts may not constitutionally exclude would be more helpful. For example, the Rule 412 exception might have alerted judges and litigants that evidence of a victim's sexual history should be admitted "when exclusion is unreasonable and would deprive the defendant of critical evidence of his innocence." That solution may appear more helpful at first glance because it directs the inexpert litigant to the constitutional standard that might be implicated. But adding specificity is risky as well. Constitutional doctrine is dynamic, subject to extension or limitation depending on specific facts as well as the makeup of the Supreme Court. Future cases may define constitutional protections differently. The deliberate process of rulemaking is ill-suited to the task of chasing a moving target, and any attempt to codify constitutional doctrine with specificity runs the risk that further amendments will be necessary in order to keep up with changes. Perhaps counterintuitively, therefore, a more generic reference to constitutional considerations is typically preferable because it offers express notice of a potential constitutional issue and will never need to be amended.

Another example of drafting in the shadow of the Constitution arose after the Supreme Court's 2009 decision in *Melendez-Diaz v. Massachusetts*.<sup>17</sup> That case held that admitting certificates to prove the results of a drug test violated the defendant's Sixth Amendment right to confrontation where those certificates were prepared for purposes of litigation and where the analysts who prepared them were not called by the government to testify.<sup>18</sup> Following *Melendez-Diaz*, it was widely recognized that the hearsay exception allowing proof of the absence of a public record—Rule 803(10)—was subject to unconstitutional application. This was because the Rule allowed a public official to prepare an affidavit indicating that the official had conducted a search for a particular public record and failed to find it—most commonly, a record indicating that the defendant had a license to carry a gun or had been permitted to re-enter the country after being deported.<sup>19</sup> This affidavit would substitute for in-court testimony by the public official and would be offered as evidence that no such record existed. Because the prosecutor would have prepared the affidavit solely for purposes of admitting it against a defendant in a criminal prosecution, it

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<sup>17</sup> 557 U.S. 305 (2009).

<sup>18</sup> *Id.* at 311 (finding that defendants had right to be confronted by analysts at trial because analysts' affidavits were testimonial statements and analysts were "witnesses" for Sixth Amendment purposes).

<sup>19</sup> Before being amended to address Confrontation Clause jurisprudence, Rule 803(10) permitted the absence of a public record to be proven by a certificate prepared for the purposes of the criminal prosecution. *See, e.g.*, *United States v. Yakobov*, 712 F.2d 20, 23-24 (2d Cir. 1983) (proffering certificate through Federal Rule of Evidence 803(10) to prove absence of firearm license).

would be indistinguishable from the records found constitutionally objectionable in *Melendez-Diaz*.<sup>20</sup>

No stakeholder has an interest in the Evidence Rules being unconstitutionally applied. The prosecution obtains no legitimate advantage from an unconstitutional use of an evidence rule; any conviction based on such a use runs the risk of being overturned. Although one might argue that a rule simply will not be applied if its application is unconstitutional, that argument depends upon the parties to raise and police the constitutional interest at issue. That cannot be taken as a given, even in our adversarial system, as some lawyers may simply not know enough to raise it. Therefore, all rulemaking stakeholders recognized the need to amend Rule 803(10) to reflect the Supreme Court's decision in *Melendez-Diaz*.

Crafting an amendment to remedy the constitutional defect in Rule 803(10) was a relatively straightforward undertaking because the Supreme Court in *Melendez-Diaz* offered a solution. The Court noted that “notice-and-demand” procedures, such as were in use in some state jurisdictions, would satisfy Sixth Amendment concerns.<sup>21</sup> Given the explicit “out” provided by the Supreme Court, the Advisory Committee did not rely on a generic constitutional catch-all exception to rectify the infirmity in Rule 803(10). Rather, it formulated an amendment setting forth a specific notice-and-demand procedure based upon the Supreme Court opinion. The amendment requires a prosecutor who intends to use a certificate under Rule 803(10) to provide the defendant with written notice at least fourteen days before trial.<sup>22</sup> It then gives the defendant seven days to object to the certificate and to demand the presence of the author at trial.<sup>23</sup> The amendment is to-the-point, indisputable, and effective. Under these circumstances, the new procedure was superior to a generic solution, which would have simply permitted the use of a Rule 803(10) certificate “unless prohibited by the Constitution.”<sup>24</sup> The notice-and-demand procedure provides a means of *solving* the constitutional problem—a means directed by the Supreme Court itself—whereas generic language would leave prosecutors with no means to admit certificates as contemplated by the Rule.

More recently, in 2017, the Supreme Court's decision in *Peña-Rodriguez v. Colorado*<sup>25</sup> suddenly rendered Federal Rule of Evidence 606(b) subject to

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<sup>20</sup> See *Melendez-Diaz*, 557 U.S. at 311 (holding that admitting certificates to prove material fact violated Confrontation Clause where their “sole purpose” was to be used in criminal prosecution).

<sup>21</sup> *Id.* at 326-27 (discussing constitutional implications of notice-and-demand procedures).

<sup>22</sup> FED. R. EVID. 803(10)(B).

<sup>23</sup> *Id.* The amended language provides that in a criminal case, “a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice—unless the court sets a different time for the notice or the objection.” *Id.*

<sup>24</sup> See *supra* note 21 and accompanying text.

<sup>25</sup> 137 S. Ct. 855 (2017).

unconstitutional application.<sup>26</sup> Rule 606(b) prohibits impeachment of a verdict through juror testimony about the deliberations that led to the verdict.<sup>27</sup> The prohibition is designed to protect the finality of verdicts and the integrity of the jury system by shielding jurors from post-verdict inquisition about the quality of their deliberations.<sup>28</sup> Although the prohibition on juror testimony is subject to exceptions when the jurors are exposed to extraneous prejudicial information or outside influences, courts have interpreted these exceptions narrowly and constitutional challenges to the Rule 606(b) prohibition have traditionally proved unsuccessful.<sup>29</sup>

In *Peña-Rodriguez*, however, the Court found that Colorado's version of Rule 606(b), which mirrors the federal provision,<sup>30</sup> was unconstitutionally applied to exclude juror testimony about racist statements made by a juror during deliberations.<sup>31</sup> Peña-Rodriguez was found guilty of unlawful sexual contact and harassment.<sup>32</sup> After the jury was discharged, two jurors approached Peña-Rodriguez's counsel reporting that another juror had expressed anti-Hispanic

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<sup>26</sup> *Id.* at 869 (“[T]he Court now holds that when a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.”).

<sup>27</sup> FED. R. EVID. 606(b)(1) (“During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.”).

<sup>28</sup> For a discussion of the rationale behind the rule and the limited nature of the exceptions, see STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 606.02 (11th ed. 2015) [hereinafter FEDERAL RULES OF EVIDENCE MANUAL].

<sup>29</sup> For example, in 1987, the Supreme Court declined to find a constitutional exception to Rule 606(b) to allow juror testimony about extensive intoxication, drug use, and illegal drug transactions among jurors in a federal criminal trial in *Tanner v. United States*, 483 U.S. 107, 127 (1987). The Court defended the constitutionality of Rule 606(b), emphasizing the important interests it protects and highlighting all of the mechanisms apart from post-verdict juror testimony that may serve to expose juror misconduct. *Id.* Some federal courts, prior to *Peña-Rodriguez*, had in fact applied Rule 606(b) to preclude evidence of racist statements made by jurors during deliberations. See, e.g., *United States v. Benally*, 546 F.3d 1230, 1241 (10th Cir. 2008) (“We therefore reject the defendant’s argument that Rule 606(b) contains an implicit exception for racially biased statements made during jury deliberations, nor do we think the Rule is unconstitutional as applied in this case.”).

<sup>30</sup> COLO. R. EVID. 606(b).

<sup>31</sup> *Peña-Rodriguez*, 137 S. Ct. at 870 (“While the trial court concluded that Colorado’s Rule 606(b) did not permit it even to consider the resulting affidavits, the Court’s holding today removes that bar. When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.”).

<sup>32</sup> *Id.* at 861.

bias toward both Peña-Rodriguez and his alibi witness during deliberations.<sup>33</sup> Relying on Rule 606(b), the Colorado courts did not allow this evidence about juror deliberations to impeach the verdict.<sup>34</sup> The Supreme Court reversed the conviction, finding that precluding the evidence of the juror's racist comments during deliberations violated the defendant's Sixth Amendment right to a fair and impartial jury.<sup>35</sup> Although the Court lauded the basic prohibition on post-verdict juror testimony as necessary to protect the finality of verdicts, it noted unique dangers associated with racial discrimination and opined that alternative methods for uncovering juror misconduct (such as *voir dire* or pre-verdict reporting) may be less effective in connection with racial bias.<sup>36</sup> Accordingly, the Court held that:

[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.<sup>37</sup>

The Court cautioned that the constitutional exception to the Rule 606(b) ban on post-verdict juror testimony should be narrowly construed, however, emphasizing that “not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry.”<sup>38</sup>

The Advisory Committee turned its attention to Rule 606(b) promptly after *Peña-Rodriguez* was handed down to explore amendment alternatives that would flag the constitutional exception for racist juror comments.<sup>39</sup> Trying to codify the specific holding in *Peña-Rodriguez* was fraught with peril for two reasons. First, crafting language for Rule 606(b) that would capture the types of juror comments justifying an exception—but that would *exclude* the “offhand comment[s] indicating racial bias or hostility” to which the Supreme Court would apply the Rule 606(b) prohibition<sup>40</sup>—was akin to walking a razor's edge. Second, the principle applied by the Supreme Court in *Peña-Rodriguez* is potentially subject to broader application—for example, to civil cases or to juror statements that indicate bias based upon gender, religion, or sexual orientation.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 862.

<sup>35</sup> *Id.* at 869 (noting that racial bias must be addressed to prevent systematic loss of confidence in jury verdicts).

<sup>36</sup> *Id.* at 868-69.

<sup>37</sup> *Id.* at 869.

<sup>38</sup> *Id.*

<sup>39</sup> See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 21, 2017, at 17-18 [hereinafter Meeting Minutes of April 21, 2017], [https://www.uscourts.gov/sites/default/files/spring\\_2017\\_evidence\\_rules\\_committee\\_minutes\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/spring_2017_evidence_rules_committee_minutes_final_0.pdf) [<https://perma.cc/B6FF-V6SM>] (noting possible amendments to Rule 606(b) following *Peña-Rodriguez*).

<sup>40</sup> *Peña-Rodriguez*, 137 S. Ct. at 869.

An amendment codifying the precise protection recognized in *Peña-Rodriguez* could become obsolete and underinclusive in the event that the Court recognizes additional types of bias that justify an exception to the no-impeachment rule.<sup>41</sup>

Adding a constitutional red flag is highly desirable, however, because a neophyte consulting the language of Rule 606(b) would remain unaware of possible constitutional challenges to the Rule's application. The Advisory Committee concluded that the only workable drafting solution would be a generic constitutional red flag like the one added to Rule 412.<sup>42</sup> Such an amendment would, at least, signal for a litigant that Rule 606(b) could not be applied in circumstances that "would violate a defendant's constitutional rights."<sup>43</sup> After significant research, reflection, and dialogue spanning a year, the Committee decided *not* to propose such an amendment. The Committee was concerned that adding such generic language could suggest a broad constitutional exception to Rule 606(b) and would actually *invite* new constitutional challenges to Rule 606(b) beyond the limits of the *Peña-Rodriguez* holding.<sup>44</sup>

But for all of the reasons explored above, leaving Rule 606(b) devoid of any warning to litigants about the unconstitutionality of excluding juror testimony about racist comments during deliberations threatens the integrity of the Rules. Preserving Rule 606(b)'s silence regarding constitutional challenges will not prevent litigants who *are aware* of the *Peña-Rodriguez* holding from asserting constitutional objections beyond the limits of that narrow holding. Indeed, litigants have already attempted to utilize *Peña-Rodriguez* to mount constitutional challenges to the exclusion of post-verdict juror testimony concerning juror misconduct beyond racist statements about a defendant.<sup>45</sup> Thus,

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<sup>41</sup> Justice Alito, dissenting in *Peña-Rodriguez*, stated that "although the Court tries to limit the degree of intrusion, it is doubtful that there are principled grounds for preventing the expansion of today's holding." *Id.* at 875 (Alito, J., dissenting).

<sup>42</sup> See FED. R. EVID. 412(b)(1)(C).

<sup>43</sup> Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 26-27, 2018, at 17-19 [hereinafter Meeting Minutes of April 26-27, 2018], [https://www.uscourts.gov/sites/default/files/ev\\_minutes\\_april\\_2018\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/ev_minutes_april_2018_final_0.pdf) [<https://perma.cc/XFD7-HYZV>].

<sup>44</sup> See *id.* (tabling issue of amending Rule 606(b) because potential constitutional exception was problematic); Meeting Minutes of April 21, 2017, *supra* note 39, at 17-18 (resolving to postpone consideration of Rule 606(b) amendment in favor of monitoring cases following *Peña-Rodriguez* because of Committee consensus that amendment could contribute to expansion of constitutional challenges).

<sup>45</sup> See, e.g., *United States v. Baker*, 899 F.3d 123, 133-34 (2d Cir. 2018) (holding juror's statement that he assumed defendant was guilty from outset not within protection of *Peña-Rodriguez*); *Austin v. Davis*, 876 F.3d 757, 797 (5th Cir. 2017) (rejecting challenge to death sentence based on juror's statement that he made up his mind to vote for death regardless of mitigating circumstances because *Peña-Rodriguez* did not extend to testimony about prejudgment); *United States v. Robinson*, 872 F.3d 760, 764 (6th Cir. 2017) (rejecting *Peña-Rodriguez* challenge to exclusion of post-verdict juror testimony about racist statements made by jury foreperson about fellow jurors during heated deliberations).

the *only* real consequence of maintaining silence in Rule 606(b) is to ensure that litigants who are in the dark about the constitutional challenge available under *Peña-Rodriguez* will remain in the dark. Even if a generic amendment were to encourage additional constitutional challenges to Rule 606(b) beyond *Peña-Rodriguez*, this would not necessarily be undesirable. If arguments invited by a constitutional exception to Rule 606(b) are meritless, courts can easily reject them, as they have already done.<sup>46</sup> But if the Constitution *does* require additional exceptions to the default prohibition on post-verdict juror testimony, alerting litigants to the potential for such constitutional protection is laudable. Be that as it may, the recent *Peña-Rodriguez* decision that makes Rule 606(b) susceptible to unconstitutional application reveals the difficulty inherent in drafting in the shadow of the Constitution.

B. *Rulemakers as Referees: Resolving Conflicts in the Courts*

The principal advantage of a federal code of evidence is that the law is uniform throughout the federal court system. Litigants need not worry that the rule applied in one federal courthouse will differ from the one applicable in another. While that is the ideal, the harsh reality is that no code of evidence—however carefully drafted—can ever be so clear that it is subject to only one interpretation. And that is particularly true of the Federal Rules of Evidence—Rules that began with an Advisory Committee draft that Congress took up and substantially altered.<sup>47</sup> All are familiar with the old adage about cooks and kitchens. So it will happen from time to time that federal courts will interpret the same evidence rule in differing ways.

The first possibility for a rulemaking committee faced with a conflict in the application of a rule is to do nothing at all. If the conflict is one that is still emerging in the federal courts and that has some realistic hope of being resolved through developing precedent, leaving well enough alone may be a viable option. But when a conflict is long-standing, shows no signs of being resolved, and creates divergent standards for litigants operating within the same court system, it is a drafting committee's responsibility to resolve the impasse. Indeed, one of the main reasons that the Advisory Committee was reconstituted in 1992

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<sup>46</sup> See, e.g., *Baker*, 899 F.3d at 133-34 (listing cases that have refused to extend *Peña-Rodriguez* beyond its narrow holding); *Berardi v. Paramo*, 705 Fed. App'x 517, 518-19 (9th Cir. 2017) (rejecting challenge based on juror's statement that jury would have convicted immediately if races of defendant and victim were reversed); *Vera v. United States*, No. 3:11-cv-00864, 2017 WL 3081666, at \*9-10 (D. Conn. July 19, 2017) (rejecting challenge based on juror's claim that other jurors pressured her to convict); *Montes v. Macomber*, No. 3:15-cv-02377, 2017 WL 1354779, at \*8-9 (S.D. Cal. Apr. 10, 2017) (rejecting challenge based on jurors' discussion of fact that defendant did not testify).

<sup>47</sup> See generally DANIEL J. CAPRA, ADVISORY COMMITTEE NOTES TO THE FEDERAL RULES OF EVIDENCE THAT MAY REQUIRE CLARIFICATION (1998), reprinted in 182 F.R.D. 268 (1998) (discussing numerous Advisory Committee proposals that were rejected by Congress—leading to many Committee Notes that do not correctly describe rule as enacted).

was to assist in the resolution of conflicts in the application of the Rules.<sup>48</sup> In the context of damaging and unresolved conflicts, the benefits of uniformity and fairness outweigh the potential costs of dislocation and unintended consequences.

Rectifying a conflict in the courts is usually a difficult task. The Evidence Advisory Committee must determine which of the conflicting interpretations of a given rule is preferable in terms of policy, as well as the efficiency and workability of the evidentiary result. The amendment to the Rule 807 residual hearsay exception proposed in 2018 illustrates the varying degrees of challenge faced in resolving conflicts in the courts.<sup>49</sup> The existing residual exception permits courts to admit hearsay statements not “specifically covered” by other categorical hearsay exceptions when those hearsay statements (1) have circumstantial guarantees of trustworthiness that are “equivalent” to those found in other hearsay exceptions, (2) are “offered as evidence of a material fact,” (3) are “more probative” than any other evidence that the proponent can obtain through reasonable efforts, and (4) will best serve the purposes of the Rules and the “interests of justice.”<sup>50</sup>

There are multiple conflicts in the federal case law on Rule 807 that the proposed amendment seeks to rectify. First, courts are split on whether they can consider corroborating evidence in determining whether a hearsay statement is sufficiently trustworthy. The “circumstantial guarantees of trustworthiness” required by Rule 807 traditionally refer to the influences and inherent motivations acting upon a declarant at the time of the hearsay statement. For example, to evaluate the circumstantial guarantees of trustworthiness surrounding a child’s hearsay statement accusing a defendant of sexual abuse, a court would look to the child’s motivations, to the identity of the recipient of the statement, to the timing of and manner in which the statement was conveyed (whether offered spontaneously or in response to an inquiry), and to the content of the statement to determine whether it reveals age-inappropriate knowledge.<sup>51</sup> Beyond these circumstantial guarantees of trustworthiness, however, corroborating evidence—such as from a medical examination showing that the child *was* in fact sexually abused or testimony that the defendant acted suspiciously after the alleged event—would also have some tendency to suggest that the hearsay statement was accurate. Some courts have held that

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<sup>48</sup> See Becker & Orenstein, *supra* note 5, at 911 (“Because the Supreme Court rarely grants certiorari, a Committee will play an important role in resolving conflicts.”).

<sup>49</sup> The amendment has been approved by the Judicial Conference and referred to the Supreme Court. Barring unforeseen circumstances, the amendment will take effect on December 1, 2019. *Pending Rules and Form Amendments*, U.S. CTS., <https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> [https://perma.cc/6KTX-M9K5] (last visited Sept. 21, 2019).

<sup>50</sup> FED. R. EVID. 807.

<sup>51</sup> For a discussion of these circumstantial guarantees of trustworthiness, see FEDERAL RULES OF EVIDENCE MANUAL, *supra* note 28, § 807.02[4].



corroboration of a hearsay statement by other evidence may *not* be considered in evaluating the trustworthiness of a hearsay statement for purposes of the residual exception.<sup>52</sup> In these circuits, the court may consider only the circumstances surrounding the statement itself in applying the residual exception and must ignore corroborative information like the aforementioned medical exam and suspicious conduct. Most courts, however, have found that corroboration is relevant to reliability and that it is appropriate to consider independent evidence supporting the truth of the statement in applying Rule 807.<sup>53</sup> Because the application of Rule 807 differs depending upon the circuit in which a case is brought, the Advisory Committee sought to create a uniform approach.

In contrast to some other circuit splits that create close questions on the merits, the role of corroborating evidence in the residual-exception equation presented a relatively straightforward decision for the Advisory Committee. Corroboration is a time-honored way of supporting accuracy in our justice system. In proving a charge or claim at trial, demonstrating that a witness's account is corroborated by other evidence is an important means of assuring the factfinder that the witness is telling the truth. Accordingly, there is no rational reason to reject corroboration in a trustworthiness inquiry under the residual exception. Thus, the Committee proposed an amendment expressly approving the consideration of corroborating evidence in assessing the trustworthiness of a hearsay statement for purposes of Rule 807.<sup>54</sup> In so doing, the Committee created a uniform approach to corroboration that is most consistent with principles of trustworthiness.

The second long-standing conflict in the interpretation of Rule 807 posed a greater challenge. This conflict relates to the language stating that the residual exception applies to hearsay statements even if “not *specifically covered* by a hearsay exception in Rule 803 or 804.”<sup>55</sup> One way of interpreting this language is to exclude a hearsay statement under Rule 807 if it “nearly misses” one of the

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<sup>52</sup> See, e.g., *United States v. Stoney End of Horn*, 829 F.3d 681, 685-86 (8th Cir. 2016) (rejecting corroboration).

<sup>53</sup> See, e.g., *United States v. Moore*, 824 F.3d 620, 624 (7th Cir. 2016) (finding hearsay statement admissible under Rule 807 in part because it was corroborated by independent evidence); *Larez v. City of Los Angeles*, 946 F.2d 630, 643 n.6 (9th Cir. 1991) (finding declarants' out-of-court statements “especially reliable” for purposes of residual exception because they corroborated one another).

<sup>54</sup> The proposed amendment to Rule 807 that is currently being considered by the Supreme Court requires the court to find that “the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement.” Memorandum Regarding Transmittal of Proposed Amendment to the Federal Rules of Evidence from James C. Duff, Sec’y, Judicial Conference of the U.S., to Chief Justice of the U.S. & Assoc. Justices of the Supreme Court, at Attachment I (Oct. 24, 2018), [http://www.uscourts.gov/sites/default/files/scotus\\_federal\\_rules\\_package\\_2018\\_0.pdf](http://www.uscourts.gov/sites/default/files/scotus_federal_rules_package_2018_0.pdf) [<https://perma.cc/WG2L-ULDY>].

<sup>55</sup> FED. R. EVID. 807 (emphasis added).

standard exceptions. According to this interpretation, a hearsay statement that nearly misses a categorical exception may not be admitted through the residual exception because hearsay of that variety *is* “specifically covered” by a standard exception (though the statement is not admissible under it). For example, assume that the unavailable mother of a murder defendant stated before trial: “I am a terrible parent—if I had been attentive to my son, he would not be murdering people now.” Her hearsay statement comes close to being a declaration against interest under Rule 804(b)(3) because it seems to acknowledge the mother’s failure as a parent in connection with her son’s conduct. Yet, it nearly misses the Rule 804(b)(3) hearsay exception because the only interests covered by the exception are pecuniary and penal interests.<sup>56</sup> Accordingly, the mother’s admission of inattentiveness would not qualify. Under an interpretation of Rule 807 that excludes “near-misses” therefore, a court could not admit this statement as residual hearsay even if the court were to find it reliable. Some federal courts subscribe to this interpretation of Rule 807 and end their inquiry under the residual exception upon finding that the hearsay statement nearly misses a standard exception.<sup>57</sup>

Most courts, however, have admitted “near misses” under Rule 807 when such hearsay statements are found to be independently trustworthy. Indeed, some courts *rely* on the fact that a hearsay statement very nearly misses a categorical hearsay exception as an indication of its reliability.<sup>58</sup> For example, in *United States v. Valdez-Soto*,<sup>59</sup> a government witness in a cocaine distribution case surprised the government by testifying that the defendants did *not* supply him with cocaine.<sup>60</sup> In response, the government sought to admit inconsistent post-arrest hearsay statements by the witness identifying the defendants as his suppliers.<sup>61</sup> The hearsay statements were not admissible through the Rule

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<sup>56</sup> Rule 804(b)(3) provides a hearsay exception if the declarant is unavailable and: a reasonable person in the declarant’s position would have made [the statement] only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability.

FED. R. EVID. 804(b)(3)(A). In addition, declarations against penal interest offered in criminal cases must be supported by corroborating circumstances that clearly indicate the trustworthiness of the statements. FED. R. EVID. 804(b)(3)(B).

<sup>57</sup> See, e.g., *Glowczenski v. Taser Int’l, Inc.*, 928 F. Supp. 2d 564, 573 (E.D.N.Y. 2013) (finding that treatise was “specifically covered by another hearsay exception, Rule 803(18),” though not admissible under it, and therefore “Rule 807 is inapplicable”).

<sup>58</sup> See, e.g., *United States v. Valdez-Soto*, 31 F.3d 1467, 1471 (9th Cir. 1994) (“And the reference to guarantees of trustworthiness equivalent to those in the enumerated exceptions strongly suggests that almost fitting within one of these exceptions cuts in favor of admission, not against.”); *United States v. Furst*, 886 F.2d 558, 573 (3d Cir. 1989) (deciding that residual exception can be used when proponent nearly misses requirements of another exception).

<sup>59</sup> 31 F.3d 1467 (9th Cir. 1994).

<sup>60</sup> *Id.* at 1470.

<sup>61</sup> *Id.* at 1469.

801(d)(1)(A) hearsay exception specifically governing prior inconsistent statements by a testifying witness because that exception admits only statements made under oath in a prior trial, hearing, deposition, or other proceeding.<sup>62</sup> The witness's post-arrest statements in a parking lot did not meet these stringent requirements for substantive admissibility of prior inconsistent statements.<sup>63</sup> The trial court nonetheless admitted the statements under the residual hearsay exception, finding them trustworthy and corroborated.<sup>64</sup> The Ninth Circuit Court of Appeals affirmed, rejecting the defendants' argument that prior inconsistent hearsay statements inadmissible through Federal Rule of Evidence 801(d)(1)(A) could not be admitted through the residual exception.<sup>65</sup> The court found the fact that the hearsay almost fit within Rule 801(d)(1)(A) to counsel *in favor* of admissibility and stated that "the existence of a catch-all hearsay exception is a clear indication that Congress did *not* want courts to admit hearsay only if it fits within one of the enumerated exceptions."<sup>66</sup> Thus, while the majority of federal courts interpret Rule 807 to allow and even to favor hearsay statements that qualify as "near-misses" under standard exceptions, some federal courts reject out of hand any hearsay statement that fails to satisfy a categorical hearsay exception by a narrow margin.<sup>67</sup>

In proposing an amendment to Rule 807, the Advisory Committee was tasked with selecting one of these approaches to "near-miss" hearsay as the uniform rule for the federal system. This task was made more difficult by the fact that there are sound arguments favoring both. On the one hand, admitting statements that nearly miss satisfying the requirements of a standard exception is in keeping with the rationale underlying the creation of a residual hearsay exception. The core function of a residual exception is to allow a reliable statement to be admitted when it is not admissible under any other exception. Given the number and variety of standard hearsay exceptions, one should expect that a hearsay statement possessing the guarantees of trustworthiness necessary for admission under the residual exception might "nearly miss" one standard exception or another. Thus, to exclude "near-miss" hearsay could be said to undermine the fundamental purpose of a residual exception.

On the other hand, an approach that excludes hearsay statements that nearly miss standard exceptions has its virtue. Allowing near misses to be admitted through the residual exception could allow litigants to evade some of the important limitations and requirements in the standard exceptions. For example, Congress limited the substantive admissibility of prior inconsistent statements under Rule 801(d)(1)(A) to those made under oath in a trial, hearing, deposition,

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<sup>62</sup> *Id.* at 1471; *see also* FED. R. EVID. 801(d)(1)(A).

<sup>63</sup> *Valdez-Soto*, 31 F.3d at 1471.

<sup>64</sup> *Id.* at 1470.

<sup>65</sup> *Id.* at 1471.

<sup>66</sup> *Id.*

<sup>67</sup> *See supra* notes 57-58 and accompanying text.

or other proceeding.<sup>68</sup> Congress designed these requirements to ensure that the witness's prior inconsistent statement was actually made and to provide some assurance that the prior statement was reliable.<sup>69</sup> In allowing the prior inconsistent statement of the government's testifying witness that did not satisfy these important criteria to be admitted for its truth through the residual exception in *Valdez-Soto*, the Ninth Circuit allowed the government to circumvent the congressionally imposed limits on prior inconsistencies.

Because the question was so close, the Committee ultimately opted for the position taken by the vast majority of courts: permitting near-miss hearsay statements—if trustworthy—to be admitted through the residual exception.<sup>70</sup> In selecting the optimal uniform standard to resolve a conflict with credible arguments on both sides, a drafter should ordinarily give greater weight to the majority rule on an issue. First, the fact that most federal courts follow one path is certainly an indication that it is likely the better result. Furthermore, adopting the majority rule results in less disruption to the evidentiary system countrywide because fewer jurisdictions will be forced to reverse course. Consequently, the proposed amendment eliminates language in the existing Rule limiting its application to hearsay “not specifically covered by” other hearsay exceptions.<sup>71</sup> Instead, the amended Rule 807 would admit any trustworthy hearsay “not admissible under” the categorical exceptions.<sup>72</sup> This new terminology resolves a long-standing conflict in the courts by expressly allowing a judge to admit “near misses” under Rule 807 when the court finds them trustworthy—even though they are “not admissible” under other exceptions.<sup>73</sup>

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<sup>68</sup> FED. R. EVID. 801(d)(1)(A).

<sup>69</sup> See H.R. REP. NO. 93-650, at 13 (1973), as reprinted in 1974 U.S.C.C.A.N. 7075, 7086.

<sup>70</sup> See Meeting Minutes of April 26-27, 2018, *supra* note 43, at 10-11, 17.

<sup>71</sup> Memorandum Regarding Report of the Advisory Committee on Evidence Rules from Hon. Debra Ann Livingston, Chair, Advisory Comm. on Evidence Rules, to Hon. David G. Campbell, Chair, Comm. on Rules of Practice & Procedure, at Attachment 6B (May 15, 2018).

<sup>72</sup> *Id.*

<sup>73</sup> See *id.* at Attachment I (providing Rule 807 as approved by Standing Committee and referred to Judicial Conference). The proposed amendment also resolves a conflict with respect to the notice requirement for the admission of residual hearsay. Unlike other notice provisions in the Rules, Rule 807's notice provision contains no “good cause” exception. This is problematic because situations may arise in which a party justifiably offers a statement as residual hearsay at trial. Perhaps because a good cause exception is necessary, most courts have read a good cause exception into the Rule. See, e.g., *Furtado v. Bishop*, 604 F.2d 80, 92 (1st Cir. 1979) (“Most courts have interpreted the pre-trial notice requirement somewhat flexibly . . .”). Yet a few courts, quite understandably, read the Rule as it was written. See, e.g., *United States v. Oates*, 560 F.2d 45, 73 n.30 (2d Cir. 1977) (“[T]here [must] be undeviating adherence to the requirement that notice be given in advance of trial.”). Proposing the addition of a “good cause” exception to Rule 807's notice requirement was not difficult for the Advisory Committee. The absence of a good cause exception was a mistake by Congress, which failed to recognize the need for a good cause safety valve and failed to

Since its reconstitution in 1992, the Advisory Committee on Evidence Rules has fulfilled its responsibility in amending the Rules to resolve many other conflicts. Some examples include Rule 407, which was amended in 1997 to resolve a conflict concerning the application of the Rule against subsequent remedial measures in products liability cases.<sup>74</sup> The Advisory Committee successfully amended Rule 702 in 2000, in part to deal with conflicts in the case law following the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>75</sup> Federal Rule of Evidence 408 was amended in 2006 to rectify a conflict in the case law about whether evidence of a civil compromise is admissible in a subsequent criminal case.<sup>76</sup> Rule 404(a) also was amended in 2006 to prevent the practice in some courts of admitting evidence of a person's pertinent character trait to prove the person's conduct in civil cases.<sup>77</sup> Finally, Rule 804(b)(3) was amended in 2010 to resolve a conflict over whether the government in a criminal case must provide corroborating circumstances supporting the trustworthiness of a hearsay statement offered as a declaration against penal interest.<sup>78</sup>

Still, conflicts in the interpretation of the Federal Rules of Evidence remain, threatening inconsistency and unfairness to litigants. As explored at length in our previous work, federal courts are sharply divided over the application of Rule 404(b) to evidence of a criminal defendant's other crimes, wrongs, or acts. While some circuits carefully limit the admissibility of this dynamite evidence that almost guarantees conviction, others treat Rule 404(b) as a "rule of inclusion" that permissively admits a criminal defendant's past misdeeds.<sup>79</sup> In

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consider the need for consistency with the other notice provisions in its zeal to tighten the residual exception. Indeed, a good cause exception was justified on its own merits, even if every court had followed the Rule as it was written—the fact that the amendment rectified a conflict was icing on the cake.

<sup>74</sup> FED. R. EVID. 407 advisory committee's note to 1997 amendment ("This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions.").

<sup>75</sup> 509 U.S. 579, 590 (1993) (establishing reliability standard for admissibility of expert testimony); see also FED. R. EVID. 702 advisory committee's note to 2000 amendment (explaining that amendment was designed to resolve "some confusion over relationship between Rules 702 and 703").

<sup>76</sup> FED. R. EVID. 408 advisory committee's note to 2006 amendment ("Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read.").

<sup>77</sup> FED. R. EVID. 404(a) advisory committee's note to 2006 amendment (explaining that amendment "resolves the dispute in the case law over whether the [Rule 404(a) exceptions] permit the circumstantial use of character evidence in civil cases").

<sup>78</sup> FED. R. EVID. 804(b)(3) advisory committee's note to 2010 amendment ("Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases.").

<sup>79</sup> See Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 832 (2018)

addition, there is a current conflict in the federal courts concerning the proper application of Rule 106—the rule of completeness. When the government offers part of a defendant’s inculpatory written or recorded hearsay statement for its truth as a statement of a party opponent under Rule 801(d)(2)(A), federal courts are divided over whether the government may use a hearsay objection to block the defendant’s effort to admit another portion of the same statement under Rule 106 to correct a distorted and misleading impression created by the government’s initial presentation.<sup>80</sup> Indeed, some federal courts have expressly recognized the unfairness inherent in excluding a completing statement necessary to remedy distortion, while claiming a lack of power to remedy that unfairness under the existing language of Rule 106.<sup>81</sup> Federal courts also disagree over whether statements made orally may be subject to completion in appropriate cases, notwithstanding Rule 106’s omission of oral statements from its coverage.<sup>82</sup> Courts utilize Rules 404(b) and 106 in criminal trials on a routine basis. Appropriate amendments to the Federal Rules of Evidence should address these lingering incongruities across jurisdictions and provide guidance to litigants and trial judges concerning the proper application of these workhorse rules.<sup>83</sup>

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(discussing conflict in circuits over proper handling of other-acts evidence in federal criminal cases).

<sup>80</sup> Compare *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008) (“[O]ur case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence.”), and *United States v. Sutton*, 801 F.2d 1346, 1368-69 (D.C. Cir. 1986) (noting that evidence that would otherwise be inadmissible may be used for completion under Rule 106 because “Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously”), with *United States v. Lentz*, 524 F.3d 501, 526 (4th Cir. 2008) (“Rule 106 does not, however, ‘render admissible the evidence which is otherwise inadmissible under the hearsay rules.’” (quoting *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996))), and *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir. 2007) (“Rule 106 does not render admissible otherwise inadmissible hearsay.”).

<sup>81</sup> See *United States v. Adams*, 722 F.3d 788, 827 (6th Cir. 2013) (agreeing that government made “unfair presentation of” defendants’ statements, but finding that “this court’s bar against admitting hearsay under Rule 106 leaves defendants without redress”).

<sup>82</sup> See *United States v. Bailey*, No. 8:16-cr-00246, 2017 WL 5126163, at \*4 (D. Md. Nov. 6, 2017) (chronicling split of authority and highlighting difficulties posed for courts and litigants “[i]n the absence of guidance from the Rule or the Committee”).

<sup>83</sup> While the Advisory Committee has proposed an amendment to the notice requirement in Rule 404(b), it has not adopted any proposal to address the substantive admissibility standard for Rule 404(b) evidence. See COMM. ON RULES OF PRACTICE & PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, AND CIVIL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 43-46 (2018), [http://www.uscourts.gov/sites/default/files/2018\\_proposed\\_rules\\_amendments\\_published\\_for\\_public\\_comment\\_0.pdf](http://www.uscourts.gov/sites/default/files/2018_proposed_rules_amendments_published_for_public_comment_0.pdf) [<https://perma.cc/XCQ5-MPQU>] (setting forth proposed amendment to notice provision of Rule 404(b)). The Advisory Committee reviewed the

C. *Time Keeps on Slipping Into the Future: Amendments to Maintain Contemporary Viability*

As Chief Justice Rehnquist noted, the Federal Rules of Evidence were designed to withstand the test of time.<sup>84</sup> In some instances, however, a rule that operated very well for the era in which it was enacted may be undermined by technological or other societal developments in the trial process. The integrity of the Rules is clearly eroded if they are not adaptable to evolving norms and technology. Thus, rulemakers must always examine existing provisions to ensure that they have kept pace with evolving litigation realities.<sup>85</sup> When the Rules are not serving contemporary trial needs, the costs generally associated with modification of the Rules are eclipsed by the need for change.

One of the most important examples of a rulemaking response to a dramatic shift in litigation norms is Federal Rule of Evidence 502. All evidence enthusiasts know the tale of the ill-fated privilege provisions originally proposed by the Advisory Committee in drafting the Federal Rules. Congress famously torpedoed the detailed proposed rules of privilege in favor of Rule 501, leaving privilege to common law development.<sup>86</sup> As a result, federal courts considered

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conflict in the cases regarding the application of Rule 106 at its fall 2018 meeting and plans to continue consideration of Rule 106 in 2019. See ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOK: OCTOBER 19, 2018, at 18-46 (2018) [hereinafter AGENDA BOOK: OCTOBER 19, 2018], [http://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book\\_0.pdf](http://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book_0.pdf) [https://perma.cc/H8MS-U2HZ].

<sup>84</sup> See *supra* note 1 and accompanying text.

<sup>85</sup> Rulemakers should not only monitor existing provisions to ensure that they have stood the test of time; they must also strive when drafting *new* provisions to avoid terminology or devices that are likely to become obsolete with the passage of time. Amendments should attempt to rely on broad language likely to capture evolving societal or technological norms. Rule 101(b)(6) takes this tack, providing that “a reference to any kind of written material or any other medium includes electronically stored information.” FED. R. EVID. 101(b)(6). Similarly, the recently added Rule 902(14), allowing authentication by way of a certificate for data copied from an electronic device, storage medium, or file, was written with the future in mind. See FED. R. EVID. 902(14) (providing that certified data copied from these sources is self-authenticating). Currently, the process for authenticating such data is through “hash value”—a unique digital identifier that the original and the copy both have. See FED. R. EVID. 902(14) advisory committee’s note to 2017 amendment (discussing and describing process of authenticating by hash value). The Advisory Committee declined to use the term “hash value” in the text of Rule 902(14) for fear that it would be eclipsed by advancements in digital identification. Instead, the Rule more generically references authentication through “a process of digital identification.” FED. R. EVID. 902(14). The Committee Note discusses authentication through hash value as the current process, but affirms that “[t]he rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.” FED. R. EVID. 902(14) advisory committee’s note to 2017 amendment.

<sup>86</sup> See FED. R. EVID. 501 (providing in part that “common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege”). For an account of the Congressional rejection, see FEDERAL RULES OF EVIDENCE MANUAL, *supra* note

claims of privilege and waiver on a case-by-case basis, developing doctrines of privilege waiver covering intentional and inadvertent disclosures of privileged information. These waiver doctrines varied across jurisdictions.

Some courts found that a single inadvertent disclosure of a privileged document would result in a broad waiver of privilege with respect to all undisclosed privileged documents on the same subject.<sup>87</sup> Most other courts found that an inadvertent disclosure did not necessarily waive privilege, even as to the disclosed document, if the privilege holder had taken reasonable precautions to prevent the inadvertent production.<sup>88</sup> In the face of such uncertain and variable standards of waiver, rational and competent counsel developed privilege review customs driven by the worst-case scenario: broad subject matter waivers resulting from a single inadvertent privileged disclosure. Lawyers (most often harried junior associates) spent countless hours reviewing document productions to prevent the inadvertent production of even a single scrap of privileged paper. While this exhaustive eyes-on privilege review was perhaps feasible during the era of paper document creation and retention, the turn of the twenty-first century ushered in an explosion of electronically stored data that taxed the limits of the possible. Suddenly, voluminous email chains and multiple drafts of every relevant document became subject to discovery by an adversary. The advent of electronically stored information (“ESI”) meant that everything was retained and retrievable in some form. Eyes-on review of every single electronically stored terabyte became prohibitively expensive, if not impossible. The costs of pre-trial discovery threatened to eclipse the value of a case in some circumstances.<sup>89</sup>

Leaving privilege waiver to common law development may have been workable when the Federal Rules of Evidence were first enacted. But the tectonic shift in discovery practice after the ESI revolution meant that the

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28, §§ 501.02[2]-[3]. Congress also ensured that an Advisory Committee could not promulgate rules of privilege in the future without express Congressional approval. *See* 28 U.S.C. § 2074(b) (2012).

<sup>87</sup> *See, e.g., In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1989) (“[A]s we have previously said, a waiver of privilege in an attorney-client communication extends ‘to all other communications relating to the same subject matter.’” (quoting *In re Sealed Case*, 676 F.3d 793, 809 (D.C. Cir. 1982))).

<sup>88</sup> *See, e.g., Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985).

<sup>89</sup> For concerns about the rising costs of e-discovery and the need for protection from waiver, see the public comments on Rule 502, collected in the ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOK: APRIL 12-13, 2007, at 130-50 (2007). Specifically, Patrick Oot, Esq. (06-EV-031), and Anne Kershaw, Esq. (06-EV-049), made a presentation at the Rule 502 public hearing illustrating the expenditures made for preproduction privilege review in one particular production. “The expenses included review of each email by as many as three sets of attorneys; the total expenditure was more than \$5,000,000.00. They estimated that if the review had been for relevance only, the expenditure would have been reduced by 80%.” *Id.* at 137.



original approach to privilege waiver had to adapt to prevent unfairness and the wasteful expenditure of resources.<sup>90</sup> Working with Congress, the Advisory Committee crafted Rule 502 to bring certainty and uniformity to the law of waiver resulting from privileged disclosures made in a federal proceeding or to a federal office or agency.<sup>91</sup> Rule 502(a) eliminated the worst-case scenario of broad subject matter waivers resulting from a single inadvertent disclosure by providing that subject matter waivers would flow only from intentional disclosures and only when the disclosed and undisclosed communications “ought in fairness to be considered together.”<sup>92</sup> Rule 502(b) also brought more certainty to the consequences of inadvertent disclosure, providing that reasonable steps to prevent inadvertent disclosure, accompanied by prompt and reasonable steps to rectify any error, would protect a privilege holder from waiver as to inadvertently disclosed documents.<sup>93</sup> Seeking to utilize the technology that created the problem with existing privilege doctrine to solve it, the Committee Note to Rule 502(b) provides that electronic privilege review may form part of a reasonable privilege review process that will avoid waivers based upon inadvertent disclosures.<sup>94</sup> Going one step further, Rule 502(d) authorizes federal court orders allowing parties to retain privilege protection even after exchanging documents *without* preproduction privilege review.<sup>95</sup>

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<sup>90</sup> Indeed, another goal of rulemaking is to avoid unnecessary costs, imposed for reasons not tied to fair and efficient litigation, whenever possible. Rule 502 served this important goal by seeking to limit the costs of preproduction privilege review. Recently adopted Federal Rules of Evidence 902(13) and (14) were also intended to avoid the often unnecessary production of witnesses who are called to authenticate electronic information. After conducting research and reviewing public comment, the Advisory Committee determined that such witnesses usually provide perfunctory testimony and are rarely cross-examined. Thus, rules allowing them to submit a certification avoid a costly, but empty, act. For a discussion of the background to the adoption of Rule 902(13) and (14), and a description and analysis of those rules, see HON. PAUL W. GRIMM, GREGORY P. JOSEPH & DANIEL J. CAPRA, *BEST PRACTICES FOR AUTHENTICATING DIGITAL EVIDENCE* 24-30 (2016), reproduced in *FEDERAL RULES OF EVIDENCE: 2018-2019 EDITION* 577-83 (Daniel J. Capra ed., 2018).

<sup>91</sup> Because Rule 502 was a rule of privilege, it had to be directly enacted by Congress. See 28 U.S.C. § 2074(b) (mandating Congressional approval for changes to evidentiary privilege rules). The legislative history on congressional input into the development of Rule 502(b) can be found in *FEDERAL RULES OF EVIDENCE: 2018-2019 EDITION*, *supra* note 90, at 93-102.

<sup>92</sup> FED. R. EVID. 502(a).

<sup>93</sup> FED. R. EVID. 502(b) (establishing rule for inadvertent disclosures).

<sup>94</sup> FED. R. EVID. 502(b) advisory committee’s note to Rule 502 (“Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.”).

<sup>95</sup> FED. R. EVID. 502(d). A federal court order protects parties from findings of waiver in any future federal or state proceeding. *Id.* Further, a federal judge may enter such a nonwaiver order even in the absence of any agreement by the parties about privilege protection. *Id.*

Thus, following the advent of ESI, an amended approach to waiver became imperative to limit the skyrocketing costs of preproduction privilege review. Rulemakers must always keep an eye trained on technological advancement to ensure that yesterday's Rules are equipped to handle the demands of contemporary litigation.<sup>96</sup>

Sometimes, evolving societal norms and increased cultural awareness call for an update to the Rules. The most profound example of this phenomenon is the 1994 adoption of Rule 412 to protect victims of sexual assault from having their reputations and past sexual conduct used against them in sexual assault trials.<sup>97</sup> Although the Federal Rules generally prohibit the use of character evidence to prove a person's conduct, Rule 404(a)(2)(B) follows the common law in allowing criminal defendants to present evidence of their alleged victim's pertinent character trait to argue that the victim behaved consistently with character on the occasion in question.<sup>98</sup> In a battery prosecution, for example, Rule 404 permits a criminal defendant to prove that his alleged victim had a violent and aggressive character in order to suggest that the would-be victim was in fact the aggressor. In rape prosecutions, however, this time-honored tactic resulted in defendants attacking the dress, sexual mores, speech, and past behavior of their victims to justify a sexual assault.<sup>99</sup> More advanced and enlightened contemporary societal norms recognize that a victim's prior consensual sexual behavior with another, or a victim's choice of attire, has very little probative value with respect to his or her consent to sex with the

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<sup>96</sup> Effective rulemakers should be proactive in proposing amendments to keep pace with advancing technological norms. Although an Advisory Committee should monitor the Rules to identify conflicts and problems that have already arisen in the case law, there may be trouble brewing beneath the surface of a particular rule. In order to permit feedback from all relevant constituencies, it takes at least three years for a rule to be enacted. For a discussion of the timeline, see Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1671-74 (1995). Even when concrete inefficiencies and anomalies in the application of the rule may only be on the horizon, the system may be undermined in significant ways before an amendment can resolve the issues if the Committee hesitates to act until those problems materialize in reported cases. A recent example of the Committee working proactively to avoid trouble still around the corner is the 2017 amendment to the ancient documents hearsay exception—Rule 803(16)—to prevent admission of an onslaught of unreliable ESI. For more on the need to amend Rule 803(16) in light of the prevalence of ESI, see generally Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix It Before Anyone Finds Out About It*, 17 YALE J.L. & TECH. 1 (2015).

<sup>97</sup> For the legislative history of the 1994 amendment, see FEDERAL RULES OF EVIDENCE: 2018-2019 EDITION, *supra* note 90, at 76-80.

<sup>98</sup> FED. R. EVID. 404(a)(2)(B).

<sup>99</sup> See 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) (noting that under then-existing law, "rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt").

defendant.<sup>100</sup> And an evidentiary standard that permitted defendants to launch a smear campaign against a victim invited jurors to acquit unjustly because the victim “had it coming.” Furthermore, evidence rules permitting a defendant to humiliate and traumatize an alleged victim by placing his or her entire sexual history under a very public microscope undermined victims’ willingness to report and pursue prosecution of sexual offenders.<sup>101</sup> In recognition of these realities, Rule 412 was adopted to reject these traditional practices in sexual assault cases.<sup>102</sup> Rule 412 provides substantial hurdles to the admission of evidence of an alleged victim’s sexual “predisposition” or past sexual behavior in civil or criminal proceedings involving alleged sexual misconduct.<sup>103</sup> Rule 412 therefore responds directly to changing societal consciousness regarding sexual assault.

Although the vast majority of the Evidence Rules may withstand the test of time, there are some that must be adjusted to account for modern technological or cultural norms. In addition to ensuring that the Rules are not subject to misinterpretation or misapplication, therefore, rulemakers must constantly monitor the shifting societal landscape to be certain that the Rules that served the justice system in eras gone by are up to the task of fairly resolving modern disputes.

#### D. *Simplicity Is the Ultimate Sophistication*

Chief Justice Rehnquist and other commentators have long warned against alterations to the Federal Rules of Evidence for fear that changes will destroy their brevity and simplicity.<sup>104</sup> Amendments to the Federal Rules of Evidence

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<sup>100</sup> See *Sandoval v. Alcedo*, 996 F.2d 145, 149 (7th Cir. 1993) (explaining rape shield rule: “in an age of post-Victorian sexual practice, in which most unmarried young women are sexually active, the fact that the woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she consented to engage in this activity with the defendant on the occasion on which she claims that she was raped”).

<sup>101</sup> See 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) (“Too often in this country victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. . . . [So] it is not surprising that it is the least reported crime.”).

<sup>102</sup> H.R. REP. NO. 103-711, at 609 (1994), as reprinted in 1994 U.S.C.C.A.N. 1839 (adopting the Committee Note as legislative history).

<sup>103</sup> FED. R. EVID. 412(a). The prohibition is subject to limited exceptions in criminal cases. FED. R. EVID. 412(b)(1). Exceptions to this prohibition in civil cases depend on a balancing test that provides significant protection for victims. See FED. R. EVID. 412(b)(2) (stating that victim’s sexual predisposition or behavior may be admitted in civil case if “its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party”).

<sup>104</sup> See, e.g., Victor Gold, *The Three Commandments of Amending the Federal Rules of Evidence*, 85 FORDHAM L. REV. 1615, 1619 (2017) (stating that first “commandment” of

that make them *more* concise and *more* accessible to lawyers and judges using them in a trial or pre-trial context accordingly serve, rather than undermine, the goals of the Rules. Rulemakers should not be so resistant to change that they become reluctant to consider amendments that make the Rules easier to understand and apply.

Probably the best example of an amendment package designed for this precise purpose is the restyling of the Evidence Rules in 2011. The goals of restyling are virtuous—to make the Rules (1) more user-friendly, (2) less legalistic, (3) easier to visualize and understand, (4) less ambiguous (most importantly by replacing the word “shall” with “may” or “must” depending on the situation), and (5) consistent in terminology.<sup>105</sup> The restyling project added helpful numbering, new subsections, and bullet points, as well as explanatory headings designed to make the Rules easier to read and use.<sup>106</sup> With respect to the Evidence Rules, there were two additional benefits to restyling. First, by the time restyling for the Evidence Rules was being considered, the Appellate, Criminal, and Civil Rules had already been restyled, so it made sense in terms of trans-rule uniformity to apply the same restyling principles to the Evidence Rules.<sup>107</sup> Second, restyling provided an opportunity for a new “definitions” section to promote uniform application of terminology and to accommodate technological development in the presentation of evidence. The original Rules were rife with references to paper-based information, and a “definitions” section presented a ready vehicle for clarifying that references to paper include the ESI that has exploded since the enactment of the original Rules.<sup>108</sup> The Advisory Committee was able to achieve the desired improvement in the Rules without any substantial readjustment in the principles underlying the Rules or even to well-accepted terminology. Indeed, the Advisory Committee wisely concluded that the restyling could not change a “sacred phrase”—defined as a phrase that has become so familiar to courts and litigators that to change it would result in substantial dislocation costs.<sup>109</sup> Therefore, amendments that allow the Rules to

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amending Federal Rules of Evidence is “If It Ain’t Broke, Don’t Fix It”); *supra* note 1 and accompanying text.

<sup>105</sup> See FED. R. EVID. 101 restyled rules committee’s note to 2011 amendment, *reproduced in* FEDERAL RULES OF EVIDENCE: 2018-2019 EDITION, *supra* note 90, at 7. The restyling principles were derived from BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995), and BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1969).

<sup>106</sup> See, e.g., FED. R. EVID. 401 (adding new heading and subsections (a) and (b) to standard of relevance); FED. R. EVID. 404 (same).

<sup>107</sup> The Appellate Rules were restyled effective December 1, 1998. See 144 CONG. REC. 8652. The Criminal Rules were restyled effective December 1, 2002. See 148 CONG. REC. 6813. The Civil Rules were restyled effective December 1, 2007. See 153 CONG. REC. 10,612.

<sup>108</sup> See FED. R. EVID. 101(b)(6) (stating that references to written materials include ESI).

<sup>109</sup> See FED. R. EVID. 101 restyled rules committee’s note to 2011 amendment, *reproduced in* FEDERAL RULES OF EVIDENCE: 2018-2019 EDITION, *supra* note 90, at 10 (defining change

function optimally in the very context for which they were designed can and should be advanced.

Another prime example of amending the Rules to enhance simplicity is the 2014 amendment to the hearsay exception for prior consistent statements in Rule 801(d)(1)(B).<sup>110</sup> The original exception provided that a testifying witness's prior consistent statement, when admitted for the nonhearsay purpose of rebutting an opponent's charge of recent fabrication or improper motive, could be used substantively for its truth as well. The original Advisory Committee articulated two reasons favoring substantive use of the admitted statements. First, the Committee Note emphasized that pre-trial consistent statements would only be admitted to rehabilitate when they matched previously admitted trial testimony. The hearsay risks associated with out-of-court statements appear less significant when the statements are preceded by live testimony to the same effect.<sup>111</sup> Second, the Advisory Committee asserted that prior consistencies only become relevant to rehabilitate after their opponent has opened the door to their admission with a triggering charge of recent fabrication or improper motive.<sup>112</sup> In essence, the Advisory Committee adopted what could be characterized as a "why not" approach to the substantive use of prior consistent statements, explaining that there is "no sound reason" why such statements "should not be received generally" once they are received for rehabilitative purposes.<sup>113</sup>

But impeaching-attacks other than those of recent fabrication and improper motivation may also be repaired with a prior consistent statement. For example, if a witness's recollection of a crucial event is challenged, a statement consistent with the witness's testimony, made close in time to the event in question before memory had a chance to fade, would rebut the attack. Furthermore, the rationale for allowing substantive use of prior consistent statements admitted to rebut charges of recent fabrication or improper motive applies equally to prior consistent statements admitted for the purpose of rebutting an attack on memory. The prior consistency would merely echo testimony previously delivered live from the witness stand subject to cross-examination. And, admission would flow directly from the opponent's decision to impeach based upon lack of memory. Yet, under the original rule, a prior consistent statement admitted to repair an attack on memory was admissible only to rehabilitate the witness and not as

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to sacred phrases as substantive and inappropriate); Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1489 (2012) (discussing "sacred" phrases).

<sup>110</sup> FED. R. EVID. 801(d)(1)(B).

<sup>111</sup> See FED. R. EVID. 801(d)(1) advisory committee's note to 2014 amendment ("If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem.").

<sup>112</sup> See FED. R. EVID. 801(d)(1)(B) advisory committee's note to 2014 amendment ("[I]f the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.").

<sup>113</sup> *Id.* In contrast to certain prior consistencies admitted to rehabilitate, the Advisory Committee articulated concern regarding the "general and indiscriminate use of previously prepared statements." FED. R. EVID. 801(d)(1) advisory committee's note to proposed rules.

substantive evidence (i.e., for its truth). This distinction between rehabilitative and substantive use required a limiting instruction that no juror—indeed no evidence professor—could understand. The instruction would go something like this:

The witness’s prior statement that he observed the event [that mirrors exactly his trial testimony about observing the event] may not be used as proof that he saw the event. Rather, it may show only that his memory of the event is as good now as it was before.<sup>114</sup>

Adding insult to injury, the dizzying mental gymnastics required by this type of instruction served no legitimate purpose. The use of a truly consistent prior statement for its truth should make little difference to anyone—by definition, the hearsay statement matches what the witness has already stated on the stand. Accordingly, Rule 801(d)(1)(B) was amended in 2014 to eliminate the needlessly complex distinction between prior consistent statements offered to repair charges of recent fabrication or improper motive and those admitted to repair other impeaching attacks. The amended Rule provides for a simple and elegant approach to the substantive use of prior consistencies that scuttles the vexing and incomprehensible limiting instruction—if ever a prior consistent statement is admissible for rehabilitation it is also admissible for its truth.<sup>115</sup>

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In sum, there are several identifiable circumstances in which amendments to the Federal Rules of Evidence are worth the potential dislocation costs inherent in any change. When the Rules may be subject to an unconstitutional application as written, an amendment serves the important goal of aligning the rule book that lawyers carry into court with the constitutional protections outlined in Supreme Court precedent.<sup>116</sup> When irreconcilable conflicts in the interpretation and application of the Rules arise among circuits, amendments become necessary to fulfill the promise of uniformity of the Federal Rules of Evidence.<sup>117</sup> When tectonic shifts in technology, trial practice, or society render rules obsolete, unfair, or ill-equipped for the task they were designed to perform, rulemakers need to step in to preserve the contemporary viability of the Rules.<sup>118</sup> Finally, the benefits of amendments that enhance the simplicity and brevity of the Rules and that make them easier for judges and litigants to deploy outweigh the costs of change.<sup>119</sup> Rather than debating the risks inherent in rule changes

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<sup>114</sup> See *United States v. Harris*, 761 F.2d 394, 400 (7th Cir. 1985) (noting that difference between substantive and rehabilitation use for prior consistent statements “may seem unrealistically subtle in light of the effect a jury may be inclined to give the statements”).

<sup>115</sup> See FED. R. EVID. 801(d)(1)(B); FED. R. EVID. 801(d)(1)(B) advisory committee’s note to 2014 amendment.

<sup>116</sup> See *supra* Section I.A.

<sup>117</sup> See *supra* Section I.B.

<sup>118</sup> See *supra* Section I.C.

<sup>119</sup> See *supra* Section I.D.

generally, rulemakers can utilize this taxonomy to distinguish a necessary amendment from wasteful tinkering.

## II. MARRYING POLITICS AND PROSE: NATURAL BARRIERS TO CHANGE

Even in the circumstances explored above, when amendments to the Evidence Rules are justified, there are natural barriers to change built into the rulemaking process. The Judicial Conference rulemaking process is a delicate dance choreographed to include roles for Congress, the Supreme Court, and the DOJ. Congress has constitutional authority over rulemaking for the federal courts and has delegated concurrent power to the Supreme Court (and thence to the Judicial Conference) via the Enabling Act.<sup>120</sup> Under the Enabling Act, the Judicial Conference can obtain enactment of a federal rule of practice or procedure by having the Supreme Court submit the proposed rule to Congress by May 1 of a given year. Congress then has until December 1 to act on a proposal. If Congress takes no action, the amendment becomes effective on December 1.<sup>121</sup> Thus, both Congress and the Supreme Court possess important authority over the rulemaking process and may determine the fate of a proposed amendment.

Although the DOJ has no independent rulemaking authority, it enjoys a permanent position on the Evidence Advisory Committee and on the Standing Committee of Rules of Practice and Procedure, to which the Advisory Committee reports—as well as, of course, influence in Congress. Thus, the DOJ represents a powerful voice that helps to shape rulemaking policy.

Achieving important updates to the Rules while according each branch of government the appropriate deference throughout the rulemaking process poses a significant challenge for an Advisory Committee seeking to fulfill its oversight obligations.

### A. *As You Wish: Deference to Congress*

A significant and recurring question for the Advisory Committee is how much deference to afford congressional intent in amending the Evidence Rules. Although the Enabling Act delegates Congress's rulemaking authority, it represents a *concurrent* delegation of authority to amend the Rules. In addition to Congress's power to reject a proposed amendment that has gone through the rulemaking process, Congress retains the power to enact Evidence Rules outside the rulemaking process, by direct statutory action. And Congress has acted directly on a number of occasions. For example, in 1984, after John Hinckley, Jr. was found not guilty by reason of insanity for his attempt to assassinate President Reagan,<sup>122</sup> Congress added Rule 704(b) to the Evidence Rules to

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<sup>120</sup> See 28 U.S.C. §§ 2072-2074 (2012).

<sup>121</sup> *How the Rulemaking Process Works*, U.S. CTS., <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> [<https://perma.cc/AA2R-N2W7>] (last visited Sept. 21, 2019).

<sup>122</sup> See *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *clarified*, 529 F. Supp. 520 (D.D.C. 1982), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982).

provide that an expert in a criminal case may not express an opinion that the defendant did or did not have the requisite mental state to commit a crime.<sup>123</sup> In 1994, Congress acted directly in an unusual way—enacting a proposed amendment to Rule 412 that was rejected by the Supreme Court before it reached Congress in the Enabling Act process.<sup>124</sup> Also in 1994, Congress directly added Rules 413-415 to the Federal Rules of Evidence to allow broader admissibility of a defendant's prior acts of sexual assault or child molestation.<sup>125</sup>

In addition to adopting these amendments to the Rules, Congress also provided significant input on the original Federal Rules of Evidence, making many changes to the Rules as drafted by the Advisory Committee and approved by the Supreme Court.<sup>126</sup> As a result of this significant congressional tinkering, the Federal Rules of Evidence were ultimately enacted by statute.<sup>127</sup> Congressional rejection of the proposed privilege provisions was discussed above.<sup>128</sup> Some other notable examples of congressional tinkering include Rule 609, governing the impeachment of witnesses with prior convictions, and Rule 801(d)(1)(A), governing substantive admissibility of a witness's prior inconsistent statements.<sup>129</sup>

In updating the Rules, rulemakers grapple with the appropriate degree of deference to afford rules that were directly enacted—or significantly altered in the original process—by Congress. The practice of the Evidence Advisory Committee has been to err on the side of deference to Congress.<sup>130</sup> Very few amendments have touched rules directly enacted by or significantly altered in

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<sup>123</sup> Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified at 18 U.S.C. § 17 (2012)).

<sup>124</sup> See FEDERAL RULES OF EVIDENCE MANUAL, *supra* note 28, at 412-28.

<sup>125</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796 (codified at 42 U.S.C. § 13701 (2012)). Of course, Rule 502 was directly enacted by Congress in 2008 because the Enabling Act requires that all rules of privilege must be directly enacted. See 28 U.S.C. § 2074(b).

<sup>126</sup> See CAPRA, *supra* note 47, at 268.

<sup>127</sup> See Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

<sup>128</sup> See *supra* Section I.C.

<sup>129</sup> For an account of the back-and-forth in Congress over Rule 609(a)(1), see 28 CHARLES ALAN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6131 (2012). For an account of the Congressional input on Rule 801(d)(1)(A), see Daniel J. Capra, *Prior Statements of Testifying Witnesses: Drafting Choices to Eliminate or Loosen the Strictures of the Hearsay Rule*, 84 FORDHAM L. REV. 1429, 1437 (2016).

<sup>130</sup> See Meeting Minutes of April 26-27, 2018, *supra* note 43, at 28 (refusing to propose amendment to Rule 609(a)(1) in large part because deference is given to compromise worked out in Congress forty-five years earlier); Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 17, 2015, at 5-7 [hereinafter Meeting Minutes of April 17, 2015], [https://www.uscourts.gov/sites/default/files/2015-04-evidence-minutes\\_0.pdf](https://www.uscourts.gov/sites/default/files/2015-04-evidence-minutes_0.pdf) [<https://perma.cc/Y4JX-QQDR>] (refusing to proceed with amendment to time periods for notice in Rules 413-415 out of deference to Congress).



Congress, and those that have did not disturb substantive congressional compromises.<sup>131</sup>

This long-standing practice of deference notwithstanding, it is doubtful that a rule should receive special deference *solely* because of its congressional lineage. First, even assuming that Congress is entitled to some special deference, that should not completely bar reconsideration of rules that were enacted forty-four years ago. As examined above, our system of litigation is constantly evolving and rules that may have functioned well in 1975 may no longer serve the interests of justice.<sup>132</sup> Where there is no indication that Congress is considering modifications to a particular rule to keep pace with the contemporary climate, the hands of the deputized rulemaking Committees should not be tied by ancient congressional compromises that may not reflect modern litigation imperatives or even modern congressional thinking on the topic. The Enabling Act means that Congress is relying upon the Supreme Court and the Judicial Conference Advisory Committee to monitor the Federal Rules of Evidence and to propose necessary reforms. If Congress does not monitor evidentiary problems in reliance on the Advisory Committee, and the Advisory Committee does not propose needed reforms in cases where Congress had a hand in crafting the original standard, there is a class of rules frozen in place.<sup>133</sup> The Advisory Committee cannot fulfill its legislatively created responsibility if it must turn a blind eye to malfunctioning evidence rules solely because Congress had a hand in hammering out the applicable standard over forty years ago.

Furthermore, there is reason to believe that the Judicial Conference rulemaking process produces results that are superior to those achieved when Congress acts on its own. The Enabling Act implicitly recognizes that Congress is not the optimal venue for developing highly specialized evidentiary provisions.<sup>134</sup> The Advisory Committee is made up of experienced federal judges and practitioners who are uniquely suited to determine which procedural rules will operate most effectively in a court proceeding. The Committee Notes that accompany rules enacted through the rulemaking process assist litigants in better understanding the operation of the Rules. Further, the rulemaking process is deliberate and inclusive, carefully gathering feedback and data from the public comment process, as well as from the Standing Committee, the Judicial

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<sup>131</sup> See, e.g., FED. R. EVID. 101 restyled rules committee's note to 2011 amendment, reproduced in FEDERAL RULES OF EVIDENCE: 2018-2019 EDITION, *supra* note 90, at 7 (stating that restyled rules do not alter substance or sacred phrases); FED. R. EVID. 609(a)(1) advisory committee's note to 1990 amendment (amending Rule only to respond to Supreme Court's opinion in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989)).

<sup>132</sup> See, e.g., *supra* Section 1.C.

<sup>133</sup> See Symposium, *supra* note 3, at 740 (noting that Congress is not maintaining Evidence Rules because it has delegated authority to monitor Rules to Supreme Court and Judicial Conference and that needed updates will not happen without action by Advisory Committee).

<sup>134</sup> See 28 U.S.C. § 2072 (2012) (delegating power to Supreme Court to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals").

Conference, and finally the Supreme Court. Of course, Congress sits at the end of the rulemaking line and is fully able to exercise its will if it so desires.

Finally, the rulemaking process is not influenced by special interests in the same way that congressional action can be. As Rules 704(b) and 413-415 illustrate, when Congress takes direct control over revising the Evidence Rules, it frequently adopts provisions that appear to be politically expedient—regardless of whether they are consistent with the principles and structure animating the existing body of rules.<sup>135</sup> Whatever “lobbying” does occur in the context of rulemaking may be tied to the costs and benefits of a proposal for a particular litigation constituency but is not tied directly to campaign contributions. The rules directly enacted by Congress have tended to be kneejerk political responses to specific incidents, and they have proceeded with minimal consideration and sometimes without a Committee Report to indicate legislative intent.<sup>136</sup>

Rules 413-415, permitting evidence of a defendant’s prior sexual assaults or acts of child molestation, were directly enacted by Congress outside the rulemaking process.<sup>137</sup> Although the liberal admissibility of past sex offenses authorized by these Rules provoked a great deal of controversy, even the notice provisions reveal the drawbacks of direct congressional action.<sup>138</sup> In drafting the notice provisions for these Rules, Congress required the proponent to provide notice “at least 15 days before trial.”<sup>139</sup> About twenty years after Congress enacted Rules 413-415, the Judicial Conference embarked on a project for uniform time-counting rules.<sup>140</sup> Under these uniform rules, all time limits must be stated in multiples of seven days to ensure that a deadline may never fall on

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<sup>135</sup> Symposium, *supra* note 3, at 741 (“Members of Congress are interested in the issues that are politically sensitive.”); see also Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 922 (1999) (applying public choice theory to Federal Rules of Civil Procedure rulemaking process to conclude that legislative process is ill-equipped for optimal procedural rulemaking); Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking,”* 53 HASTINGS L.J. 843, 864 (2002) (noting that “Congress clearly has an interest in the evidence rules when it suits a political constituency”).

<sup>136</sup> Congress’s direct enactment of Rules 413-415 reflects this phenomenon perfectly. See FEDERAL RULES OF EVIDENCE MANUAL, *supra* note 28, § 413.04 (noting that Congress passed rules without meaningfully considering Advisory Committee’s suggestions and without committee report).

<sup>137</sup> *Id.*

<sup>138</sup> The controversy surrounding the merits of these Rules is well documented. See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51, 52 (1995) (“After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules.”).

<sup>139</sup> See, e.g., FED. R. EVID. 413(b). The multiples-of-seven approach avoids having a notice period end or begin on a weekend.

<sup>140</sup> See, e.g., FED. R. CIV. P. 6.

a weekend.<sup>141</sup> While these uniform rules are not directly applicable to the Evidence Rules, they reflect the most contemporary wisdom regarding time periods stated in days within the Federal Rules. Importantly, the only notice periods in the Federal Rules of Evidence expressed in a specific number of days, apart from Rules 413-415, are Rules 412 and 803(10)—and the time periods in those Rules are fourteen days and seven days, consistent with the multiples-of-seven approach to counting days.<sup>142</sup> All the other notice provisions in the Evidence Rules are stated without specifying time periods.<sup>143</sup> So, the Rule 413-415 time periods created by Congress are not only out of line with the other notice provisions in the Rules, but they are also out of step with contemporary time-counting conventions throughout the Federal Rules of Practice and Procedure. There is no indication that Congress gave any serious thought to the fifteen-day time period and how it would interact with the other time periods in the Evidence Rules or in the Federal Rules more generally. And, of course, Congress did not have the benefit of the subsequent uniform time-counting project in selecting a notice period for Rules 413-415. Accordingly, there appears to be little reason to defer to the ill-considered and outdated fifteen-day period crafted by Congress. And yet, the Advisory Committee has hesitated to tinker with the notice provisions in Rules 413-415 out of deference to Congress.<sup>144</sup>

An Advisory Committee undoubtedly ought to approach rules that bear congressional fingerprints with a degree of circumspection. A rules committee may sensibly decline to propose the “repeal” of rules recently enacted by Congress where legislative intent is clear, such as Rule 704(b) or the substantive provisions of Rules 413-415.<sup>145</sup> Still, when a malfunctioning or outmoded rule originated in Congress in the 1970s, or where the legislative intent behind a congressionally enacted provision fails to account for or justify its incongruous operation, that rule should get no more deference than any other rule of evidence. If such inadequacies in the Evidence Rules are ever to be corrected, the Advisory Committee must initiate proposals to correct the deficiencies in congressionally enacted provisions. If Congress truly has legislative policy objectives that are at odds with a proposed amendment, Congress has the opportunity allotted by the Enabling Act to reject or redraft the proposed amendment.

#### B. *The Supremacy of Supreme Court Interpretation*

Like Congress, the Supreme Court possesses a dual role with respect to the Federal Rules of Evidence. The Enabling Act delegates the rulemaking function

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<sup>141</sup> *Id.*

<sup>142</sup> FED. R. EVID. 412(c)(1)(B); FED. R. EVID. 803(10).

<sup>143</sup> *See* FED. R. EVID. 404(b), 807, 902(11) (requiring reasonable notice “before trial”).

<sup>144</sup> *See* Meeting Minutes of April 17, 2015, *supra* note 130, at 5-7.

<sup>145</sup> *See* Scallen, *supra* note 135, at 861-62 (“Eliminating rules passed directly by Congress, such as Rule 704(b) or Rules 413-415, is an impractical and impolitic suggestion.”).

to the Court, which has entrusted the task to the Judicial Conference.<sup>146</sup> The Supreme Court thus plays a crucial role in the rulemaking process by reviewing the work of the Advisory Committees. The Court has the final word on whether to advance a proposed amendment to Congress in the penultimate step in the rulemaking process.<sup>147</sup> In addition, the Supreme Court possesses the authority to interpret the Federal Rules of Evidence in the course of deciding an appeal. And it happens, although not very often, that Supreme Court precedent articulates the intended operation of an existing evidence rule.<sup>148</sup> In considering potential modifications to a rule, therefore, an Advisory Committee must determine the appropriate weight to give to previous Supreme Court interpretation of that rule.

The amount of deference to be given depends to a large extent on the type of analysis embodied in a Supreme Court opinion regarding a Federal Rule of Evidence. When the Court makes a normative judgment about a particular evidence rule and opines that the rule *must* operate in a certain manner in order to be viable and fair, the Advisory Committee should rightly resist amending that rule in a way that would be inconsistent with the Court's analysis.<sup>149</sup> On the other hand, when the Court writes in a purely descriptive fashion, merely explaining the way in which an existing evidence rule operates as written, the Advisory Committee should remain free to propose an amendment to that rule if research demonstrates a flaw in its operation. Differentiating between the two types of Supreme Court opinions can be challenging, however, and rulemakers too often adopt a hands-off approach with respect to any rule the Court has touched.

The Supreme Court's opinion in *Williamson v. United States*<sup>150</sup> is a prime example of a holding that should not be disturbed by an amendment to the Federal Rules of Evidence. In that case, the Court examined Rule 804(b)(3), which provides a hearsay exception for statements that are contrary to a declarant's pecuniary or penal interest.<sup>151</sup> The rationale behind the against-interest exception is that a hearsay statement that hurts the declarant's own interests is trustworthy because no reasonable actor would speak to her own detriment unless her statement was true.<sup>152</sup> The Supreme Court in *Williamson*

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<sup>146</sup> 28 U.S.C. § 2073(a) (2012).

<sup>147</sup> *Id.* § 2074.

<sup>148</sup> *See, e.g.,* *Tome v. United States*, 513 U.S. 150, 155 (1995) (holding that Rule 801(d)(1)(B) incorporates "pre-motive" requirement); *Bourjaily v. United States*, 483 U.S. 171 (1987) (articulating operation of Rule 104(a) in connection with coconspirator hearsay exception).

<sup>149</sup> Of course if the Court holds a rule to be *unconstitutional*, different considerations apply. *See supra* Section I.A.

<sup>150</sup> 512 U.S. 594 (1994).

<sup>151</sup> *Id.* at 596 (citing FED. R. EVID. 804(b)(3)).

<sup>152</sup> FED. R. EVID. 804(b)(3) advisory committee's note to proposed rules ("The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.").

considered whether the Rule should admit neutral statements (statements not against the speaker's interest) when made as a collateral part of an otherwise dissembling statement.<sup>153</sup> The majority of the Court rejected the admissibility of collateral neutral statements and held that Rule 804(b)(3) admits *only* statements that are themselves against the speaker's interest.<sup>154</sup> The majority reasoned that the against-interest nature of the covered statements offers the sole guarantee that those statements are sufficiently reliable.<sup>155</sup> Because there is no assurance that a neutral statement accompanying an otherwise dissembling remark is trustworthy, the Court cautioned that collateral neutral statements should not be admitted.<sup>156</sup>

In *Williamson*, therefore, the Court articulated a persuasive policy justification for excluding collateral neutral statements. Although the Supreme Court, acting in its rulemaking capacity, could certainly quash any attempt to amend Rule 804(b)(3) to admit collateral neutral statements, the Committee, as the Supreme Court's designee in the rulemaking process, would be ill-advised to propose an amendment directly at odds with the clear reliability-based policy judgment of the Court regarding the Rule.<sup>157</sup>

Not all Supreme Court decisions that interpret the Federal Rules of Evidence offer such a clear judgment on the merits of a particular provision, however. Some opinions simply construe the text of a rule and offer a primer on its application as it is currently drafted. For example, in *Huddleston v. United States*,<sup>158</sup> the Supreme Court examined the proper application of Rule 404(b)<sup>159</sup>—the provision governing the admissibility of a defendant's other

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<sup>153</sup> *Williamson*, 512 U.S. at 600.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 601 (stating that lower court "may not just assume . . . that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else").

<sup>157</sup> *Id.* at 602. Even when Supreme Court interpretation of a Rule may reflect a policy choice, rulemakers may nonetheless propose an amendment to the Rule while showing deference to the Court by retaining the specific rule text interpreted by the Court. The 2014 amendment to the Rule 801(d)(1)(B) hearsay exception for prior consistent statements did exactly that. The amendment was designed to simplify and rationalize the hearsay rule by making *all* rehabilitative prior consistent statements admissible for their truth and could have been drafted to say just that (the height of elegant simplicity). Drafting the amendment in that seemingly lean and clean manner would have required dropping the original language from the rule, however, which was the focal point of *Tome v. United States*, 513 U.S. 150 (1995), one of the few Supreme Court cases interpreting the Federal Rules of Evidence. Instead of deleting the original language interpreted by the Court, therefore, the Committee chose to retain the original language and to add a new subsection to expand substantive admissibility of prior consistent statements.

<sup>158</sup> 485 U.S. 681 (1988).

<sup>159</sup> *Id.* at 681.

crimes, wrongs, or acts to prove points such as intent, knowledge, or motive.<sup>160</sup> In *Huddleston*, the defendant denied committing the prior bad acts that the government was seeking to admit. Thus, the question in *Huddleston* concerned the proper standard of proof for determining whether a defendant had, in fact, committed a prior bad act offered under Rule 404(b). The Supreme Court found that this preliminary question was one of conditional relevance—the relevance of the prior bad act being conditioned on whether the defendant actually committed it. As such, the preliminary finding is controlled by Rule 104(b), meaning that a judge merely screens the evidence of the prior bad act to determine whether a reasonable juror could find by a preponderance of the evidence that the defendant committed the prior bad act.<sup>161</sup> In responding to the defendant’s argument that a higher standard was needed to protect defendants from unfair prejudice, the Court outlined the operation of Rule 404(b) as follows:

We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.<sup>162</sup>

In so doing, the Court noted the role that Rule 403 plays in balancing the probative value of a prior bad act against the unfair prejudice to a defendant in the Federal Rules’ scheme.

The Advisory Committee recently explored the possibility of amending Rule 404(b) to protect defendants from the permissive admission of prior bad acts in federal criminal trials.<sup>163</sup> Such an amendment would have been aimed at correcting a conflict in the circuits, as well as at remedying injustice in the application of Rule 404(b). One amendment alternative was the addition of a heightened balancing test to require the probative value of prior bad acts offered against criminal defendants under Rule 404(b) to *outweigh* any unfair prejudice.<sup>164</sup> This balancing test would offer defendants slightly more protection than the standard Rule 403 balancing by favoring exclusion (rather than

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<sup>160</sup> FED. R. EVID. 404(b).

<sup>161</sup> See FED. R. EVID. 104(b) (providing that when relevance of evidence is conditioned on the existence of a fact, the standard of proof for the conditional fact is evidence “sufficient to support a finding that the fact does exist”).

<sup>162</sup> *Huddleston*, 485 U.S. at 681-82 (citations and footnote omitted).

<sup>163</sup> See Meeting Minutes of April 26-27, 2018, *supra* note 43, at 18-24.

<sup>164</sup> See Capra & Richter, *supra* note 79, at 832.

admission) of such evidence.<sup>165</sup> The DOJ argued that such a balancing amendment would improperly “overrule” the Supreme Court’s *Huddleston* opinion to the extent that it imposed a standard different from the Rule 403 balancing test described by the Court.<sup>166</sup>

But a heightened balancing test simply would have substituted one of the protections *referred to* by the Supreme Court (Rule 403) for a more protective balancing test. That switch would not have overruled anything in *Huddleston* because the Court was merely *describing* the protections provided by the rules in existence at the time. Nowhere does the Court suggest that the protections could not or should not be strengthened. Indeed, a heightened balancing test might be embraced by a Court that was trying to emphasize needed protections for a criminal defendant. Thus, the Advisory Committee would have been acting well within its jurisdiction in proposing a contemporary balancing test to increase protections for criminal defendants in light of permissive trends in the federal precedent.<sup>167</sup>

A Federal Rule of Evidence does not become written on a stone tablet simply because the Supreme Court has explained its operation. Accordingly, an Advisory Committee should carefully assess the nature of any Supreme Court precedent regarding a particular rule before deciding that a valuable amendment is foreclosed by that precedent.

C. *Realpolitik: Effective Rulemaking and the Role of the DOJ*

There are many stakeholders in the rulemaking process and accommodating the interests of all of them is a tall order. When the stakeholder is the DOJ, however, the dynamics of the rulemaking process change entirely. Although the DOJ holds only one position on the Evidence Advisory Committee and on the Standing Committee, the DOJ obviously has influence beyond the confines of the rulemaking process. Because the DOJ can influence Congress directly, its leverage in the rulemaking process is considerable.<sup>168</sup> Simply put, if the DOJ

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<sup>165</sup> FED. R. EVID. 403 (requiring that risk of unfair prejudice *substantially outweigh* probative value before evidence may be excluded).

<sup>166</sup> See Advisory Comm. on Evidence Rules, Minutes of the Meeting of October 26, 2017, at 10, [https://www.uscourts.gov/sites/default/files/2017-10-26-evidence\\_rules\\_minutes\\_0.pdf](https://www.uscourts.gov/sites/default/files/2017-10-26-evidence_rules_minutes_0.pdf) [<https://perma.cc/8653-K2CL>] (stating that DOJ “suggested that a modification of the balancing test was inconsistent with the will of Congress and the Supreme Court in *Huddleston*”).

<sup>167</sup> For more on the benefits of a stronger balancing test to protect criminal defendants from evidence of their uncharged misconduct, see Capra & Richter, *supra* note 79, at 825.

<sup>168</sup> The DOJ has occasionally hinted that it would seek relief in Congress if an amendment before the Committee was approved. See, e.g., Meeting Minutes of April 26-27, 2018, *supra* note 43, at 20 (“Mr. Hur cautioned that Congress may get involved if the Committee chose to pursue an amendment limiting admissibility of Rule 404(b) evidence.”).

opposes a proposed amendment on any plausible ground, the chances of that proposal progressing to the next stage are very slim indeed.<sup>169</sup>

This realpolitik should not prevent an Advisory Committee from exploring amendments justified by the important considerations outlined in Part I of this Article simply because they appear contrary to the interests of the DOJ. First and foremost, the DOJ is, of course, charged with pursuing “justice” and may support a proposed amendment that runs counter to its litigating interests when it is demonstrably and undeniably fair. An example is the 2010 amendment to Rule 804(b)(3)—the hearsay exception for declarations against interest. With respect to declarations against penal interest, the original Rule required only criminal defendants seeking to admit against-interest hearsay to show “corroborating circumstances clearly indicat[ing] the trustworthiness” of the statement.<sup>170</sup> There was no similar requirement placed on the prosecution.<sup>171</sup> There was no rational reason for this evidentiary disparity. It arose as a result of a misconception in Congress and a miscommunication with the original Advisory Committee.<sup>172</sup> In light of the blatant double standard, many courts had refused to tolerate the inexplicable comparative disadvantage to the criminal defendant. These courts required the government to establish corroborating circumstances as well, even though the plain language of the Rule did not.<sup>173</sup> Under these circumstances, although the 2010 amendment to Rule 804(b)(3) that leveled the playing field imposed a new burden on the prosecution, the DOJ supported it.<sup>174</sup>

Furthermore, even an amendment proposal that is ultimately defeated by DOJ opposition may set the stage for important improvements to the Federal Rules of Evidence. As discussed above, from 2017-2018, the Committee considered a proposal to add a more protective balancing test for criminal defendants under Rule 404(b). The proposal was generated by contemporary circuit precedent questioning the long-standing tradition of permitting almost automatic

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<sup>169</sup> Symposium, *supra* note 3, at 747, 749 (equating DOJ to “800 pound gorilla as far as federal litigation is concerned,” pointing out “heated discussions” with DOJ representatives over amendment proposals, and providing examples of proposals that failed due to DOJ opposition).

<sup>170</sup> The original Rule 804(b)(3) is reproduced in RICHARD FRIEDMAN & JOSHUA DEAHL, *FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY* 426 (2015).

<sup>171</sup> *Id.*

<sup>172</sup> For a description of the missteps that led to the disparity, see generally Peter W. Tague, *Perils of the Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 *GEO. L.J.* 851 (1981).

<sup>173</sup> See, e.g., *United States v. Rasmussen*, 790 F.2d 55, 56 (8th Cir. 1986) (applying corroboration requirement to government-offered statements).

<sup>174</sup> See Meeting Minutes of April 23-24, 2009, *supra* note 9, at 89 (“As it had on a number of previous occasions, the Committee (including the DOJ representative) unanimously agreed with the substantive result mandated by the amendment, i.e., that the government will have to provide corroborating circumstances before a declaration against penal interest can be admitted by the accused.”).



admissibility of prior-bad-act evidence in criminal cases.<sup>175</sup> The DOJ was predictably opposed to such an amendment because it would create a higher obstacle for prosecutors to surmount in seeking admission of prior-bad-act evidence.<sup>176</sup> After almost two years of dialogue regarding the appropriate standard for the admission of Rule 404(b) evidence, the DOJ countered the substantive balancing proposal with a proposed amendment that would enhance the Rule 404(b) notice requirements in favor of criminal defendants. The amended notice provision would require a prosecutor to provide defense counsel with much greater specificity regarding the Rule 404(b) evidence she intends to offer, demanding that a prosecutor “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning supporting the purpose.”<sup>177</sup> The notice proposal was approved by the Advisory Committee and released for a period of public comment on August 15, 2018.<sup>178</sup> If adopted, the notice provision may bring *some* additional protection for criminal defendants—the government will have to explain precisely *how* a defendant’s uncharged bad act is probative of anything other than his propensity to commit crime, enabling defendants to be more prepared to argue for the exclusion of Rule 404(b) evidence.<sup>179</sup> Thus, the Advisory Committee’s willingness to explore a substantive amendment to Rule 404(b) that was certain to be unpalatable to the DOJ led to an alternative notice proposal that may move the needle in the direction of improved safeguards—if not all the way to the optimal destination.

Finally, as explored in Part III of this Article, effective rulemakers may be able to craft compromise remedies for defects in evidentiary standards that can garner the support, or at least the tolerance, of the DOJ. With patience and dialogue, victory is often snatched from the jaws of potential defeat and amendment proposals can be formulated such that all stakeholders are able to approve.

In sum, the DOJ has a powerful voice in the rulemaking process, as well as significant influence in Congress. Proposed amendments that are perceived as disadvantageous to the government’s litigating posture may face strong headwinds. Still, a rulemaker should not be deterred from proposing fair and helpful amendments that will be opposed by the DOJ. If the Rules are improved by the effort, the objective of sound rulemaking is advanced.

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<sup>175</sup> See Capra & Richter, *supra* note 79, at 790-802 (discussing case law).

<sup>176</sup> See Meeting Minutes of April 26-27, 2018, *supra* note 43, at 21-22.

<sup>177</sup> See *id.* at 23.

<sup>178</sup> See Proposed Amendments Published for Public Comment, U.S. CTS., <http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment> [<https://perma.cc/PF35-36WJ>] (last visited Sept. 21, 2019) (demonstrating open comment period from August 15, 2018, to February 15, 2019).

<sup>179</sup> *Id.*

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III. ACHIEVING CONSTRUCTIVE EVIDENTIARY REFORM:  
THE ART AND SCIENCE OF CRAFTING AN AMENDMENT

As demonstrated by the foregoing discussion, there are compelling circumstances in which the Federal Rules of Evidence should be amended despite the dislocation costs that can accompany changes. But even when modifications to the Rules are needed, there are inherent barriers to change that must be confronted. There are certain fundamental drafting techniques and tools that an Advisory Committee should utilize to minimize the costs and barriers associated with rules amendments.

A. *Something Borrowed: Taking Advantage of Established Language*

When it comes to amending the Federal Rules of Evidence, something borrowed is often better than something new. Terminology and tests that are new to an established body of rules create significant transaction costs. Judges and litigants are likely to expend considerable resources determining the contours of a new standard foreign to the code. Further, courts may interpret an unfamiliar standard erroneously notwithstanding seemingly artful drafting. There is even a threat to the settled meaning of existing terminology if distinct terminology is selected to implement a similar concept. These risks and costs are minimized when an amendment can borrow from recognized phraseology in another rule.

There are many examples of profitable language-borrowing in amendments to the Federal Rules of Evidence. A leading example is Rule 502(a) which, as discussed above, was enacted in 2008 to help reduce the escalating costs of privilege review driven by the sudden explosion of ESI.<sup>180</sup> Rule 502(a) governs the issue of subject matter waiver of the attorney-client privilege—a waiver that extends not only to privileged information that has been disclosed outside the confidential attorney-client relationship, but also to all other nondisclosed privileged information on the same subject matter.<sup>181</sup> The threat of a broad subject matter waiver strikes fear in the heart of any lawyer and incentivizes exhaustive privilege review to avoid any disclosure that might give rise to such a waiver. In adopting a Federal Rule of Evidence regarding subject matter waiver, therefore, the intent was to reject federal precedent that encouraged excessive and wasteful privilege review costs in pre-trial discovery.<sup>182</sup>

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<sup>180</sup> See *supra* Section I.C.

<sup>181</sup> Rule 502(a) provides that a waiver of attorney-client privilege or work product protection as to a disclosed communication will operate as a waiver with respect to *undisclosed* communications when: “(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.” FED. R. EVID. 502(a); see *supra* notes 86-89 and accompanying text.

<sup>182</sup> See FEDERAL RULES OF EVIDENCE: 2018-2019 EDITION, *supra* note 90, at 1034 (noting intent to limit doctrine of subject matter waiver); see also *In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1989) (holding that waiver of attorney-client privilege resulting from inadvertent disclosure of privileged information “extends ‘to all other communications

In studying subject matter waiver, the Committee determined that the punishment should fit the crime. Because a broad waiver of all privileged communications on a topic is such a severe sanction, the Committee concluded that it should not flow from a purely inadvertent disclosure. Furthermore, permitting subject matter waiver after an inadvertent disclosure of privileged information would perpetuate and indeed exacerbate the escalating costs of privilege review in the era of voluminous e-discovery. Accordingly, the Advisory Committee decided that subject matter waivers should be found only when the holder of the privilege *intentionally* uses its own privileged information in an unfair way to disadvantage the adversary. The classic example is an intentional disclosure made to advance an advice of counsel defense. A privilege holder should not be permitted to disclose some self-serving privileged information purposely, only to turn around and invoke privilege for related information that may aid the adversary in countering the defense.<sup>183</sup>

There are multiple ways to draft a rule limiting subject matter waiver to such circumstances. One possibility is to draft with great specificity and to authorize subject matter waiver only after disclosures of privileged information made to advance an “advice of counsel defense.”<sup>184</sup> Alternatively, an amendment could be drafted more broadly to allow subject matter waiver following intentional disclosures that “disadvantage the adversary.”<sup>185</sup> Using broader language would capture the advice-of-counsel scenario but could also potentially extend to unforeseen unfair uses of privileged information beyond that specific defense. But clarifying the reach of such amorphous terminology for courts and litigants may have been an impossible task. If an adversary might *benefit* from securing additional privileged information after an initial privileged disclosure, does that mean that the adversary is “disadvantaged” by the limited disclosure? That interpretation—although a plausible reading of “disadvantage the adversary”—would be broader than the Committee intended.

In searching for terminology to capture clearly the situations in which it intended subject matter waiver to operate, the Committee found an analog in the rule of completeness already codified in Rule 106. Rule 106 applies when a party introduces a portion of a writing or recording in such a way that it misleads the trier of fact. Rule 106 allows the adversary to insist upon the introduction of the remainder of the writing or recording to restore the fair meaning of the

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relating to the same subject matter” (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)).

<sup>183</sup> See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 24-25, 2006, at 6-8 [hereinafter Meeting Minutes of April 24-25, 2006], [https://www.uscourts.gov/sites/default/files/fr\\_import/EV04-2006-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/EV04-2006-min.pdf) [<https://perma.cc/HX4C-Y7HP>] (discussing limitations on Rule 502, attorney-client privilege, and work product).

<sup>184</sup> *Id.* at 7.

<sup>185</sup> *Id.*

statement.<sup>186</sup> Further, Rule 106 provides that an adversary can demand completion where the remainder of the writing or recording “ought in fairness” to be introduced.<sup>187</sup> Federal courts have found that Rule 106 “‘functions as a defensive shield against potentially misleading evidence proffered by an opposing party.’ Only the portions of a statement that are relevant to an issue in the case and necessary to explain or clarify the already-admitted portions need be admitted.”<sup>188</sup>

This Rule 106 principle protects a litigant from unfair distortion of evidence to which only an adversary has initial access and mirrors the principle the Advisory Committee sought to advance regarding subject matter waiver of privilege. Rather than crafting new terminology foreign to the Federal Rules of Evidence to convey the intended and limited application of subject matter waiver, the Committee borrowed the recognized Rule 106 “ought in fairness” standard—already backed by existing federal precedent—for Rule 502(a). Carrying this familiar language over to the newly enacted rule provided consumers of the Federal Rules with the background necessary to understand the intended scope of Rule 502(a). To the extent that a judge or litigant examining Rule 502(a) for the first time does not recognize the Rule 106 standard that it utilizes, the Committee Note seals the deal by referring specifically to Rule 106.<sup>189</sup> By drawing upon existing terminology with an accepted meaning, the Advisory Committee was able to make a needed reform to the Rules with minimal risk of misinterpretation.<sup>190</sup>

There are additional opportunities for successful borrowing in the ongoing effort to advance the Federal Rules of Evidence that have yet to be adopted due to reluctance to alter time-honored Evidence Rules. As noted above, Rule 404(b) offers another borrowing possibility. Prosecutors frequently rely on Rule 404(b)

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<sup>186</sup> Rule 106 provides: “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.” On the operation of Rule 106, see generally Michael A. Hardin, Note, *This Space Intentionally Left Blank: What to Do When Hearsay and Rule 106 Completeness Collide*, 82 *FORDHAM L. REV.* 1283 (2013).

<sup>187</sup> As a result of the 2011 restyling, Rule 106 currently states that completion is required for a remainder “that in fairness ought to be considered.” *FED. R. EVID.* 106.

<sup>188</sup> *United States v. Williston*, 862 F.3d 1023, 1038 (10th Cir. 2017) (citation omitted) (quoting *Echo Acceptance Corp. v. Household Retail Servs., Inc.*, 267 F.3d 1068, 1089 (10th Cir. 2001)).

<sup>189</sup> See *FED. R. EVID.* 502(a) advisory committee’s explanatory note to rule 502 (“The language concerning subject matter waiver—‘ought in fairness’—is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.”).

<sup>190</sup> There are many other examples of successful borrowing in the Rules. The 2018 proposal to amend Rule 807, for example, appropriated language from Rule 103. See Meeting Minutes of April 26-27, 2018, *supra* note 43, at 10-11.

to admit evidence of a criminal defendant's past crimes.<sup>191</sup> Once a trial court determines that such a crime is relevant to prove something other than the defendant's bad character, the forgiving Rule 403 balancing test that favors admissibility currently offers the only safeguard for defendants.<sup>192</sup> There has been growing concern about the ease with which prejudicial evidence of a criminal defendant's past misdeeds is paraded before the jury and the proper application of Rule 404(b) is the subject of a circuit split.<sup>193</sup>

A prime opportunity exists to protect against liberal admissibility of the past crimes of criminal defendants by borrowing language for Rule 404(b) that currently exists in Rule 609(a)(1)(B). Rule 609(a)(1)(B) governs the admissibility of a criminal defendant's prior felony convictions for the limited purpose of impeaching the truthfulness of the defendant's trial testimony.<sup>194</sup> When a felony conviction is offered to impeach a testifying criminal defendant, the conviction is admissible only if its probative value in illustrating the defendant's truthfulness *outweighs* the prejudicial effect of the prior criminal conduct.<sup>195</sup> This specialized balancing test was crafted by Congress when the Rules were enacted after significant deliberation and debate.<sup>196</sup> The balancing test applicable under Rule 609(a)(1) provides criminal defendants with greater protection against bad-character reasoning than the Rule 403 balancing test by demanding that the legitimate probative value of the conviction eclipse its unfair and prejudicial effect. The difference in balancing between Rules 404(b) and 609(a)(1)(B) is unjustified because the two Rules protect criminal defendants from the same potential unfairness—the risk that a defendant will be convicted for who he is and for what he has done in the past.<sup>197</sup> Amending Rule 404(b) to add the special balancing test that Congress devised for criminal defendants in Rule 609(a)(1)(B) would deploy a familiar and well-considered evidentiary standard to resolve contemporary defects in the operation of Rule 404(b).<sup>198</sup>

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<sup>191</sup> FED. R. EVID. 404(b) (allowing evidence of other crimes, wrongs, or acts for purposes such as proving “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident”).

<sup>192</sup> FED. R. EVID. 403. For a discussion of Rule 404(b) and its relationship with Rule 403 balancing, see generally Capra & Richter, *supra* note 79.

<sup>193</sup> See, e.g., *United States v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014) (en banc) (discussing and disapproving of liberal admission of defendants' prior crimes under Rule 404(b)).

<sup>194</sup> FED. R. EVID. 609(a)(1)(B).

<sup>195</sup> *Id.*

<sup>196</sup> For a discussion of the extensive legislative history behind Rule 609(a)(1), see Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 318 (2008).

<sup>197</sup> Capra & Richter, *supra* note 79, at 829-31.

<sup>198</sup> This borrowing proposal has not been adopted by the Advisory Committee. See Meeting Minutes of April 26-27, 2018, *supra* note 43, at 23. For another potential improvement to the Rules through borrowing, see Liesa L. Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 WM. & MARY L. REV. 897, 930 (2018) (proposing expansion of

B. *The Importance of Committee Notes*

One of the principal arguments against amending the Rules is the threat to their clarity and brevity created by constant and complicated modifications to rule text. In fulfilling its important obligation to maintain the contemporary integrity of the Rules, the Advisory Committee may utilize the power of Committee Notes to tackle the complexity of the evidentiary issues addressed by an amendment while retaining concise and straightforward rule text.

Advisory notes are required by statute. According to 42 U.S.C. § 2073(d), any recommendation made pursuant to the Supreme Court's rulemaking authority must contain "a proposed rule" and "an explanatory note on the rule."<sup>199</sup> Because it suggests that a rulemaking proposal should contain *both* a proposed rule *and* a note, that statute—fairly read—prevents a Rules Committee from retroactively amending a Committee Note without amending the rule.<sup>200</sup> Thus, the drafter gets one shot at providing all necessary insight into the operation of a rule and may not correct future problems in the operation of a rule with additions to a Committee Note alone. Committee Notes come in different shapes and sizes and may be used effectively in service of multiple rulemaking objectives. A Committee Note may serve to explain the rule with detailed and lengthy language—and citations—that would be unacceptable in rule text. It can instruct the courts on the exercise of discretion, without binding that discretion in rigid rules. And a Committee Note can highlight the limits of any amendment, clarifying what an amendment does *not* do.

Probably the best example of a detailed Committee Note designed to support a concise amendment to rule text is the Note to the 2000 amendment to Rule 702, governing the admissibility of expert testimony.<sup>201</sup> In 1993, the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>202</sup> requiring federal trial judges to act as gatekeepers to prevent unreliable scientific expert

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trustworthiness exception in Rules 803(6) and 803(8) to other Rule 803 hearsay exceptions to create symmetry in operation of Rule 803 exceptions and to solve perceived problems in some applications of certain exceptions).

<sup>199</sup> 42 U.S.C. § 2073(d) (2012).

<sup>200</sup> The report by the President's Council of Advisors on Science and Technology, *FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* 144 (2016), recommends that the Advisory Committee develop a Committee Note concerning procedures for evaluating the scientific validity of forensic feature-comparison methods. Because a Committee Note cannot be promulgated independent of a rule change, the Advisory Committee is currently considering whether to amend the Federal Rules to further regulate forensic evidence. Any new Committee Note would accompany that amendment. *See* Meeting Minutes of April 24-25, 2006, *supra* note 183, at 6-8.

<sup>201</sup> *See* Advisory Comm. on Evidence Rules, Minutes of the Meeting of October 20-21, 1997, at 5-6 [hereinafter Meeting Minutes of October 20-21, 1997], [https://www.uscourts.gov/sites/default/files/fr\\_import/EV10-1997-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/EV10-1997-min.pdf) [<https://perma.cc/JV9R-R65W>].

<sup>202</sup> 509 U.S. 579, 597 (1993) (outlining factors for federal trial judges to consider in evaluating reliability of expert testimony).

testimony from infecting the trial process. In so doing, the Court provided a nonexhaustive list of factors, including factors traditionally associated with scientific opinion, such as peer review and potential error rate, for district judges to evaluate in assessing the reliability of expert testimony.<sup>203</sup> Then in 1999, in *Kumho Tire Co. v. Carmichael*,<sup>204</sup> the Court clarified that the trial court's gatekeeper role applies to the evaluation of *all* expert opinion testimony and not only to scientific-opinion evidence.<sup>205</sup> Consistent with the need to maintain the contemporary accuracy of the Rules, the Advisory Committee proposed an amendment to Rule 702 to memorialize this gatekeeping role succinctly in the rule text. The 2000 amendment to Rule 702 clarified that its requirements apply to all types of expert testimony, whether based on "scientific, technical, or other specialized knowledge."<sup>206</sup> It further highlighted the trial court's duty to assess the "sufficiency" of the facts and data upon which an expert relies, as well as the reliability of her methodology and of her application of that methodology to the facts of the particular case.<sup>207</sup>

Notwithstanding the concise mandate of amended Rule 702, the Advisory Committee anticipated that trial courts would continue to wrestle with the significant details underlying a reliability analysis of expert opinion testimony. Accordingly, the Committee determined that a comprehensive Committee Note could illuminate several matters that could not be included in the text of Rule 702. The Committee determined that a thorough Note was especially warranted because *Daubert* was somewhat conflicting in its meaning.<sup>208</sup> For example, the *Daubert* Court required a trial judge to make her gatekeeping findings under a Rule 104(a) preponderance of the evidence standard.<sup>209</sup> Although this tasked trial judges with determining the reliability of expert testimony *before* submitting it to the jury, the *Daubert* Court stated—somewhat contradictorily—that cross-examination before the jury and the battle of competing experts

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<sup>203</sup> *Id.* at 593-94 (citing testability, peer review and publication, error rate, standards and controls, and general acceptance as factors to be considered in evaluating expert's methodology and opinion).

<sup>204</sup> 526 U.S. 137 (1999) (establishing judiciary's role in assessment of all expert opinions).

<sup>205</sup> *Id.* at 138 (establishing judiciary's role in assessment of all expert opinions).

<sup>206</sup> FED. R. EVID. 702(a).

<sup>207</sup> FED. R. EVID. 702(b), (d).

<sup>208</sup> See Meeting Minutes of October 20-21, 1997, *supra* note 201, at 5-6 ("After a general discussion, the Committee agreed that some amendment to Rule 702 should be proposed, in light of the conflicts created by *Daubert*, and the importance of the issue to courts and litigants . . . . Members expressed the opinion that the Committee could perform a valuable service by setting forth some general standards that would guide a trial court in determining whether expert testimony is sufficiently reliable . . . . Finally, it was generally agreed that any amendment to Rule 702 should not be excessively long or detailed. No rule could attempt to include all the factors that should be considered in assessing the trustworthiness of all types of expert testimony. It was agreed that any details or elaborations on general principles should be left for the Advisory Committee Note.").

<sup>209</sup> *Daubert*, 509 U.S. at 592.

ordinarily offer the best approach to expert testimony.<sup>210</sup> The Committee Note provided insight into what *Daubert* meant by articulating the trial judge's obligation to find the Rule 702 requirements satisfied *before* allowing a battle of competing experts in front of the jury.<sup>211</sup> The Note explained the factors that *Daubert* had listed and identified additional factors that may prove helpful to trial judges exercising the gatekeeper function. The Note cautioned that trial judges should exercise the same care in evaluating nonscientific expert testimony as they do in evaluating expert opinion testimony based on traditional scientific principles. It also explained the quantitative nature of the requirement of sufficient underlying facts or data for an expert's opinion and noted the trial judge's flexibility in designing appropriate procedures for the consideration of expert opinion testimony. Finally, the Note cited numerous federal cases and law review articles examining the admissibility of expert opinion evidence.

Thus, the Advisory Committee crafted a concise and straightforward amendment to the text of Rule 702 to bring it into alignment with evolving Supreme Court precedent, and it utilized a comprehensive Committee Note to help courts and litigants master the post-*Daubert* tsunami of case law, and to process that rapidly evolving precedent in a comprehensive review of the subject that would be inappropriate for inclusion in Rule text. The Committee Note to the 2000 amendment to Rule 702 has been relied upon more than 1400 times in reported federal decisions, suggesting that it is serving its intended purpose of lighting the path for consumers of Rule 702.<sup>212</sup>

A Committee Note can also be employed to clarify what an amendment does *not* do to prevent the disruption feared by Chief Justice Rehnquist when an Evidence Rule is altered.<sup>213</sup> A Committee Note can offer insurance against an overbroad reading of an amendment that might be extrapolated from the text alone. For example, the 2014 amendment simplifying the hearsay exception<sup>214</sup> for prior consistent statements in Rule 801(d)(1)(B) was drafted to retain the language of the original provision—i.e., making a prior consistent statement admissible substantively “to rebut an express or implied charge that the declarant recently fabricated” trial testimony or “acted from a recent improper influence or motive.”<sup>215</sup> The amendment simply added a new subsection admitting prior consistent statements for their truth when offered to rehabilitate a witness

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<sup>210</sup> *Id.* at 596 (“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.”).

<sup>211</sup> See Meeting Minutes of October 20-21, 1997, *supra* note 201, at 5-6.

<sup>212</sup> This statistic was confirmed with a Westlaw search on August 2, 2018.

<sup>213</sup> See *supra* note 1 and accompanying text.

<sup>214</sup> Of course, Rule 801(d)(1)(B) is technically not an “exception” per se, but operates to the same effect. See FED. R. EVID. 801(d)(1) (defining statements that are “not hearsay”).

<sup>215</sup> See *supra* note 115 and accompanying text.



attacked on some basis other than recent fabrication or improper motive.<sup>216</sup> The Supreme Court, in *Tome v. United States*,<sup>217</sup> had held that the prior consistent statement must have been made *before* the charged motive to falsify arose to be admissible under the original Rule. By incorporating the original language into a broader amended provision, the rule text created a potential question as to whether the amended version of the Rule contemplated any change in that time-honored meaning of the original language. Because the language the Court construed was not changed by the 2014 amendment, the text could be fairly read to retain the pre-motive requirement when a consistent statement was offered to rebut a charge of bad motive. But to avoid any speculation on the matter, the Committee Note squarely addressed the *Tome* pre-motive question, stating that the amendment “retains the requirement set forth in *Tome v. United States*.”<sup>218</sup> That same Committee Note makes another important point about the limits of the amendment by clarifying that it in no way expands the admissibility of prior consistent statements for rehabilitative purposes. Instead, as the Note explains, the amendment merely makes those prior consistent statements already admissible for rehabilitation under existing law also admissible for their truth.<sup>219</sup> Thus, Committee Notes may be employed to prevent unintended and overbroad interpretations of an amended provision.

Notwithstanding the many beneficial uses to which Committee Notes may be put, the past decade has seen an emerging debate in the Rules committees about the type of information that should be included in a Committee Note. Some have argued that notes should be spare, and that a note should extend no further than the text of a rule. According to this view, the optimal Committee Note is five words long: “The Rule speaks for itself.” The argument supporting this narrow view is, essentially, that the role of the Committee is to propose rules, not notes.<sup>220</sup> Under this view, a Committee Note may, perhaps, explain what the rule does *not* do and a little about what the rule actually accomplishes, but it cannot refer to or resolve a matter that goes beyond the text of the rule. For example,

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<sup>216</sup> For discussion of the amendment to Rule 801(d)(1)(B), see *supra* notes 110-115 and accompanying text.

<sup>217</sup> 513 U.S. 150, 156 (1995).

<sup>218</sup> FED. R. EVID. 801(d)(1)(B) advisory committee’s notes to 2014 amendment. The Advisory Committee Note to the 2000 amendment to Rule 103, designed to provide some protection against waiver of an evidentiary objection, makes a similar attempt to avoid an overbroad application by stating that there is no attempt to affect Supreme Court-imposed requirements on preserving a claim of error for appeal. FED. R. EVID. 103 advisory committee’s notes to 2000 amendment.

<sup>219</sup> FED. R. EVID. 801(d)(1)(B) advisory committee’s notes to 2014 amendment.

<sup>220</sup> See, e.g., Comm. on Rules of Practice & Procedure, Minutes of the Meeting of June 11-12, 2007, at 4, [https://www.uscourts.gov/sites/default/files/fr\\_import/ST06-2007-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST06-2007-min.pdf) [<https://perma.cc/3CMW-72AT>] (noting that “Judge Thrash . . . played a vital role in shaping the way that committee notes are written, believing that they should normally be short and to the point”); *id.* at 46 (debating propriety of lengthy Committee Note for Rule 502 and advocating brevity).

under this truncated view, a Committee Note should *not* list relevant factors that a court should take into account in applying the rule—as does the comprehensive Committee Note to the 2000 amendment to Rule 702.<sup>221</sup> And it should never opine on an evidentiary rule that is not part of the accompanying rule text. Proponents of this austere view also object to citations to cases, statutes, articles, or treatises. Because Committee Notes are forever, some frown on citing cases that can be overruled, statutes that can be repealed, and articles and treatises that can become out of date.

The contrary view is that the notes are the Advisory Committee's one opportunity to help consumers of the Rules read between the lines and solve foreseeable problems in the implementation of the Rules. Many foreseeable complexities in applying a particular rule simply cannot be resolved through rule text. For example, the Committee Note to the 2000 amendment to Rule 702 sets forth a list of factors that could not be embodied in Rule 702 itself, but that courts may properly consider in determining the reliability of proffered expert testimony.<sup>222</sup> Though a list containing as many factors as are potentially appropriate to assess the wide array of expertise seen in federal litigation would undermine the simplicity of the rule and might be read to improperly limit judicial discretion, the factors can be quite helpful as background guidance in a Committee Note that also explains the trial court's discretion and flexibility in selecting appropriate factors in a given case. This is not to say that every Committee Note should be written as a treatise. But it is to say that a terse, Delphic note squanders the only opportunity for the body that drafted the rule to offer helpful guidance.

The more expansive view of Committee Notes also embraces the use of cases, statutes, articles, and treatises to educate litigants and judges. These sources are needed to illustrate and provide foundation for the instruction provided by the note. They allow the reader to delve deeper into the problems and nuances addressed in a note and to see how the principles discussed actually apply in particular cases. They also show that the Committee is not simply speaking *ex cathedra*—i.e., that the point being made has support in the federal cases and authorities. The numerous citations to post-*Daubert* precedent in the Committee Note to the 2000 amendment to Rule 702 were included for just these reasons.<sup>223</sup>

It is true that citing sources runs the risk that some sources will become obsolete. The poster child for this unfortunate phenomenon is the original

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<sup>221</sup> See FED. R. EVID. 702 advisory committee's note to 2000 amendment (listing *Daubert* factors and other factors that courts pre- and post-*Daubert* have found relevant in determining whether expert testimony is sufficiently reliable to be considered).

<sup>222</sup> See *id.*

<sup>223</sup> See *id.* (reviewing post-*Daubert* case law and noting that “[a]ll of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended”); Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 12-13, 1999, at 7, [https://www.uscourts.gov/sites/default/files/fr\\_import/499minEV.pdf](https://www.uscourts.gov/sites/default/files/fr_import/499minEV.pdf) [<https://perma.cc/N9Y6-MU2V>] (resolving to add specific language and supporting authority to Committee Note in response to public comments).

Advisory Committee's extensive note on the relationship between the hearsay rule and the Confrontation Clause. Given all the significant case law developments on confrontation since the 1970s, this mini-treatise on the intersection between hearsay and the Constitution now holds historical interest only.<sup>224</sup> But federal cases interpreting and applying Evidence Rules—as opposed to constitutional doctrines—are much less likely to be overruled or to become outdated. Moreover, case citations in Committee Notes are illustrative only—some might well be included to illustrate a result to be *avoided*. Thus, the risk that citations included in a Committee Note may become outmoded is overstated and inadequate to justify stripping all helpful source material from the Committee Notes.

Boiled down to its essence, the recent debate over the role of Committee Notes is about whether those notes should be helpful and constructive or whether they should abandon litigants to the language of the accompanying rule. One of the principal strengths of the Evidence Rules is their reliance on straightforward and concise provisions. In crafting necessary updates, rulemakers may ensure the continued brevity of the Rules by seizing the invaluable opportunity to provide clear guidance in the interpretation and application of succinct standards through Committee Notes.

C. *If You Try Sometimes, You Just Might Find—You Get What You Need: Flexibility and Compromise in the Rulemaking Process*

Amendments that are necessary to protect the contemporary viability of the Rules or to resolve an unintended or unjust application of existing rules may nonetheless run square into the counterforce of tradition or the settled expectations of a powerful constituent like the DOJ. Flexibility and compromise are key characteristics of a constructive reform process that allow the advancement of the Rules without the needless dislocation costs decried by Chief Justice Rehnquist.<sup>225</sup>

1. Flexibility in Rulemaking

The ideal amendment may not be a destination that can be preordained at the beginning of the rulemaking process. There is much to learn along the way to the appropriate solution to a perceived problem. Even subject experts may discover previously unappreciated nuances in a rule once they turn over every stone in federal and state practice while working to craft an optimal amendment. The problem that a committee sets out to resolve might morph into a different

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<sup>224</sup> That note provided excellent guidance in 1973, but it was completely undermined by the Supreme Court's shift in Confrontation Clause jurisprudence, begun by *Crawford v. Washington*. See 541 U.S. 36 (2004) (reformulating standard for determining when Confrontation Clause permits admission of hearsay statements in criminal cases); see also FEDERAL RULES OF EVIDENCE: 2018-2019 EDITION, *supra* note 90, at 173-75 (setting forth original note).

<sup>225</sup> See *supra* note 1 and accompanying text.

problem that may be solved by a different take on the rule in question. Flexibility and adaptability are required in the dynamic landscape of rulemaking.

There are many examples of amendment adaptation during the Evidence rulemaking process. The ancient documents exception to the hearsay rule, Rule 803(16), was amended in 2017 to account for the contemporary reality of aging ESI.<sup>226</sup> That amendment constitutes a prime example of adaptability in rulemaking objectives because Rule 803(16) went through several twists and turns before arriving at its ultimate destination. The original Rule 803(16) was quite straightforward. It provided that any statement in a document that could be authenticated as over twenty years old could be admitted for its truth without any independent showing of the statement's reliability.<sup>227</sup> At the time the hearsay exception was drafted, the absence of any reliability requirement was not a source of significant concern. The common law cases generally involved a paper document that had been squirreled away in a trunk in someone's attic and offered under circumstances in which the proponent had little alternative evidence.<sup>228</sup> When the Federal Rules were enacted, the very act of having preserved a document for over twenty years may have lent it an air of reliability.

But the explosion of ESI as the Rules entered the twenty-first century shifted the ancient-documents paradigm dramatically.<sup>229</sup> Electronically stored documents can be easily preserved and potentially available for use in any litigation to which they may be relevant. For such ESI to be admissible for its truth under the original Rule 803(16), a proponent needed to show only the authenticity of the ESI—in other words, that the ESI was what the proponent claimed it to be—and that it was created more than twenty years earlier. Although federal courts had yet to admit ESI through Rule 803(16) at the time, the Committee recognized in 2014 the legitimate prospect that terabytes of electronic information (then nearing their twentieth birthday) would soon become automatically admissible in federal courts through the ancient documents exception—without any showing of reliability or necessity.<sup>230</sup>

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<sup>226</sup> FED. R. EVID. 803(16) advisory committee's note to 2017 amendment ("The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI).").

<sup>227</sup> See FRIEDMAN & DEAHL, *supra* note 170, at 343 (providing Rule 803(16) in its original form).

<sup>228</sup> See, e.g., *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 643 (2d Cir. 2004) (finding two letters, "both 'in existence 20 years or more at the time [they were] offered' as evidence," admissible for their truth under Rule 803(16) absent other evidence that rights to dances had been assigned).

<sup>229</sup> FED. R. EVID. 803(16) advisory committee's note to 2017 amendment ("Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.").

<sup>230</sup> Advisory Comm. on Evidence Rules, Minutes of the Meeting of October 24, 2014, at 4, [https://www.uscourts.gov/sites/default/files/minutes\\_oct\\_2014\\_evidence\\_committee\\_0](https://www.uscourts.gov/sites/default/files/minutes_oct_2014_evidence_committee_0)

Although the proposal to amend the exception was always directed at the mounting risks of massive admission of ESI, the proposed amendment that was published for public comment called for the abrogation of the exception altogether.<sup>231</sup> Concerned that age alone failed to safeguard against unreliable hearsay, particularly in the context of automatically preserved electronic information, the Committee concluded that the simplest and most effective amendment would eliminate the ancient documents hearsay exception. It was thought that abrogation would not be unduly disruptive for two reasons. First, there was scant appellate precedent interpreting the exception, suggesting that it was not frequently invoked.<sup>232</sup> Second, the Committee concluded that reliable, but older, hearsay could still be admitted through other hearsay exceptions, like the business records exception or the residual exception, in the absence of an ancient documents avenue.<sup>233</sup>

After the Committee proposed that Rule 803(16) be abrogated,<sup>234</sup> public comment emphasized the disruption that elimination of the ancient documents exception would cause in cases currently maintained only through old hard copy documents<sup>235</sup>—cases involving latent diseases, for example, often stand or fall on the basis of ancient documents.<sup>236</sup> This public comment revealed more use of

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.pdf [<https://perma.cc/F33G-YV7H>] (“On the first question of whether an amendment is necessary at this point: Some members argued that the obscurity of the ancient documents exception will not last now that ESI either has reached or is reaching the 20-year-old point.”).

<sup>231</sup> See COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA BOOK: JUNE 2016, at 74 (2016) [hereinafter AGENDA BOOK: JUNE 2016], <https://www.uscourts.gov/sites/default/files/2016-06-standing-agenda-book.pdf> [<https://perma.cc/9YX7-NWYR>].

<sup>232</sup> See Meeting Minutes of April 17, 2015, *supra* note 130, at 3.

<sup>233</sup> Memorandum Regarding Report of the Advisory Committee on Evidence Rules from Hon. William K. Sessions, III, Chair, Advisory Comm. on Evidence Rules, to Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure 3 (May 7, 2015), [https://www.uscourts.gov/sites/default/files/2015-05-07-evidence\\_rules\\_report\\_to\\_standing\\_committee\\_1.pdf](https://www.uscourts.gov/sites/default/files/2015-05-07-evidence_rules_report_to_standing_committee_1.pdf) [<https://perma.cc/MZ9M-5S4P>]; see also FED. R. EVID. 803(6) (business records exception); FED. R. EVID. 807 (residual exception).

<sup>234</sup> Memorandum Regarding Report of the Advisory Committee on Evidence Rules from Hon. William K. Sessions, III, Chair, Advisory Comm. on Evidence Rules, to Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure 1-3 (May 7, 2016), [https://www.uscourts.gov/sites/default/files/2016-05-07-evidence\\_rules\\_report\\_to\\_the\\_standing\\_committee\\_0.pdf](https://www.uscourts.gov/sites/default/files/2016-05-07-evidence_rules_report_to_the_standing_committee_0.pdf) [<https://perma.cc/TJ6U-433V>] (explaining that ancient documents exception is “of relatively recent vintage” and thus “abrogating the exception would not present the kind of serious uprooting as might exist with other rules in the Federal Rules of Evidence”).

<sup>235</sup> AGENDA BOOK: JUNE 2016, *supra* note 231, at 74-100 (summarizing public comments on amendment to Rule 803(16)).

<sup>236</sup> See, e.g., *id.* at 100 (“Richard Grant . . . opposes the elimination of the ancient documents hearsay exception, arguing that in cases involving latent diseases, ‘crucial evidence such as packing slips, purchase orders, inter-office memos and reports, shipping invoices, and bills of lading, amongst many other documents that cannot be properly authenticated under other hearsay exceptions play a significant part in litigation.’”).

the exception at the trial level than was evident from the reported cases.<sup>237</sup> Further comment suggested that the business records exception and the residual exception would not serve as effective alternative routes for the admission of hearsay previously entered through the ancient documents exception.<sup>238</sup> In deference to the costs that would be imposed in such actions by abrogation, the Advisory Committee decided to grandfather such cases by retaining the ancient documents exception for all documents prepared before January 1, 1998.<sup>239</sup> This amended exception continues to admit those hard copy documents created prior to 1998 that have been hidden away in an archive or attic and that were long admissible at common law while closing the door to contemporary ESI that is ill-suited to the original intent and assumptions inherent in the ancient documents exception. Thus, the lessons learned through the public comment process enabled the amended rule to address the explosion of ESI without harming cases requiring proof through hard copy documents from the 1950s, '60s, and '70s.

The most recent example of adaptation in rulemaking objectives is the amendment to the residual hearsay exception in Rule 807, recently adopted by the Supreme Court.<sup>240</sup> The Committee first turned its attention to Rule 807 in response to the public comment that was received on the ancient documents

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<sup>237</sup> See, e.g., *id.* at 84 (“Justin Shrader . . . argues that the exception is especially important in cases involving toxic torts and latent injuries: ‘Every asbestos trial our firm has been involved in has relied on FRE 803(16) to enter into evidence key historical documents to impute knowledge to a defendant that may otherwise be inadmissible.’”).

<sup>238</sup> See, e.g., *id.* at 89 (“David Romine . . . concludes that the business records exception is not a substitute because no custodian will be found for ancient documents; and the residual exception is not a substitute because it is disfavored by the courts.”).

<sup>239</sup> *Id.* at 74 (“In response to the public comment, the amendment was changed to limit the coverage of the ancient documents exception to those documents prepared before January 1, 1998.”); FED. R. EVID. 803(16) advisory committee’s note to 2017 amendment (“The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI).”). The textual change to Rule 803(16) is as follows:

*Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness*

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (16) *Statements in Ancient Documents.* A statement in a document ~~that is at least 20 years old that was prepared before January 1, 1998,~~ and whose authenticity is established.

<sup>240</sup> See Order Amending Evidence Rule 807 at 3-5, SUPREMECOURT.GOV (Apr. 25, 2019), [https://www.supremecourt.gov/orders/courtorders/frev19\\_774d.pdf](https://www.supremecourt.gov/orders/courtorders/frev19_774d.pdf) [<https://perma.cc/9CTN-9UHF>] (noting that amendment will take effect on December 1, 2019). Rule 807 allows the admission of hearsay under certain conditions even if the hearsay does not fit within any of the standard exceptions to the rule against hearsay. FED. R. EVID. 807.

exception.<sup>241</sup> As noted above, the Committee anticipated that a reliable old document could be qualified and admitted under the residual exception in the absence of an ancient documents exception. But the public comment pushed back powerfully on the notion that the residual exception would readily admit such reliable old hearsay. Many public comments emphasized that Rule 807 has been applied so narrowly that it would not be helpful in qualifying old documents.<sup>242</sup> As a result, the Committee resolved to explore ways in which the residual exception could be expanded to admit reliable hearsay more readily without overtaking the standard exceptions or creating unbridled judicial discretion in the admission of hearsay.<sup>243</sup>

Making the residual exception a little broader, but not *too* broad, is obviously a challenging assignment—in effect a tightrope walk. For help in walking this thin line, the Committee hosted symposia focused on hearsay issues and reviewed over a decade of federal case law applying the residual exception.<sup>244</sup> The outstanding exchange at these events and this exhaustive research revealed that the real defect in Rule 807 was *not* that it was too restrictive but rather that many of its provisions had created unwieldy and confusing obstacles for courts and litigants.<sup>245</sup> Most notably, the Committee found that the requirement that the guarantees of trustworthiness for a hearsay statement admitted through Rule 807 be “equivalent” to those found in the Rule 803 and 804 exceptions created a

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<sup>241</sup> For a description of the amendment process for Rule 807, see generally Daniel J. Capra, *Expanding (or Just Fixing) the Residual Exception to the Hearsay Rule*, 85 *FORDHAM L. REV.* 1577 (2017).

<sup>242</sup> See, e.g., Kay Gunderson Reeves, Comment Letter on Proposed Rule to Amend Federal Rules of Evidence 803 and 902 (Feb. 16, 2016), <https://www.regulations.gov/document?D=USC-RULES-EV-2015-0003-0214> [<https://perma.cc/2RRU-96TN>] (expressing concerns that Rule 807 has always been interpreted and applied narrowly, and that it “imposes greater burdens on proponents of evidence than does 803(16), while also granting the judge discretion even if those burdens are met”); Public Comments on Proposed Abrogation of Rule 803(16), *REGULATIONS.GOV*, <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=USC-RULES-EV-2015-0003> (last visited Sept. 21, 2019).

<sup>243</sup> See Advisory Comm. on Evidence Rules, Minutes of the Meeting of October 21, 2016, at 9 [hereinafter Meeting Minutes of October 21, 2016], [https://www.uscourts.gov/sites/default/files/2016-10-21-evidence\\_rules\\_minutes\\_final\\_0.pdf](https://www.uscourts.gov/sites/default/files/2016-10-21-evidence_rules_minutes_final_0.pdf) [<https://perma.cc/95Q3-BUN8>] (noting Committee’s determination that “residual exception should be crafted to prohibit unjust and unnecessary exclusion of reliable hearsay, while also prohibiting overuse and unbridled judicial discretion”).

<sup>244</sup> See generally *Conference on Possible Amendments to Federal Rules of Evidence 404(b), 807, and 801(d)(1)(A)*, 85 *FORDHAM L. REV.* 1517 (2017); *Symposium on Hearsay Reform*, 84 *FORDHAM L. REV.* 1323 (2016).

<sup>245</sup> The case law digests prepared by the Reporter to the Advisory Committee can be found in the Agenda Book for the Spring 2017 meeting. See *ADVISORY COMM. ON EVIDENCE RULES, AGENDA BOOK: APRIL 2017*, at 127-221 (2017), [http://www.uscourts.gov/sites/default/files/advisory\\_committee\\_on\\_rules\\_of\\_evidence\\_-\\_spring\\_2017\\_meeting\\_materials.pdf](http://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf) [<https://perma.cc/HN6B-U996>].

difficult and unnecessary exercise for courts.<sup>246</sup> After substantial consideration, the Committee determined that Rule 807 was not in need of expansion but rather in need of amendment to make the Rule more user friendly.<sup>247</sup> Thus, the ultimate goal of the original proposal shifted from a “liberalizing” one to one of “sound rulemaking” aimed at clarifying and simplifying the Rule and at resolving long-standing conflicts concerning its application. The ability to adapt to the research, deliberations, public comment, and other contributions along the rulemaking road contributes to sound and sensible amendments that function optimally with existing provisions and solve problems experienced by the consumers of the Rules without imposing wasteful dislocation costs.<sup>248</sup>

## 2. Compromise Is Not a Dirty Word

Even when the rulemaking objective remains fixed throughout consideration of a potential amendment, a compromise may be required to advance an amendment that upsets the settled expectations of a powerful constituency. There are many stakeholders in the process of Evidence rulemaking. Interested parties include private plaintiffs and civil defendants (corporate and individual), criminal defendants, judges, lawyers, law professors, other lawmakers, and the all-important DOJ. It is a rarity that any amendment is so even-handed in its impact on these many constituencies that it is not opposed by at least one of these stakeholders. An affected stakeholder may well dig in its heels and oppose

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<sup>246</sup> See Meeting Minutes of October 21, 2016, *supra* note 243, at 7 (“The requirement that the court find trustworthiness ‘equivalent’ to the circumstantial guarantees in the Rule 803 and 804 exceptions should be deleted . . . . That standard is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions.”).

<sup>247</sup> See Minutes of the Meeting of April 21, 2017, *supra* note 39, at 3-11 (summarizing deliberations regarding proposal to amend residual exception); *id.* at 5 (“Although the Committee originally considered amendments to Rule 807 in order to expand the scope of the Rule and permit more liberal admission of hearsay through the residual exception, the Committee’s current working draft is not intended to expand the coverage of the Rule. Instead, the goal of the working draft is to engage in good rulemaking that assists courts in applying the trustworthiness standard and resolves conflicts among the courts with respect to the evidence to be considered in evaluating admissibility.”).

<sup>248</sup> There are many other instances of successful adaptation in the amendment process. For example, the 2000 amendment to Rule 702 was initially intended only to clarify that the *Daubert* standard applies to nonscientific as well as to scientific expert testimony. See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 6-7, 1998, at 3, [https://www.uscourts.gov/sites/default/files/fr\\_import/0498evidenceminutes.pdf](https://www.uscourts.gov/sites/default/files/fr_import/0498evidenceminutes.pdf) [<https://perma.cc/X65B-5DRT>] (describing amendment as premised in part on clarifying that “[t]he trial court’s gatekeeping function should apply to all expert testimony, not only scientific expert testimony”). After significant exploration of the standards surrounding the admissibility of expert testimony, the Rule that was ultimately enacted went much further—for example, by adding the requirements that the expert must have a sufficient basis for an opinion and must have reliably applied her methodology. FED. R. EVID. 702(b), (d) (requiring that “testimony is based on sufficient facts or data” and “expert has reliably applied the principles and methods to the facts of the case,” respectively).



any amendment that imposes burdens on its litigating position. To achieve resolution of problems with the existing rule, a compromise amendment may be the only option. While “compromise” should not be viewed as a dirty word, compromise amendments are rarely as clean in their application as amendments without limitations included to appease a concerned stakeholder. The Advisory Committee must always question whether a compromise necessary to achieve support for an amendment diminishes its effectiveness to such an extent that it is better to propose no amendment at all. Frequently, however, an amendment can be crafted to resolve difficulties with a rule while at the same time protecting a valuable player’s interests in the litigation process.

The 2006 amendment to Rule 609(a)(2), governing impeachment of testifying witnesses with dishonesty convictions, illustrates the delicate dance involved in crafting a compromise amendment. Prior to the amendment, Rule 609(a)(2) provided for automatic impeachment of all witnesses with recent convictions that “involved dishonesty or false statement.”<sup>249</sup> That language clearly encompassed convictions for crimes in which the elements required proof of lying—such as perjury or fraud. But many courts had held that Rule 609(a)(2) would admit other types of convictions whenever the witness had lied in committing the underlying crime.<sup>250</sup> That line of authority was problematic for a number of reasons, the most important of which was that it led to *most* convictions being automatically admissible for impeachment. Most criminal conduct involves some kind of lying in the doing—even violent behavior such as assault and murder may involve deception of some sort. Moreover, a judge’s retrospective assessment of which facts ultimately led to a witness’s conviction in a previous trial constitutes an indeterminate inquiry, to say the least. If a witness was previously convicted of drug distribution, how is the trial judge to determine whether the jury in that prior case found beyond a reasonable doubt that the witness acted dishonestly or made a false statement in committing the crime? The general verdict of guilty is obviously an insufficient indication. The trial judge might hold a hearing to essentially retry the prior case to determine whether the conviction can be “automatically” admitted. But going to great lengths to peer behind the curtain of a prior conviction to determine whether it is “automatically admissible” for impeachment is oxymoronic (if not simply moronic).

The cleanest and simplest solution to this problem would have been to limit Rule 609(a)(2) to convictions for crimes that contain an *element* of false statement. A trial judge would have no difficulty determining the statutory

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<sup>249</sup> FRIEDMAN & DEAHL, *supra* note 170, at 234-35 (providing Rule 609(a)(2) as it was before 2006 amendment).

<sup>250</sup> See, e.g., *United States v. Mehrmanesh*, 689 F.2d 822, 833 (9th Cir. 1982) (holding that prior smuggling conviction was not automatically admissible on its face because such activity does not necessarily involve misrepresentation or falsification, but that conviction could be automatically admitted if government presented proof that witness had actually used fraud or deceit in smuggling).

elements of a witness's prior crime. Applying an elements rule would be truly "automatic"—the trial judge would be spared looking at transcripts, indictments, or other materials to determine whether acts of deception were alleged or found. And an amendment that narrowed automatic impeachment to convictions containing elements of falsehood would limit Rule 609(a)(2) appropriately. By requiring automatic admissibility of an impeaching conviction without balancing by the court, Rule 609(a)(2) is an outlier in the Federal Rules of Evidence. It is the lone provision that expressly deprives the trial court of any discretion in determining whether evidence is admissible. When an impeaching conviction is found to fit within the limits of Rule 609(a)(2), a judge "must" admit it. As such, narrowly defining the reach of the Rule is particularly appropriate.<sup>251</sup>

Accordingly, the Advisory Committee's initial proposal was to limit Rule 609(a)(2) to convictions for crimes containing an element of falsity. But because this amendment would narrow the types of convictions that would be "automatically" available for impeachment, the DOJ initially opposed *any* change to Rule 609(a)(2), notwithstanding the fact that an amendment would protect the government's witnesses from automatic impeachment as well.<sup>252</sup> After significant exchange, the DOJ retreated from its position of complete opposition, but drew a line in the sand with respect to one type of conviction: obstruction of justice. Deceit or dishonesty is not a statutory element of obstruction of justice because that offense can be committed without any deception at all—for example, by threatening a witness or destroying evidence.<sup>253</sup> On the other hand, many convictions for obstruction *are* grounded on dishonest conduct, such as making false statements to authorities or suborning perjury.<sup>254</sup> Thus, the DOJ urged that convictions for obstruction of justice grounded on deceptive conduct should be automatically admissible for impeachment through Rule 609(a)(2) even though deception per se may not be a required statutory element of the offense.<sup>255</sup>

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<sup>251</sup> For attacks on Rule 609(a)(2) and its automatic nature, see generally Aviva Orenstein, *Honoring Margaret Berger with a Sensible Idea: Insisting That Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence 609(a)(2)*, 75 BROOK. L. REV. 1291 (2010) (advocating for balancing test over automatic admission); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016) (critiquing impeachment of criminal defendants' testimony through use of prior convictions).

<sup>252</sup> See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 28, 2005, at 8-11, [https://www.uscourts.gov/sites/default/files/fr\\_import/EV04-2005-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/EV04-2005-min.pdf) [<https://perma.cc/UB2F-ANS2>] (summarizing exchange).

<sup>253</sup> See 18 U.S.C. § 1512(b) (2012) (describing obstruction by intimidation, threats, persuasion, and deception).

<sup>254</sup> *Id.*

<sup>255</sup> See Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 29-30, 2004, at 16-18, [https://www.uscourts.gov/sites/default/files/fr\\_import/EV04-2004.pdf](https://www.uscourts.gov/sites/default/files/fr_import/EV04-2004.pdf) [<https://perma.cc/Y6RD-2RNQ>]; *id.* at 17 (noting DOJ's concern that "certain crimes that should be

While a strict “elements” approach to the automatic admissibility of impeaching convictions under Rule 609(a)(2) presented the simplest and most effective solution to the liberal admission of dishonesty convictions in the courts, the Advisory Committee concluded that it would be unable to advance an amendment in the face of staunch opposition from the DOJ.<sup>256</sup> Furthermore, the Committee determined that automatic admission of obstruction of justice convictions based on deception would not necessarily embroil trial judges in lengthy and indeterminate evaluations of prior trials because the centrality of the deceptive acts to the conviction might well be evident.<sup>257</sup> For example, an obstruction of justice indictment might provide sufficient indication that proof of dishonest acts was fundamental to a conviction. The Committee, therefore, labored to craft a Rule 609(a)(2) test that would encompass obstruction of justice convictions based on deceptive acts or statements, but limit the existing problems associated with courts peering behind the veil of every conviction.<sup>258</sup>

As a result of these efforts, the 2006 amendment to Rule 609(a)(2) provides for automatic impeachment of a witness with a prior conviction if a trial judge “can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.”<sup>259</sup> The Committee Note accompanying the amendment clarifies that Rule 609(a)(2) is intended to cover only those crimes in which the defendant was punished for an act of dishonesty or false statement, even if the statute under which he was convicted covers crimes other than lying-based crimes—crimes like (and probably limited to) obstruction of justice.<sup>260</sup> The Note cautions against a court conducting a mini-trial to determine whether the crime was based on deceit or false statement.<sup>261</sup>

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included as *crimina falsi* would not fit under a strict ‘elements’ test,” with prime example being obstruction of justice).

<sup>256</sup> *See id.* at 18 (“The Committee resolved to allow the Reporter and the Department of Justice representatives to work on compromise language that would accomplish the goals on which everyone agreed.”).

<sup>257</sup> *Id.* (“The compromise would permit automatic impeachment when an element of the crime required proof of deceit; but it would go somewhat further and permit automatic impeachment if an underlying act of deceit could be ‘readily determined’ from such information as the charging instrument.”).

<sup>258</sup> *Id.* (“Committee members eventually agreed that the new draft captured the goals of the Committee in proposing an amendment to Rule 609(a)(2): it would rectify a conflict, prevent a mini-trial, and permit automatic admissibility for only those crimes that are especially probative of the witness’s character for untruthfulness.”).

<sup>259</sup> FED. R. EVID. 609(a)(2).

<sup>260</sup> FED. R. EVID. 609(a)(2) advisory committee’s note to 2006 amendment (“The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of . . . an act of dishonesty or false statement.”).

<sup>261</sup> *See id.* (“The amendment requires that the proponent have ready proof that the conviction required the factfinder to find . . . an act of dishonesty or false statement. . . . [A] proponent may offer information such as an indictment, a statement of admitted facts, or jury

The 2006 amendment to Rule 609(a)(2) thus illustrates both the art and the pain of a compromise amendment to the Federal Rules of Evidence. On the pain side of the equation, compromising to achieve the support of the DOJ meant sacrificing the most straightforward and effective solution to the problem with the existing provision. An elements-only standard would have provided a bright-line test that judges could have easily (and automatically) implemented in the heat of trial. On the art side of the equation, however, the resulting amendment to Rule 609(a)(2)—even with the obstruction of justice carve-out—resulted in a net benefit for the trial process, putting an end to expansive interpretation of “dishonesty” convictions and to time-consuming mini-trials to determine the admissibility of previous convictions. Compromise is a critical component of constructive reform that advances the Federal Rules of Evidence without upsetting litigants’ long-standing expectations.

#### CONCLUSION

If Evidence professors ruled the world, the Federal Rules of Evidence might look a lot different than they do now. They would be theoretically sound, completely consistent, and perfect engines of fairness, letting the chips fall where they may. But perhaps unfortunately (or fortunately, depending upon your viewpoint), Evidence professors are pretty low on the scale of important consumers of the Federal Rules of Evidence. Instead, the Rules are geared toward the litigants and judges who rely on them day in and day out. So, they need to be direct and easy to apply in the heat of trial and they need to accommodate *both* sides of an adversarial proceeding. Under these circumstances, rulemakers may reasonably decline to advance watershed changes to the Rules. But they should be expected, at least, to adapt the Rules to contemporary constitutional doctrine, to keep the Rules up to date with technological and societal advancement, to rectify conflicts in their interpretation, and to promote fairness in a way that balances their many constituencies. The principles set forth in this Article, garnered by what is almost a lifetime of experience in rulemaking, can hopefully be used to promote responsible rulemaking for the Federal Rules of Evidence and beyond.

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instructions to show that the factfinder had to find . . . an act of dishonesty or false statement in order for the witness to have been convicted.”).