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## NOTES

### THE ADMISSION OF HEARSAY THROUGH RULE 106: AND NOW YOU KNOW THE REST OF THE STORY

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#### INTRODUCTION

At trial, both parties have been crafting a story: a story of what happened and who is responsible. And a bombshell just dropped. After admission of the defendant's self-incriminating statement under Federal Rule of Evidence<sup>1</sup> 801(d)(2),<sup>2</sup> the government likely has enough evidence to persuade the jury of the defendant's guilt. The story seems clear. The facts line up almost perfectly. Then, defense counsel moves to admit another part of that statement under Rule 106, arguing that the additional, exculpatory portion of the statement is necessary to correct the misleading impression created by taking the defendant's statement out of context.<sup>3</sup> The jury must know the rest of the story.

Under Federal Rule of Evidence 106, "[i]f 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."<sup>4</sup> Generally, in order for

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1. The restyled Federal Rules of Evidence went into effect on December 1, 2011. The restyled Rules are written in the active voice with no substantive change intended. Unless otherwise noted, this Note references the restyled Rules.

2. FED. R. EVID. 801(d)(2) ("The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy.").

3. FED. R. EVID. 106.

4. *Id.*

evidence to be admitted under Rule 106, such evidence must be relevant to or explanatory of the allegedly misleading passages offered by the opponent.<sup>5</sup> However, whether Rule 106 operates as an independent rule of admissibility, admitting otherwise inadmissible evidence such as hearsay, is unclear.

The split among the circuit courts and authorities revolves around the perceived function of Rule 106: whether the Rule serves only a timing function or also a trumping one.<sup>6</sup> As written, Rule 106 does not restrict admission to otherwise admissible evidence; rather, the scope of Rule 106 extends to “any other writing or recorded statement . . . that in fairness ought to be considered.”<sup>7</sup> Further, Rule 106 expresses the doctrine of completeness, which at common law could “trump[],” i.e. override, exclusionary rules of evidence.<sup>8</sup> In 1991, this issue was called “the by far most intriguing” problem to transpire under Rule 106.<sup>9</sup> Over twenty years later, little has changed.

Although Rule 106 should operate as an independent rule of admissibility, some circuits fail to recognize its trumping function. Part I of this Note reviews the common law origins of Rule 106, the most recent Supreme Court decision in *Beech Aircraft Corp. v. Rainey*,<sup>10</sup> and each circuit’s stance on the issue. Part II examines five arguments for a trumping function under Rule 106: a textual, functional, and legislative analysis, as well as a focus on the exclusion of confusing or misleading evidence under Rule 403 and on the admission of evidence against a criminal defendant under Rule 801(d)(2). Part III addresses the decision of the Advisory Committee on Evidence Rules not to amend Rule 106 in 2003.<sup>11</sup> Finally, Part IV explores the possibility of amending Rule 106 to exclude misleading evidence when the necessary completing evidence is inadmissible because of privilege.

## I. HISTORY OF RULE 106

The history of Rule 106 consists of two parts: the common law doctrine of completeness and the interpretation of Rule 106 subsequent to its promulgation.

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5. *United States v. Lewis*, 641 F.3d 773, 785 (7th Cir. 2011) (quoting *United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982)). The Seventh Circuit requires “a complete statement . . . to be read or heard when ‘it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding.’” *Id.* (quoting *United States v. Sweiss*, 814 F.2d 1208, 1211-12 (7th Cir. 1987)).

6. See discussion *infra* Part I.C.

7. FED. R. EVID. 106 (emphasis added).

8. Dale A. Nance, *Verbal Completeness and Exclusionary Rules under the Federal Rules of Evidence*, 75 TEX. L. REV. 51, 54 (1996) [hereinafter Nance, *Verbal Completeness*].

9. TRIAL EVIDENCE COMM., A.B.A., EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE, 21 (David A. Schlueter et al. eds., 2d ed. 1991) [hereinafter EMERGING PROBLEMS].

10. 488 U.S. 153, 172 (1988).

11. MINUTES OF THE ADVISORY COMMITTEE ON EVIDENCE RULES MEETING OF APRIL 25, 2003, at 8-9 [hereinafter ADVISORY COMMITTEE MINUTES APR. 25, 2003], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/403EVMin.pdf>.

When proposing Rule 106 in 1972, the Advisory Committee on Evidence noted that “[Rule 106] is an expression of the rule of completeness.”<sup>12</sup> At common law, the doctrine of completeness possessed a trumping function.<sup>13</sup> However, in *Rainey*, the Supreme Court failed to address whether Rule 106 incorporated this trumping function.<sup>14</sup> Lacking guidance, the circuit courts remain split.<sup>15</sup>

### A. Common Law Origins

Rule 106 traces back to the common law doctrine of completeness.<sup>16</sup> As exemplified by the seventeenth-century trial of Algernon Sidney, the remainder of a defendant’s out-of-court statement was admissible if necessary to provide context for previously-admitted evidence.<sup>17</sup> In his formulation of the common law doctrine, Professor Wigmore recognized a trumping function.<sup>18</sup> However, because Rule 106 expressed, rather than completely codified, the doctrine of completeness,<sup>19</sup> the issue arose as to whether the Rule had in fact incorporated the trumping function of the common law doctrine.

1. *Trial of Algernon Sidney*.—The doctrine of completeness traces as far back as the famous seventeenth-century English trial of Algernon Sidney, where the defendant Sidney successfully argued against the piecemeal admission of his allegedly “certain false, seditious, and traitorous Libel.”<sup>20</sup> Sidney, an English politician and political theorist, had been accused of conspiring in the death of the king and indicted for high treason.<sup>21</sup> In the manuscript evidence at issue,

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12. FED. R. EVID. 106 advisory committee’s note.

13. See *infra* Part I.A.

14. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170-72 (1988).

15. Compare *United States v. Crosgrove*, 637 F.3d 646, 661 (6th Cir. 2011) (finding no trumping function), with *United States v. Lopez-Medina*, 596 F.3d 716, 735-36 (10th Cir. 2010) (finding a trumping function).

16. Nance, *Verbal Completeness*, *supra* note 8.

17. See *infra* Part I.A.1.

18. See *infra* Part I.A.2; see also 7 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2094, at 597-601 (James H. Chadbourn rev. 1978) (stressing wholeness, as illustrated by Algernon Sidney’s Trial, where the remainder of a text—an out-of-court statement—was admitted).

19. See FED. R. EVID. 106 advisory committee’s note; accord 21A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE* § 5072.1 (2d ed. 2012) (noting the Advisory Committee described Rule 106 as “an expression of the rule of completeness” (quoting FED. R. EVID. 106 advisory committee’s note)).

20. *Trial of Algernon Sidney*, 9 HOW. ST. TR. 818, 868 (K.B. 1683), reprinted in 3 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS UPON HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS, FROM THE REIGN OF KING RICHARD III TO THE END OF THE REIGN OF KING GEORGE II, 710 (2d. ed. 1730); see also 7 WIGMORE, *supra* note 18, at 601; Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825, 829 & n.12 (1995) [hereinafter Nance, *A Theory*]; James P. Gillespie, Note, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness*, 62 NOTRE DAME L. REV. 382, 383 (1987).

21. *Trial of Algernon Sidney*, *supra* note 20, at 710-711, 721.

*Discourses Concerning Government*, Sidney laid out a justification for rebellion against absolute monarchy.<sup>22</sup> At trial, the clerk read the following excerpt from *Discourses*:

[T]he King hath three Superiors, to wit, *Deum, Legem, & Parliament*[], that is, the Power, originally in the People of *England*, is delegated unto the Parliament. He is subject unto the Law of God as he is a Man, to the People that makes him a King, in as much as he is a King: The Law sets a Measure unto that Subjection . . . . If he doth not like this Condition, he may renounce the Crown.<sup>23</sup>

Sidney objected that his indictment was based on “200 and odd Sheets . . . scraps of Paper found in his House” showing “neither Beginning nor Ending.”<sup>24</sup> Sidney further argued: “My Lord, if you will take Scripture by pieces, you will make all the Penmen of the Scripture blasphemous; you may accuse *David* of saying, There is no God; and accuse the Evangelists of saying, Christ was a Blasphemer and a Seducer; and the Apostles, That they were drunk.”<sup>25</sup> The court accepted Sidney’s argument: “Mr. *Sidney*, if there be any Part of it that explains the Sense of it, you shall have it read; indeed we are trifled with a little.”<sup>26</sup> Sidney replied, “If they will produce the whole, my Lord, then I can see whether one Part contradicts another.”<sup>27</sup>

Although Sidney’s *Discourses* would conceptually qualify as hearsay, it would likely be admissible (barring a Rule 403 analysis<sup>28</sup>) under Rule 801(d)(2)<sup>29</sup> as statements of a party-opponent. Under the doctrine of completeness, as exemplified in the trial of Algernon Sidney, any part of these statements that provided context would also be admissible. Thus, as Rule 106 expresses the doctrine of completeness, any evidence needed to provide further context would arguably also be admissible under Rule 106—even if classified as hearsay.

2. *Wigmore on Evidence*.—Well-regarded by jurists, authors of treatises, and scholars for his formulation of the common law doctrine of completeness,<sup>30</sup>

22. JONATHAN SCOTT, ALGERNON SIDNEY AND THE RESTORATION CRISIS, 1677-1683, at 260-64 (1991).

23. *Trial of Algernon Sidney*, supra note 20, at 719.

24. *Id.* at 724.

25. *Id.*

26. *Id.*

27. *Id.*

28. FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

29. FED. R. EVID. 801(d)(2).

30. See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988) (“[T]he rule of completeness was stated succinctly by Wigmore . . . .” (quoting 7 WIGMORE, supra note 18, § 2113, at 653), quoted in 2 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 11:35 n.80 (7th ed. 2012)); 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 56, at 283-84 (6th ed.

Professor Wigmore stressed the concept of wholeness:

[T]he thought as a whole, and as it actually existed, cannot be ascertained without *taking the utterance as a whole* . . . . To look at a part alone would be to obtain a false notion of the thought. The total—that is to say, the real—meaning can be got at only by going on to the end of the utterance. One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation.<sup>31</sup>

Wigmore went on to distinguish two forms of incompleteness: (1) the “lack of verbal precision” and (2) “the lack of entirety of parts.”<sup>32</sup> The lack of verbal precision relates to how the presence or absence of a single word within an utterance may “substantially alter the true meaning of even the shortest sentence” while the lack of entirety of parts expresses how the correct understanding of an utterance depends upon other parts of the utterance.<sup>33</sup> Wigmore explained:

A word is interpretable in the light of the use of the same word in another part; a clause is modified by a prior or subsequent clause; one sentence qualifies another; and one paragraph may form only part of a whole exposition. We must compare the whole [utterance], not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and effect of the first part.<sup>34</sup>

The doctrine of completeness encompasses Wigmore’s “[e]ntirety of parts” theory.<sup>35</sup>

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2006) (citing 7 WIGMORE, *supra* note 18, § 2094 for “[t]he oft-repeated classic illustration” of misquoting the Bible and presenting a “half-truth because it divorces the quotation from its context”); 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE ¶ 106[02], at 106-14 (Joseph P. McLaughlin ed., 2d ed. 1996) [hereinafter 1 WEINSTEIN’S EVIDENCE] (“For this reason Wigmore—dignifying common sense by impressive terminology—speaks of the principle codified in Rule 106 . . . .”); 21A WRIGHT ET AL., *supra* note 19, § 5072 (“Wigmore codified what he called the principle of ‘*Verbal Completeness*’ . . . .” (quoting JOHN HENRY WIGMORE, WIGMORE’S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW 371 (3d ed. 1942))); *see also* Nance, *Verbal Completeness*, *supra* note 8, at 129 n.16 (“Wigmore . . . did more than any other evidence scholar to render the doctrine comprehensible . . . .”); Nance, *A Theory*, *supra* note 20 at 829 (“Wigmore’s synthesis of the common-law rule provides an excellent starting point . . . .”); Gillespie, *supra* note 20 (“Many scholars and judges credit Professor Wigmore with recognizing and synthesizing the common law on the subject into a unified doctrine.”).

31. 7 WIGMORE, *supra* note 18, at 597 (emphases omitted); *see* Nance, *A Theory*, *supra* note 20, at 826 (questioning “whether the mandate to tell ‘the whole truth,’ as distinct from the mandate not to lie, has any practical significance”).

32. 7 WIGMORE, *supra* note 18, at 597, 601; *see also* Nance, *A Theory*, *supra* note 20, at 829 n.13.

33. 7 WIGMORE, *supra* note 18, at 601.

34. *Id.*

35. 1 WEINSTEIN’S EVIDENCE, *supra* note 30, at 106-15; *accord* Nance, *A Theory*, *supra* note 20, at 830.

Under Wigmore's formulation, the doctrine of completeness dealt with the substantive admission of evidence and not merely timing.<sup>36</sup> In his treatise, Wigmore "distinguish[ed] the completeness doctrine from rules governing the timing of evidence presentation."<sup>37</sup> He explained, "That the stage of *reexamination or cross-examination* is the proper *time* for putting in explanatory utterances is one of the rules for the order of evidence and does not involve the tenor or limits of the utterance."<sup>38</sup>

3. *Codification.*—The Federal Rules of Evidence were enacted on January 2, 1975 and became effective on July 1, 1975.<sup>39</sup> It is generally accepted that Rule 106 expresses or reflects—rather than completely codifies—the common law doctrine of completeness.<sup>40</sup> For example, whereas the common law doctrine of completeness allowed oral statements, Rule 106 excludes such statements.<sup>41</sup>

*B. The Supreme Court: Beech Aircraft Corp. v. Rainey*

In *Beech Aircraft Corp. v. Rainey*,<sup>42</sup> the Supreme Court skirted the question of whether Rule 106 operates as an independent rule of admissibility for otherwise inadmissible evidence. In *Rainey*, a Navy flight instructor and her student were killed when their aircraft banked sharply to avoid another plane, lost altitude, and crashed.<sup>43</sup> At issue was whether pilot error or equipment malfunction had caused the crash.<sup>44</sup> Plaintiff John Rainey, husband of the deceased pilot and himself a Navy flight instructor, wrote a "detailed letter" (the contested evidence in *Rainey*), taking issue with an investigative report that had concluded the accident was due to pilot error and outlining his theory that

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36. See Nance, *A Theory*, *supra* note 20, at 835-47 (citing 7 WIGMORE, *supra* note 18, § 2095, at 607) (arguing that Wigmore described two distinct completeness rules: (1) a rebuttal rule, which included a "timing" function (removing the limit on the scope of cross-examination to the subject matter of the direct examination) and a trumping function; and (2) an interruption rule, which allowed the proponent of the completing evidence to "interrupt" the other party's case immediately)).

37. Nance, *A Theory*, *supra* note 20, at 837 & n.37 (citing 7 WIGMORE, *supra* note 18, § 2114, at 661-62) (internal citations omitted).

38. 7 WIGMORE, *supra* note 18, § 2114, at 661-62.

39. The Federal Rules of Evidence were enacted pursuant to Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975) (codified at 28 U.S.C. app. (2006 & Supp. V 2011)). See Gillespie, *supra* note 20, at 382 n.1.

40. See FED. R. EVID. 106 advisory committee's note; accord 21A WRIGHT ET AL., *supra* note 19 (noting the Advisory Committee described Rule 106 as "an expression of the rule of completeness") (quoting FED. R. EVID. 106 advisory committee's note); Nance, *Verbal Completeness*, *supra* note 8, at 53.

41. Gillespie, *supra* note 20; see 21A WRIGHT ET AL., *supra* note 19 (discussing the differences between Rule 106 and the common law).

42. 488 U.S. 153 (1988).

43. *Id.* at 156.

44. *Id.* at 157.

equipment malfunction was “[t]he most probable primary cause” of the accident.<sup>45</sup> The trial court permitted defense counsel to question Rainey (presumably under 801(d)(2)(A)) regarding a statement in his report that tended to suggest pilot error.<sup>46</sup> However, the court sustained an objection to plaintiff counsel’s questioning of Rainey as to whether he had said the primary cause of the accident was equipment malfunction.<sup>47</sup>

Although the jury returned a verdict for the defendants (the manufacturer and the company that serviced the plane), “[a] panel of the Eleventh Circuit reversed and remanded [the case] for a new trial.”<sup>48</sup> On rehearing *en banc*, the Eleventh Circuit Court of Appeals unanimously reaffirmed the panel’s decision that Rule 106 (or alternatively Rule 801(d)(1)(B)) “require[ed] the court to let Rainey testify as to the whole letter.”<sup>49</sup> Upon review, the Supreme Court affirmed under “the general rules of relevancy” (Rules 401 and 402) but declined to address whether Rule 106 or Rule 801(d)(1)(B) applied.<sup>50</sup>

The Court’s decision in *Rainey* is puzzling in that, although the Court recognized that “[c]learly the concerns underlying Rule 106 are relevant here,” it reverted to the argument that where “misunderstanding or distortion can be averted only through presentation of another portion [of a document], the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402.”<sup>51</sup> At least one authority has described *Rainey* as implicitly upholding the common law doctrine of completeness as “a supplement to Rule 106.”<sup>52</sup> However, the Court presented the rule of completeness as merely an alternative to Rule 106,<sup>53</sup> rendering the latter superfluous.

The Court’s reasoning suggests that the rule of completeness renders the additional evidence relevant and thus admissible under Rule 402.<sup>54</sup> After citing Wigmore’s doctrine of completeness,<sup>55</sup> the Court described the Advisory Committee note to Rule 106 as “a reaffirmation of the obvious: that when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402.”<sup>56</sup> The Court added:

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45. *Id.* at 159 (alteration in original).

46. *Id.* at 159-60.

47. *Id.* at 160.

48. *Id.*

49. *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498, 1500 (11th Cir. 1987), *aff’d in part, rev’d in part*, 488 U.S. 153 (1988).

50. *Rainey*, 488 U.S. at 172.

51. *Id.* at 172.

52. 21A WRIGHT ET AL., *supra* note 19 (attributing the ability to offer evidence on cross-examination to the common law doctrine rather than Rule 106).

53. *See* FED. R. EVID. 106 & advisory committee’s note.

54. FED. R. EVID. 402.

55. *See Rainey*, 488 U.S. at 171 (citing 7 WIGMORE, *supra* note 18, § 2113, at 653).

56. *Id.* at 172 (citing 1 WEINSTEIN’S EVIDENCE, *supra* note 30, at 106-20).

While much of the controversy in this suit has centered on whether Rule 106 applies, we find it unnecessary to address that issue. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106.<sup>57</sup>

The primary difficulty with the Court's avoidance of Rule 106 derives from the hearsay nature of *Rainey's* letter. Although all relevant evidence may be admissible under Rule 402, that admissibility is conditioned upon the "as otherwise provided" clause of the rules of evidence.<sup>58</sup> And under Rule 802, hearsay is inadmissible unless a federal statute, the rules of evidence, or the Supreme Court provides otherwise.<sup>59</sup> While *Rainey* may be construed as a roundabout route to admit otherwise inadmissible evidence required for completeness, the Court's language is not so clear—the Court focuses on relevance rather than a hearsay exception. Furthermore, the Court's reliance upon a common law approach thwarts legislative intent by ignoring Rules 106 and 802—rules specifically codified to handle evidence required for completeness and out-of-court statements respectively.<sup>60</sup>

### C. The Circuit Split

Lacking guidance from the Supreme Court, the circuit courts split on whether Rule 106 operates as an independent rule of admissibility.<sup>61</sup> The circuits that find

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57. *Id.*

58. In 1975, Congress passed an Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (amended 2011).

59. FED. R. EVID. 802.

60. The Court's decision in *Rainey* could be seen as an implicit "judicial codification" of a trumping function for Rule 106. *Rainey*, 488 U.S. at 171-72. After all, in an evidentiary situation where Rule 106 could apply, the Court invoked the trumping function of the common law doctrine of completeness. However, the Court did not address the use of Rule 106: "While much of the controversy in this suit has centered on whether Rule 106 applies, *we find it unnecessary to address that issue*. Clearly the concerns underlying Rule 106 are relevant here, but, as the general rules of relevancy permit a ready resolution to this litigation, we need go no further in exploring the scope and meaning of Rule 106." *Id.* at 172 (emphasis added). The Court's stance toward a trumping function for Rule 106 is thus unclear. It is interesting to note that the Fourth Circuit changed its position after *Rainey* was decided in December 1988. Compare *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988) (pre-*Rainey*; recognizing a trumping function), with *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (post-*Rainey*; not recognizing a trumping function).

61. Compare *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010), *United States v. Kopp*, 562 F.3d 141, 144 (2d Cir. 2009), *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008), *United States v. Baker*, 432 F.3d 1189, 1222-23 (11th Cir. 2005), *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986), and *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986), with *United States v. Collicott*, 92 F.3d 973, 982-83 (9th Cir. 1996), *Wilkerson*, 84 F.3d at 696, *United States v. Woolbright*, 831 F.2d 1390, 1395 (8th Cir. 1987), and *United*



no trumping function often state that Rule 106 serves a timing or order-of-proof function.<sup>62</sup> In contrast, circuits recognizing a trumping function base their reasoning on statutory rules of construction,<sup>63</sup> arguing principally that, in order for Rule 106 to fulfill its purpose, the admission of otherwise inadmissible evidence must be permitted.<sup>64</sup>

1. *Trumping Function.*<sup>65</sup>—The First,<sup>66</sup> Second,<sup>67</sup> Seventh,<sup>68</sup> Tenth,<sup>69</sup> Eleventh,<sup>70</sup> and D.C.<sup>71</sup> Circuits recognize the trumping function of Rule 106. The Second Circuit recently adopted this position, stressing the importance of satisfying the common law requirements of Rule 106, namely, that the additional evidence is necessary to explain the admitted portion, to provide context, to avoid misleading the jury, or to ensure a fair and impartial understanding of the admitted portion.<sup>72</sup> The Seventh Circuit, in often-cited dicta, has gone beyond

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States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982).

62. *Costner*, 684 F.2d at 373 (citing 1 WEINSTEIN'S EVIDENCE, *supra* note 30, ¶ 106[01], at 106-13), *cited by* United States v. Crosgrove, 637 F.3d 646, 661 (6th Cir. 2011); *see also* Donald F. Paine, *The Rule of Completeness*, 38 TENN. B.J. 31, 31 (2002). *But see* 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 106.03[1], at 106-13 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2011) [hereinafter 1 WEINSTEIN FEDERAL EVIDENCE] (recognizing a conflict among the circuit courts).

63. *See infra* Part II.

64. *See, e.g.,* Sutton, 801 F.2d at 1368, *cited in* Lopez-Medina, 596 F.3d at 735-36; Bucci, 525 F.3d at 133; United States v. Glover, 101 F.3d 1183, 1190-92 (7th Cir. 1996); *Gravelly*, 840 F.2d at 1163.

65. Authorities who agree with this position include: BROUN ET AL., *supra* note 30, at 286 (stating that “as a categorical rule,” the statement that the additional material must be otherwise admissible “is unsound”); 2 FISHMAN & MCKENNA, *supra* note 30, § 11:39 (describing this position as “[t]he better view”); 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 106.1 (7th ed. 2012) (discussing “waiver of objection through ‘door opening’” (citing United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948))); 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 89 (6th ed. 1994) (citing the “open door principle”); *see also* Adam H. Kurland, *Prosecuting Ol’ Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant*, 51 U. PITT. L. REV. 841, 894 (1990) (stating “the better view seems to be that Rule 106 provides for a limited independent source of admissibility that overrides hearsay objections”).

66. *See Bucci*, 525 F.3d at 133 (rejecting the government’s argument that Rule 106 is limited to the order of proof).

67. *See* United States v. Kopp, 562 F.3d 141, 144 (2d Cir. 2009).

68. *See* United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986); *accord* United States v. Lewis, 641 F.3d 773, 785 (7th Cir. 2011).

69. *Lopez-Medina*, 596 F.3d at 735 (citing 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1.43 (3d ed. 2007); *Bucci*, 525 F.3d at 133; and *Sutton*, 801 F.2d at 1368).

70. United States v. Baker, 432 F.3d 1189, 1222-29 (11th Cir. 2005).

71. *Sutton*, 801 F.2d at 1368.

72. *Kopp*, 562 F.3d at 144 (quoting United States v. Johnson, 507 F.3d 793, 796 (2d Cir.

recognizing Rule 106 as a rule for the admission of hearsay to also exploring the possibility of excluding the original misleading evidence.<sup>73</sup> And the D.C. Circuit is a well-cited jurisdiction for its reasoning that “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.”<sup>74</sup>

2. *No Trumping Function.*<sup>75</sup>—In contrast, the Fourth,<sup>76</sup> Sixth,<sup>77</sup> Eighth,<sup>78</sup> and Ninth<sup>79</sup> Circuits do not recognize a trumping function under Rule 106. Pre-*Rainey*, the Fourth Circuit admitted hearsay under Rule 106;<sup>80</sup> however, now it asserts that the Rule does “not render admissible the evidence which is otherwise inadmissible.”<sup>81</sup> The Sixth Circuit stresses the timing function of Rule 106,<sup>82</sup> while the Eighth Circuit demands that the hearsay evidence falls within a defined

2007)) (rejecting admission of statement because defendant’s intent to kill was irrelevant). *Contra* U.S. Football League v. Nat’l Football League, 842 F.2d 1335, 1375-76 (2d Cir. 1988) (rejecting the letter on the bases of hearsay under Rule 805 and “unduly prejudicial” content under Rule 403).

73. *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986) (“If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too.”). However, the Seventh Circuit found “no danger of a misleading impression” in *LeFevour*. *Id.*

74. *Sutton*, 801 F.2d at 1368, quoted in *Lopez-Medina*, 596 F.3d at 735-36. The *Sutton* court also provided reasoning for the admission of hearsay under Rule 106 and added that “Rule 106 [would] be invoked rarely and for a limited purpose.” *Id.* at 1367-69. See also *United States v. Glover*, 101 F.3d 1183, 1192 (7th Cir. 1996) (citing *Sutton*’s finding that excluded portions of a recorded conversation should be admitted to protect a defendant’s constitutional right to not take the stand and testify); *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988) (citing *Sutton* to support the proposition “that parties should not be able to lift selected portions out of context”).

75. Authorities who agree with this position include: 1 MUELLER & KIRKPATRICK, *supra* note 69; JOHN C. O’BRIEN & ROGER L. GOLDMAN, *FEDERAL CRIMINAL TRIAL EVIDENCE* 98-99 (1989).

76. *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996).

77. *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982).

78. *United States v. Woolbright*, 831 F.2d 1390, 1395 (8th Cir. 1987).

79. *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996).

80. *United States v. Gravely*, 840 F.2d 1156, 1163-64 (4th Cir. 1988) (pointing out that the defendant had selectively omitted fourteen intervening and undesirable lines in a thirty-page memorandum: “The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. . . . The rule simply speaks the obvious notion that parties should not be able to lift selected portions out of context.” (citing *United States v. Sutton*, 801 F.2d 1346, 1366-69 (D.C. Cir. 1986))).

81. *Wilkerson*, 84 F.3d at 696 (holding the judge did not abuse discretion in omitting exculpatory portions of defendant’s confession, despite admitting the inculpatory portions under Rule 801(d)(2), in part, because hearsay may not come in under Rule 106).

82. *Costner*, 684 F.2d at 373 (citing 1 WEINSTEIN’S EVIDENCE, *supra* note 30, ¶ 106[01], at 106-13), see also *United States v. Crosgrave*, 637 F.3d 646, 661 (6th Cir. 2011); Paine, *supra* note 62.

hearsay exception.<sup>83</sup> The Ninth Circuit is entrenched in its position with no explanation other than citing the authority of the Second Circuit.<sup>84</sup>

3. *Issue Remains Unaddressed.*—The issue whether Rule 106 possesses a trumping function remains a noted, yet unaddressed, quandary in the Third<sup>85</sup> and Fifth<sup>86</sup> Circuits. The Third Circuit considered the admission under Rule 106 of an entire tape of statements made to an undercover government operation—portions of which were already admitted under Rule 801(d)(2)—but declined because the tape was not necessary to explain or place in context other evidence (another tape recording), avoid misleading the jury, or insure a fair and impartial understanding.<sup>87</sup> Similarly, based on the facts presented before the court, the Fifth Circuit has also found it unnecessary to resolve the issue.<sup>88</sup>

## II. THE ADMISSION OF OTHERWISE INADMISSIBLE EVIDENCE

An analysis of Rule 106 strongly suggests that the Rule operates as an independent rule of admissibility. First, the text of Rule 106 does not ban a trumping function.<sup>89</sup> Second, Rule 106 depends upon the ability to trump other evidentiary rules to fulfill its function of providing context.<sup>90</sup> Third, an examination of the legislative history of Rule 106 makes clear that Congress refused banning the admission of otherwise inadmissible evidence and, in fact, recently considered amending Rule 106 to explicitly include a trumping function.<sup>91</sup> Fourth, a broader treatment of Rule 106 to include all additional evidence—whether otherwise admissible or not—would advantageously address the purpose of Rule 403 with less complexity. Finally, in the case of hearsay evidence admitted against a criminal defendant under Rule 801(d)(2), much may

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83. *Woolbright*, 831 F.2d at 1395 (“We conclude, however, that neither Rule 106, the rule of completeness, which is limited to writings, nor Rule 611 . . . empowers a court to admit unrelated hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception.”, *cited in* *United States v. Ramos-Caraballo*, 375 F.3d 797, 802-03 (8th Cir. 2004)). *But see infra* Part IV; *Brewer v. Jeep Corp.*, 724 F.2d 653, 657 (8th Cir. 1983) (admitting “the complete report . . . [both] the mundane as well as the sensational”).

84. *Collicott*, 92 F.3d at 983 (citing *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1375-76 (2d Cir. 1988)) (identifying the impermissibility of the admission of hearsay under Rule 106 as one of three reasons for error in the admission of defendant’s statements).

85. *See* *United States v. Hoffecker*, 530 F.3d 137, 192-93 (3d Cir. 2008).

86. *See* *United States v. Branch*, 91 F.3d 699, 727-28 (5th Cir. 1996).

87. *Hoffecker*, 530 F.3d at 192.

88. *Branch*, 91 F.3d at 728 (declining to reach the issue because the defendant failed to show how additional evidence would “qualify, explain, or place into context” the portion already introduced).

89. 21A WRIGHT ET AL., *supra* note 19, § 5078.1.

90. *See infra* Part II.B (discussing the purpose of Rule 106).

91. MINUTES OF THE ADVISORY COMMITTEE ON EVIDENCE RULES MEETING OF OCTOBER 18, 2002, at 3-4 [hereinafter ADVISORY COMMITTEE MINUTES OCT. 18, 2002], *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/1002EVMin.pdf>.

depend upon the admission of the remainder of that evidence under Rule 106.

*A. Text*

Interpretation of a statute begins with its text.<sup>92</sup> Under Rule 106, “[i]f 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.”<sup>93</sup> On its face, Rule 106 neither limits admission to otherwise admissible evidence<sup>94</sup> nor overrides the rules of hearsay.<sup>95</sup> The title for Rule 106—“Remainder of or Related Writings or Recorded Statements”<sup>96</sup>—provides little further guidance. Thus, the recognition of a trumping function under Rule 106 would not be inconsistent with its text.

Furthermore, a timing function under Rule 106 would be consistent with the rule’s lack of an “except as otherwise provided by the rules”<sup>97</sup> qualifier. Authorities recognize that Rule 106, unlike other major rules of admissibility, lacks this qualifier.<sup>98</sup> Under the rules of statutory construction, the drafters of Rule 106 presumably knew of the option to qualify Rule 106 with an “except as otherwise provided” provision but nevertheless chose otherwise.<sup>99</sup>

There are two main avenues to interpret this decision. First, the courts may interpret Rule 106 to be free from exclusionary rules such as Rule 802.<sup>100</sup> However, as the late Professor Charles A. Wright and Professor Kenneth W. Graham point out, “another of the meta-rules—Rule 104(a)—contains an explicit clause that frees the trial judge from the other exclusionary Rules.”<sup>101</sup> This

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92. *Dean v. United States*, 556 U.S. 568, 572 (2009).

93. FED. R. EVID. 106 (emphasis added).

94. 21A WRIGHT ET AL., *supra* note 19, § 5078.1.

95. 1 SALTZBURG ET AL., *supra* note 65.

96. FED. R. EVID. 106.

97. “[E]xcept as otherwise provided by the rules” is a commonly-known phrase from the pre-December 1, 2011 version of the Federal Rules of Evidence. The restyled Rules are written in the active voice and thus lack this phrasing. “There is no intent to change any result in any ruling on evidence admissibility.” *See id.*; FED. R. EVID. 106 advisory committee’s note.

98. *See, e.g., United States v. Sutton*, 801 F.2d 1346, 1368 & n.17 (D.C. Cir. 1986) (citing 21A WRIGHT ET AL., *supra* note 19, § 5078); 21A WRIGHT ET AL., *supra* note 19, § 5078.1 n.6 (citing Rules 402, 501, 602, 613(b), 704, 802, 806, 901(10), and 1002 as examples); Gillespie, *supra* note 20, at 390-91 & 391 n.82. *Cf.* FED. R. EVID. 402 (admissibility of relevant evidence); FED. R. EVID. 802 (inadmissibility of hearsay).

99. 21A WRIGHT ET AL., *supra* note 19, § 5078.1 n.7.

100. FED. R. EVID. 802 (“Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.”).

101. 21A WRIGHT ET AL., *supra* note 19, § 5078.1 n.6; *see* FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.”).

analogy is faulty. Rule 104(a) differs from Rule 106 in that Rule 104 handles how a judge may decide questions of admission. It does not address the admission of evidence under a rule.

Second, as Professors Wright and Graham also note, “with respect to the exclusionary [r]ules that do contain such a clause, Rule 106 could be said to be a [r]ule that ‘otherwise provides.’”<sup>102</sup> For example, under Rule 802, “[h]earsay is not admissible unless [the rules] provide[] otherwise.”<sup>103</sup> A situation may arise where a party introduces all or part of a writing under a hearsay exception and Rule 106 could operate to admit “any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time,”<sup>104</sup> regardless of the hearsay rules. This interpretation also best aligns with the recognition of a trumping function under Rule 106. Although Rule 106’s lack of an “except as otherwise provided by the rules” qualifier may be seen as a deliberate omission by Congress, which clearly is not opposed to circuits treating Rule 106 as an independent rule of admissibility. And Congress’s inaction since 1975 may be seen as an affirmation of a trumping function.

#### *B. The Purpose of Rule 106: Timing and Trumping Functions*

The split among the circuit courts and authorities revolves around the perceived function of Rule 106: whether the Rule serves only a timing function or also a trumping one. The placement of Rule 106 provides little guidance. However, an analysis of Rule 102<sup>105</sup>—which provides the purpose for the Federal Rules of Evidence—suggests the inclusion of a trumping function under Rule 106. Such an interpretation, consistent with the rules of statutory construction, would also avoid rendering Rule 611—which governs “the mode and order of examining witnesses and presenting evidence”—superfluous.<sup>106</sup>

*1. Placement.*—Rule 106’s placement in the Federal Rules of Evidence under Article “I: General Provisions” and not under Articles “IV: Relevance and Its Limits” or “VIII: Hearsay” sets it apart.<sup>107</sup> This placement is consistent with both a timing-only position and a trumping position. Under a timing-only interpretation, this placement would be logical because there would be no need to determine admissibility. On the other hand, under a trumping interpretation, this placement also would make sense because Rule 106—incorporating the common law doctrine of completeness—serves a “responsive role.”<sup>108</sup> Unlike rules of admission under Article IV or VIII, Rule 106 requires that an adverse party first introduce all or part of a writing. Furthermore, as the D.C. Circuit

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102. 21A WRIGHT ET AL., *supra* note 19, § 5078.1.

103. FED. R. EVID. 802.

104. FED. R. EVID. 106.

105. FED. R. EVID. 102.

106. FED. R. EVID. 611(a) & advisory committee’s note to subdiv. a; *see* Gillespie, *supra* note 20, at 391 n.84.

107. FED. R. EVID. art. I, art. IV, art. VIII.

108. Nance, *A Theory*, *supra* note 20, at 835.

Court pointed out in *United States v. Sutton*,<sup>109</sup> “Article I . . . contains rules that generally *restrict* the manner of applying the exclusionary rules.”<sup>110</sup> By allowing the admission of otherwise inadmissible evidence, a trumping function under Rule 106 would restrict the manner of applying exclusionary rules such as Rule 802—the rule against hearsay.

2. *Guidance from Rule 102.*—Rule 102,<sup>111</sup> which provides the purpose for the Federal Rules of Evidence, should be used to interpret Rule 106.<sup>112</sup> Under Rule 102, the rules of evidence “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.”<sup>113</sup> The advisory committee notes for Rule 106 parallel Rule 102: “The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial.”<sup>114</sup>

A trumping function under Rule 106 would more fully serve the purpose of the Federal Rules of Evidence. Rule 106 is not only about timing; it is substantive and supports the paramount purpose of our judicial system: to determine the truth. Professors Wright and Graham confirm the importance of a trumping function under Rule 102: “No one has ever explained how these standards would be met by a construction that would allow a party to present evidence out of context so as to mislead the jury, [and] then assert an exclusionary rule to keep the other side from exposing his deception.”<sup>115</sup> A trumping function would also promote efficiency by avoiding jury confusion.<sup>116</sup>

The alternative theory for Rule 106, a timing-only purpose, may satisfy the letter but fails to satisfy the spirit of Rule 102. Should a party invoke Rule 106 immediately, a timing-only purpose would help eliminate the expense and delay of fixing a misleading impression later at trial. However, the committee notes for Rule 106 preserve a party’s right to invoke Rule 106 upon cross-examination, which would lessen this benefit should the party wait until cross to invoke the rule.<sup>117</sup> Further, inadmissible evidence would not come in, and some misleading

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109. 801 F.2d 1346 (D.C. Cir. 1986).

110. *Id.* at 1368 (emphasis added) (citing 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5078, at 377 (1977 & 1985 Supp.)) [hereinafter 21 WRIGHT & GRAHAM].

111. FED. R. EVID. 102.

112. *See Sutton*, 801 F.2d at 1369-70.

113. FED. R. EVID. 102.

114. FED. R. EVID. 106 advisory committee’s note (referring to remedial measures undertaken later in trial to correct the misleading impression); *see* FED. R. EVID. 102.

115. 21A WRIGHT ET AL., *supra* note 19, § 5078.1.

116. *Id.*

117. FED. R. EVID. 106 advisory committee’s note (“The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.”). *But see* Gillespie, *supra* note 20, at 392 (claiming a party will have no opportunity to introduce this evidence at a later time).

impressions would remain.

3. *Impact on Rule 611.*—A timing-only purpose for Rule 106 would render Rule 611(a)<sup>118</sup> meaningless because Rule 611(a) governs the mode and order of examining witnesses and presenting evidence.<sup>119</sup> Rule 611(a) provides, “The court should exercise reasonable control over *the mode and order* of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; [and] (2) avoid wasting time . . . .”<sup>120</sup> Thus, a timing-only reading of Rule 106 would oppose one of the most basic interpretative canons— “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .”<sup>121</sup> As Judge Weinstein noted, “Rule 106 might well have been omitted or covered by a more general provision acknowledging the court’s broad power to insure that any evidence is presented in a way that avoids misleading, unfairness, and undue consumption of time.”<sup>122</sup> However, Congress chose otherwise. And a similar reading of Rule 106 would render Rule 611 superfluous, contrary to the rules of statutory construction.

### C. Legislative History

The legislative history of Rule 106 reveals that Congress did not intend to limit the application of Rule 106 to only otherwise admissible evidence. During the drafting of Rule 106 and despite a contrary request from the Department of Justice,<sup>123</sup> Congress refused to explicitly bar the admission of otherwise inadmissible evidence. Furthermore, Congress modeled the Federal Rules of Evidence using the California Evidence Code—which consistently has included a trumping function under its codification of the doctrine of completeness.<sup>124</sup> Under the original text, additional evidence introduced under Rule 106 could be construed as nonhearsay.<sup>125</sup> This legislative history culminated in 2002 when the Advisory Committee on Evidence Rules considered amending Rule 106 to

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118. FED. R. EVID. 611(a).

119. Gillespie, *supra* note 20, at 391 n.84.

120. FED. R. EVID. 611(a) (emphasis added).

121. *Corley v. United States*, 556 U.S. 303, 314 (2009) (alterations in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (internal quotation marks omitted).

122. 1 WEINSTEIN’S EVIDENCE, *supra* note 30.

123. Letter from W. Vincent Rakestraw, Asst. Attorney Gen., Legislative Affairs, to Hon. James O. Eastland, Chairman, Senate Judiciary Comm. (June 14, 1974), *Federal Rules of Evidence: Hearings on H.R. 5463, Before the S. Comm. on the Judiciary*, 93d Cong. 121-23 (1974) [hereinafter Rakestraw Letter]; accord Gillespie, *supra* note 20, at 387.

124. See CAL. LAW REVISION COMM’N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE: ARTICLE VIII HEARSAY EVIDENCE 599 (1962) (discussing Section 1854); 1 WEINSTEIN’S EVIDENCE, *supra* note 30, at 106-20 (discussing Section 356); 21A WRIGHT ET AL., *supra* note 19, § 5078.1 nn.17-18.

125. See Nance, *Verbal Completeness*, *supra* note 8, at 59-60.

explicitly include a trumping function.<sup>126</sup>

*1. Committee Hearings.*—During hearings on the Federal Rules of Evidence, although Assistant Attorney General W. Vincent Rakestraw and the Department of Justice specifically requested that the Senate Judiciary Committee amend Rule 106 to only permit the introduction of “any other part or any other writing or recorded statement *which is otherwise admissible*,”<sup>127</sup> no such proviso was added. Some scholars suggest that the advisory committee was “satisfied with the [Committee] Reporter’s mischievous explanation that the ‘fairness’ standard [in Rule 106] implicitly required that completing evidence be admissible.”<sup>128</sup> In other words, in order to determine whether the additional evidence “ought in fairness to be considered with” the original evidence under Rule 106, a judge would have “to know what the offered evidence purport[ed] to be”<sup>129</sup> and presumably reject any hearsay. However, a rule of statutory construction stresses that Congress intends what is written. Courts “ordinarily resist reading words or elements into a statute that do not appear on its face.”<sup>130</sup> Here, Congress chose not to exclude a trumping function from Rule 106.

*2. The California Evidence Code.*—The Federal Rules of Evidence were modeled after the California Evidence Code.<sup>131</sup> A member of the Advisory Committee, Herman Selvin, had been the Chair of the California Law Revision Commission—the group that drafted California’s codification of the common law.<sup>132</sup> And when updating the California Code, the drafters noted that “[t]o the extent that this section [Section 1854, California’s doctrine of completeness] makes hearsay admissible, we may regard the section as a special exception to the hearsay rule.”<sup>133</sup> Then section 1854 provided:

When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.<sup>134</sup>

126. ADVISORY COMMITTEE MINUTES OCT. 18, 2002, *supra* note 91; ADVISORY COMMITTEE MINUTES APR. 25, 2003, *supra* note 11, at 8.

127. Rakestraw Letter, *supra* note 123, at 122; *accord* Gillespie, *supra* note 20, at 387.

128. 21A WRIGHT ET AL., *supra* note 19, § 5078.1. The reasoning behind the word choice “mischievous” is interesting but unknown.

129. 1 SALTZBURG ET AL., *supra* note 65.

130. *Dean v. United States*, 556 U.S. 568, 572 (2009) (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)).

131. CAL. CIV. PROC. CODE § 1854 (West 1872) (recodified at Cal Evid. Code § 356 (West 1965)).

132. 21A WRIGHT ET AL., *supra* note 19, § 5078.1 n.21.

133. CAL. LAW REVISION COMM’N, *supra* note 124, at 599, *quoted in* 1 WEINSTEIN’S EVIDENCE, *supra* note 30, at 106-20; 21A WRIGHT ET AL., *supra* note 19, § 5078.1.

134. CAL. LAW REVISION COMM’N, *supra* note 124, at 599.



Like Rule 106, § 1854 did not explicitly mention a trumping function although it possessed one. Even after the enactment of Rule 106, California courts continued to admit otherwise inadmissible evidence under the completeness doctrine.<sup>135</sup>

3. *Hearsay? The Original Language.*—As originally enacted, additional evidence introduced under Rule 106 could be construed as nonhearsay because the original party offering the evidence would introduce the remainder.<sup>136</sup> Subsequent amendments to the rule were not intended to cause any changes in substance.<sup>137</sup> Originally, Rule 106 stated: “When a writing or recorded statement or part thereof is introduced by a party, an adverse party *may require him* at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”<sup>138</sup> In 1987, the rule was amended to emphasize gender neutrality—“no substantive change was intended.”<sup>139</sup> The amended rule provided that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party *may require the introduction* at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”<sup>140</sup> In 2011, Rule 106 again underwent stylistic, but not substantive, changes when the Federal Rules of Evidence were restyled in their entirety.<sup>141</sup>

Under the originally-enacted Rule 106, it was possible to interpret that the original party was offering the evidence and therefore that evidence met a hearsay exception.<sup>142</sup> As the amendments were not intended to substantively change Rule 106, this fiction is still possible under the current Rule.

4. *The Almost-Amendment to Rule 106 in 2003.*—From 2002 to 2003, the Advisory Committee on Evidence Rules considered an amendment to explicitly add that Rule 106 “operat[ed] as an independent rule of admissibility.”<sup>143</sup> At its April 2002 meeting, the Committee requested that its reporter, Professor Daniel J. Capra, prepare a report on a number of rules that required amendment.<sup>144</sup> At

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135. CAL. EVID. CODE § 356 (West 1965) (California’s equivalent of Rule 106); 21A WRIGHT ET AL., *supra* note 19, § 5078.1.

136. See Nance, *Verbal Completeness*, *supra* note 8, at 59-60.

137. FED. R. EVID. 106 advisory committee’s note.

138. FED. R. EVID. 106 (emphasis added) (original enactment by Congress, effective July 1, 1975), *quoted in* Nance, *Verbal Completeness*, *supra* note 8, at 59 & n.27; *see also* 1 MUELLER & KIRKPATRICK, *supra* note 69 (describing Rule 106 as a “force the proponent rule”).

139. Nance, *Verbal Completeness*, *supra* note 8, at 59 n.28; 1 WEINSTEIN FEDERAL EVIDENCE, *supra* note 62, § 106App.02.

140. FED. R. EVID. 106 (emphasis added) (amended 1987); *see* 1 WEINSTEIN FEDERAL EVIDENCE, *supra* note 62, § 106App.02.

141. The restyled Rules went into effect December 1, 2011.

142. Nance, *A Theory*, *supra* note 20, at 845-46.

143. ADVISORY COMMITTEE MINUTES OCT. 18, 2002, *supra* note 91, at 3; ADVISORY COMMITTEE MINUTES APR. 25, 2003, *supra* note 11, at 8.

144. See ADVISORY COMMITTEE MINUTES OCT. 18, 2002, *supra* note 91, at 2.

the October 2002 meeting, Professor Capra submitted his memorandum on Rule 106, indicating that the courts and commentators were in dispute over whether the rule operated as an independent rule of admissibility.<sup>145</sup> The Committee “noted that while the courts appeared to be in dispute over the existence of a trumping function, this dispute [did] not seem to make a real difference in the cases.”<sup>146</sup> In light of this discussion, Professor Capra prepared a memorandum on Rule 106, analyzing the split in authority and concluding “that few if any of the cases [with respect to their holdings] would be affected *by the addition or rejection* of a trumping function in Rule 106.”<sup>147</sup> Relying upon this analysis, at its April 2003 meeting, the Committee decided not to amend Rule 106 to include a trumping function because “the costs of amending Rule 106 to include a trumping function were far outweighed by the risks that a change in language would be misinterpreted, and concluded that any problems under the current rule were being well-handled by the courts.”<sup>148</sup>

While the Committee did not explicitly state that Rule 106 possessed a trumping function, it considered the costs and benefits of amending Rule 106 to include a trumping function.<sup>149</sup> This effort would have been misplaced had the Committee thought otherwise—that a trumping function did not exist under Rule 106.

#### D. A Focus on Rule 403

A broader treatment of Rule 106 to include all evidence—whether otherwise admissible or not—would address the purpose of Rule 403<sup>150</sup> with less complexity. When addressing Rule 403 in a Rule 106 context, some authorities focus on the problems of the additional evidence rather than the original evidence.<sup>151</sup> However, this overlooks the prejudicial impact of the original misleading statement. As Professor Dale Nance stresses in *A Theory of Verbal Completeness*: “Indeed, the risks of misleading inaccuracies usually associated with a party’s presentation of her own out-of-court statements for the truth

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145. *Id.* at 3-4.

146. ADVISORY COMMITTEE MINUTES APR. 25, 2003, *supra* note 11, at 8-9.

147. *Id.* at 9 (emphasis added).

148. *Id.*

149. ADVISORY COMMITTEE MINUTES OCT. 18, 2002, *supra* note 91.

150. FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

151. See 21A WRIGHT ET AL., *supra* note 19, § 5078.2; 2 GRAHAM, *supra*, note 65; 1 SALTZBURGET AL., *supra* note 65, at 97 (citing *United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986)); Memorandum from Daniel J. Capra, Professor, Fordham Univ. Sch. of Law, to the Advisory Comm. on Evidence Rules (Apr. 1, 2003) [hereinafter Capra Memo], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Evidence/EV2003-04.pdf> (pdf pages 107-26).

thereof, even when that party does not testify, are overwhelmed by the likelihood of distortion accompanying the proponent's selective presentation of portions of the opponent's statement."<sup>152</sup> The admission of additional evidence under Rule 106 would serve as an alternative to the exclusion of the original misleading evidence under Rule 403.

Rule 106 and Rule 403 share many similarities. Both address the idea of fairness as well as the dangers of misleading evidence and undue delay. Under Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."<sup>153</sup> Similarly, Rule 106 only admits evidence "that in fairness ought to be considered at the same time" as the original statement.<sup>154</sup> The advisory committee notes for Rule 106 also parallel: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial."<sup>155</sup>

A Rule 403 analysis does not suit well the narrow context where the original evidence unfairly creates a misleading impression by taking a statement out of context. The difficulty with Rule 403 derives from (1) its complicated two-step analysis—evaluation of probative value and dangers followed by their comparison—and (2) its substantial tilt toward the admission of the contested evidence.<sup>156</sup> The admission of otherwise inadmissible evidence under Rule 106 would more fairly address the misleading context in two respects.

First, a Rule 106 analysis would focus on the admission of additional explanatory evidence rather than exclusion of the original misleading evidence.<sup>157</sup> Within the misleading impression context, the exclusion of the original evidence under Rule 403 would not necessarily erase its prejudicial impact upon the jury—despite any instructions to the contrary. The addition of context would better rectify the situation by giving the jury the rest of the story.

Second, a Rule 106 analysis would be simpler and more neutral than one under Rule 403. The focus would be to evaluate the fairness of admitting additional explanatory evidence (a one-step analysis) rather than to evaluate the probative value of either the original or the additional evidence and then determine whether the dangers of unfair prejudice substantially outweighed such probative value<sup>158</sup> (a two-step analysis). Otherwise inadmissible evidence would come in freely under Rule 106 for the sole purpose of correcting a misleading

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152. Nance, *A Theory*, *supra* note 20, at 846.

153. FED. R. EVID. 403.

154. FED. R. EVID. 106.

155. FED. R. EVID. 106 advisory committee's note (referring to remedial measures undertaken later in trial to correct the misleading impression).

156. *See* FED. R. EVID. 403.

157. *But see* discussion *infra* Part IV.

158. FED. R. EVID. 403; *see, e.g.*, *United States v. LeFevour*, 798 F.2d 977, 983-84 (7th Cir. 1986).

impression.

*E. A Focus on the Criminal Defendant and Rule 801(d)(2)*

During a criminal trial, the prosecutor routinely admits the defendant's self-incriminating statements under Rule 801(d)(2).<sup>159</sup> With his life, liberty, and future livelihood at stake, the defendant's arsenal should include an equally powerful exception to the rule against hearsay for the limited purpose of correcting a misleading impression. Without Rule 106,<sup>160</sup> the jury would never know the rest of the story.<sup>161</sup> A court may invoke Rule 106 without harm; in fact, the rule lessens the hearsay dangers presented both by the original misleading evidence and by the additional evidence. Further, the admission of otherwise inadmissible evidence through Rule 106 counters any burden that a court may place upon a criminal defendant's Fifth Amendment right not to testify.<sup>162</sup>

1. *Lessening the Hearsay Dangers of the Original Misleading Evidence.*—As a responsive—as opposed to a proactive—rule,<sup>163</sup> Rule 106 lessens the hearsay dangers presented by the original misleading evidence. Although the rationale behind the Rule 801(d)(2) hearsay exception is based on an adversarial concept—that it is fair to hold a party opponent to her previous statements—rather than reliability, the reliability of any evidence admitted under Rule 801(d)(2) has already been called into question by virtue of its hearsay origins.<sup>164</sup> A Rule 106 motion makes that portion appear even less reliable.<sup>165</sup>

159. FED. R. EVID. 801(d)(2).

160. FED. R. EVID. 106.

161. See John D. Cline, *It Is Time to Fix the Federal Criminal System*, 35-SEP CHAMPION 34, 36 (2011) (presuming a defendant's self-incriminating statements under Rule 801(d)(2)(A) would be admissible under Rule 106 and further arguing, nevertheless, that "[t]his imbalance permits the government to select inculpatory snippets from a defendant's wiretapped conversations, FBI interview, or civil deposition testimony while barring the defendant from introducing the exculpatory portions except to the limited extent [Rule 106] requires. The defendant's apparently inculpatory statements are thus wrenched out of context, and the jury is left with the distorted impression that the defendant spoke and thought about nothing but criminal conduct." (footnote omitted)).

162. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself* . . ." U.S. CONST. amend V (emphasis added).

163. A court may invoke Rule 106 only in response to the introduction of another statement. FED. R. EVID. 106 ("If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time."); see Nance, *A Theory*, *supra* note 20, at 835.

164. Interview with Jeffrey O. Cooper, Assoc. Professor of Law, Ind. Univ. Robert H. McKinney Sch. of Law in Indianapolis, Ind. (Oct. 26, 2011).

165. *Id.*

Therefore, in order to restore confidence in the original misleading evidence, a court must admit otherwise inadmissible evidence<sup>166</sup> under Rule 106 to provide context and clarification.

2. *Lessening the Hearsay Dangers of the Additional Explanatory Evidence.*—Similarly, as a responsive—as opposed to a proactive—rule, Rule 106 lessens the hearsay dangers of the additional evidence. The lack of cross-examination, and thus reliability, is a common problem with the admission of hearsay statements.<sup>167</sup> Within the context of 801(d)(2) also lurks the danger of lack of candor. Most likely, a defendant will always wish to admit his self-serving statements. However, as Professor Nance correctly points out, “[T]hat the proponent has already chosen to inject the statement into the trial of the issue assures the tribunal that the proponent has the wherewithal to challenge the opponent’s version of the complete statement, an important check upon total fabrication of self-serving hearsay.”<sup>168</sup> After all, when the proponent cleverly admits a portion of an otherwise inadmissible hearsay statement for the truth of the matter asserted—yet also consciously creates a misleading impression in favor of his case—fairness demands that a court admit the remainder under Rule 106 for the purpose of providing context and clarification and avoiding jury confusion.

3. *The Fifth Amendment Right Not to Testify.*—Both commentators and courts recognize that special considerations accompany motions made by criminal defendants.<sup>169</sup> These authorities voice concern that a bar on the admission of otherwise inadmissible evidence under Rule 106 would unduly burden a defendant’s Fifth Amendment right not to testify—that a defendant would be coerced into “testify[ing] in order to get what he feels is a full explanation admitted into the record as substantive evidence.”<sup>170</sup> In *United States v. Walker*,<sup>171</sup> the Seventh Circuit explained:

In criminal cases where the defendant elects not to testify, as in the present case, more is at stake than the order of proof. If the Government is not required to submit all relevant portions of prior testimony which

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166. In the 801(d)(2) context, such evidence could be a portion of the same statement as the original evidence; see FED. RULE EVID. 801(d)(2).

167. Gillespie, *supra* note 20, at 392 & n.91 (claiming also that exceptions to the rule against hearsay must have “circumstantial guarantee[s] of trustworthiness (citing FED. R. EVID. 801 advisory committee’s note)).

168. Nance, *A Theory*, *supra* note 20, at 846.

169. See Gillespie, *supra* note 20, at 385 & n.27 (stating that courts tend to “show[] more sensitivity” (citing *United States v. Sutton*, 801 F.2d 1346, 1369 (D.C. Cir. 1986)); *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981)); see also Kurland, *supra* note 65, at 898-99; O’BRIEN & GOLDMAN, *supra* note 75.

170. Kurland, *supra* note 65, at 899 (noting that the original evidence must be misleading and that merely desiring a fuller explanation would be insufficient); see also Gillespie, *supra* note 20, at 389-92.

171. 652 F.2d at 708.

further explain selected parts which the Government has offered, the excluded portions may never be admitted. Thus there may be no “repair work” which could remedy the unfairness of a selective presentation later in the trial of such a case. While certainly not as egregious, the situation at hand *does bear similarity to* “[f]orcing the defendant to take the stand in order to introduce the omitted exculpatory portions of [a] confession [which] is a denial of his right against self-incrimination.”<sup>172</sup>

The D.C. Circuit also supports this reasoning.<sup>173</sup>

Not all circuits are in agreement with the Seventh or D.C. Circuits. In *United States v. Holden*,<sup>174</sup> the Sixth Circuit emphasized, “The mere fact that evidence admitted under Rule 801(d)(2) motivates a defendant to take the stand does not mean that he was compelled to do so in a manner that implicates his privilege against self-incrimination.”<sup>175</sup> However, such reasoning overlooks the effect that a ban on the admission of otherwise admissible evidence would have under Rule 106. Although such a ban may not compel a violation of the Fifth Amendment, it would burden such a right. The admission of otherwise inadmissible evidence under Rule 106 would counter this problem. Considering that much is at stake for the criminal defendant and that Rule 106 lessens hearsay dangers, a ban makes little sense.

### III. A PRACTICAL PROBLEM: *UNITED STATES V. HOLDEN*

#### A. *The 2003 Decision Not to Amend Rule 106*

At the October 2002 meeting of the Advisory Committee on Evidence Rules, the Reporter, Professor Capra, submitted his memorandum on Rule 106, indicating that the courts and commentators were in dispute over whether the rule operated as an independent rule of admissibility.<sup>176</sup> At the April meeting, the Committee “noted that while the courts appeared to be in dispute over the existence of a trumping function, this dispute [did] not seem to make a real difference in the cases.”<sup>177</sup> In his memorandum, Professor Capra concluded:

[F]ew if any of the cases would be affected by the addition or rejection of a trumping function in Rule 106. The cases rejecting a trumping function would come out the same because the proffered evidence would

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172. *Id.* at 713 (alterations in original) (emphasis added) (quoting 1 WEINSTEIN’S EVIDENCE, *supra* note 30, ¶ 106[01] at 106-9).

173. *United States v. Sutton*, 801 F.2d 1346, 1370 (D.C. Cir. 1986) (“Since this was a criminal case Sucher had a constitutional right not to testify, and it was thus necessary for Sucher to rebut the government’s inference with the excluded portions of these recordings.” (citing *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981))).

174. 557 F.3d 698 (6th Cir. 2009).

175. *Id.* at 706.

176. ADVISORY COMMITTEE MINUTES OCT. 18, 2002, *supra* note 91, at 3.

177. ADVISORY COMMITTEE MINUTES APR. 25, 2003, *supra* note 11, at 8.

still have been excluded under the circumstances, *most commonly because the proffered statements were not needed to correct any misimpression*. And the cases adopting a trumping function *could all have been decided on other grounds*, most commonly because the proponent “opened the door” to completing evidence, or because the “fairness” language of Rule 106 mandated the result.<sup>178</sup>

Professor Capra correctly asserts that the holdings of most cases would be unaltered should a court admit otherwise impermissible evidence under Rule 106. However, a court rarely bases its opinion upon one facet of law. Rather, a well-written legal argument often supports a court’s conclusion with alternative assumptions and chains of reasoning. In Capra’s memorandum, the jurisdictions that did not recognize a trumping function also happened to reject the contested additional evidence for other reasons.<sup>179</sup>

Professor Capra also recognized that his view could be incongruent with the holding in *United States v. Ortega*<sup>180</sup>—where the court did not specify whether the portions of a confession presented by the prosecution were misleading.<sup>181</sup> Further, the Committee’s rejection of an amendment because of the lack of a “real effect on the results of the cases”<sup>182</sup> left open the possibility that a federal court could base its decision solely on its belief that Rule 106 did not possess a trumping function. Time has played out the consequences. In at least one case since 2003, the court’s holding hinged upon its unexplained assertion that

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178. *Id.* at 9 (emphases added).

179. See Capra Memo, *supra* note 151, at 5-8; see, e.g., *United States v. Ortega*, 203 F.3d 675, 682-83 (9th Cir. 2000) (finding Rule 106 does not extend to oral statements), *holding modified by* *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007); *United States v. Edwards*, 159 F.3d 1117, 1126-27 (8th Cir. 1998) (explaining that the initially proffered portions of the various confessions were not misleading); *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (finding the omitted statements unnecessary for completeness); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) (stating that Rule 106 does not cover oral statements and that omitted portion was unnecessary to correct a misimpression); *Phoenix Assoc. III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995) (finding working papers independently admissible as working papers); *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1375-76 (2d Cir. 1988) (finding letter was also excluded under Rule 403); *United States v. Woolbright*, 831 F.2d 1390, 1395-96 (8th Cir. 1987) (holding honeymoon statement properly admitted as residual hearsay); *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) (finding Rule 106 inapplicable to oral statements but determining that defendants’ completing statements should have been admitted under the state-of-mind exception to the hearsay rule); *United States v. Costner*, 684 F.2d 370, 373-74 (6th Cir. 1982) (portion offered by the government did not correct any misimpression); *United States v. Burrenson*, 643 F.2d 1344, 1349 (9th Cir. 1981) (finding the additional excluded portion was irrelevant).

180. 203 F.3d 675 (9th Cir. 2000), *holding modified by* *United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007).

181. *Id.* at 682-83.

182. Capra Memo, *supra* note 151, at 9.

hearsay could not be admitted through Rule 106.<sup>183</sup>

For those jurisdictions recognizing a trumping function within Rule 106, Professor Capra noted that a court could decide these “minority of cases” under either an “opening the door” principle or nonhearsay purpose.<sup>184</sup> Or such language in these minority cases constituted dictum.<sup>185</sup> Although a court might reason such cases under a common law principle, this does not alter the reality that these circuit courts based their reasoning upon the admission of otherwise inadmissible evidence through Rule 106.

#### B. *United States v. Holden*

Although Professor Capra’s memorandum characterized the “apparent conflict in the cases” as “more [of] an academic problem than a practical one” because “the Rule [had] not been used to reach an unfair result,”<sup>186</sup> the recent case of *United States v. Holden*<sup>187</sup> unfairly hinged on the Sixth Circuit’s exclusion of hearsay under Rule 106.

In *Holden*, Mike Holden, the operator of a water treatment plant, was convicted of two counts: first, “knowingly falsifying and concealing material facts in a matter within the jurisdiction of the Environmental Protection Agency” and, second, “falsifying documents with the intent to impede an investigation.”<sup>188</sup> The district court held that certain admissions Holden made to an agent of the Tennessee Bureau of Investigation were admissible under Rule 801(d)(2).<sup>189</sup> However, when Holden sought to bring in other statements from the same conversation during cross-examination, the court sustained the government’s hearsay objections.<sup>190</sup> The court held that Holden had waived his rights under the rule of completeness by failing to invoke the rule at the time the purportedly misleading evidence was introduced.<sup>191</sup> Holden appealed his conviction.<sup>192</sup>

The Sixth Circuit found the trial court erred because Rule 106 “does not circumscribe the right of the adversary to [introduce completing evidence] on cross-examination or as part of his own case.”<sup>193</sup> However, “this error was harmless . . . [b]ecause the statements Holden s[ought] to introduce [were]

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183. *United States v. Holden*, 557 F.3d 698, 706 (6th Cir. 2009); see *infra* Part III.B.

184. Capra Memo, *supra* note 151, at 8; see, e.g., *United States v. Gravely*, 840 F.2d 1156, 1163-64 (4th Cir. 1988); *United States v. Sutton*, 801 F.2d 1346, 1368-69 (D.C. Cir. 1986); *United States v. Rubin*, 609 F.2d 51, 70 (2d Cir. 1979).

185. See, e.g., *United States v. LeFevour*, 798 F.2d 977, 981-82 (7th Cir. 1986).

186. Capra Memo, *supra* note 151, at 1, 4.

187. 557 F.3d 698 (6th Cir. 2009).

188. *Id.* at 700.

189. *Id.* at 705.

190. *Id.* at 705-06.

191. *Id.*

192. *Id.* at 702.

193. *Id.* at 706.



inadmissible hearsay” and properly excluded.<sup>194</sup> Further, “Rule 106 [was] . . . not designed to make something admissible that should be excluded.”<sup>195</sup> Contrary to the findings Professor Capra presented to the Committee,<sup>196</sup> how a court interprets Rule 106 does have a real impact on cases.

### C. Need for Simplicity & Uniformity

An amendment to Rule 106, namely clarification that the rule contains a trumping function, would create simplicity and uniformity in how courts apply the rule. In his memorandum, while reserving to the Committee the decision “whether the process-oriented gains of an explicit trumping function [would] justify the costs of an amendment,” Professor Capra quoted Professors Wright and Graham in espousing the benefits:

No self-respecting judge would permit a party to manipulate the rules of evidence to put on a case that looked like an advertisement for a bad movie—bits and pieces taken out of critical context to create a misleading impression of what was really said. If this cannot be done in a forthright manner under Rule 106, the judge must find some other way to see that justice is done. *He can accomplish this in a number of ways*; a fictional waiver of the right to object can be based on the introduction of the part of a writing, hearsay objections can be surmounted by ruling that evidence is not offered for the truth of the matter but only to aid in interpretation, other rules can be strained or deliberately misinterpreted, and if all else fails, the part of the evidence introduced by the proponent can be stricken under Rule 403. In short, there will be few cases in which the judge cannot reach the result that sound policy compels; *to say that he cannot do this under Rule 106 is to prefer the costly, roundabout, fictional method over the direct and honest approach.*<sup>197</sup>

In addition to simplicity, it would be more fair and just—especially within the 801(d)(2) context—if evidence law were applied uniformly across the federal courts.<sup>198</sup>

## IV. THE EXCLUSION OF MISLEADING EVIDENCE: *UNITED STATES V. LEFEVOUR*

An interesting question arises when the necessary completing evidence is

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194. *Id.* at 705-06.

195. *Id.* at 706 (quoting *United States v. Costner*, 684 F.2d 370, 373 (6th Cir.1982)).

196. *See* Capra Memo, *supra* note 151, at 1.

197. *Id.* at 9 (emphases added) (quoting 21 WRIGHT & GRAHAM, *supra* note 110; *see also* *United States v. Sutton*, 801 F.2d 1346, 1369 n.18 (D.C. Cir. 1986)).

198. It is important to note that the Federal Rules of Evidence are mirrored at the state level. Compare FED. R. EVID. 106, with IND. R. EVID. 106 (mirroring the pre-2011 version of Rule 106) and MISS. R. EVID. 106 (mirroring the pre-1987 version of Rule 106). But *see* OHIO R. EVID. 106 (adding that the additional evidence must be otherwise admissible). Accordingly, an amendment to Rule 106 would have far reaching effects.

inadmissible because of privilege—an unlikely but plausible situation.<sup>199</sup> For example, suppose a party successfully admits incriminating selections of a letter written by the party opponent into evidence—a letter that tells a story but also contains privileged attorney-client information. In *United States v. LeFevour*,<sup>200</sup> the Seventh Circuit proposed the exclusion of the original misleading evidence.<sup>201</sup> Exclusion would offer an escape valve for the rare situation when Rule 106 demands the introduction of additional, but privileged, evidence.<sup>202</sup> However, authorities do not universally endorse this position.<sup>203</sup> Accordingly, an amendment will most likely be necessary. Such an amendment would offer courts the option of excluding evidence that a party has strategically selected to create a factually true, although misleading, impression.

#### A. *United States v. LeFevour*

In *LeFevour*, Judge Posner agreed with the admission of otherwise inadmissible evidence under Rule 106:

If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too. The party against whom that evidence is offered can hardly care which route is taken, provided he honestly wanted the otherwise inadmissible evidence admitted only for the purpose of pulling the sting from evidence his opponent wanted to use against him. Rule 106 was not intended to override every privilege and other exclusionary rule of evidence in the legal armamentarium, so there must be cases where if an excerpt is misleading the only cure is to exclude it rather than to put in other excerpts.<sup>204</sup>

In *LeFevour*, the additional evidence proffered by the defendant—a portion of a tape recording—was inadmissible under Rule 106, not because of its hearsay nature, but rather because the original evidence was not misleading.<sup>205</sup> In that case, the defendant LeFevour, a former state court judge, was convicted of violating the RICO Act, committing mail fraud, and filing false income tax returns during a fourteen-year career of taking bribes.<sup>206</sup> At trial, the government played a portion of a taped conversation between LeFevour and a police

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199. Interview with Jeffrey O. Cooper, *supra* note 164.

200. 798 F.2d 977 (7th Cir. 1986).

201. *Id.* at 981; see 21A WRIGHT ET AL., *supra* note 19, § 5078.3 (describing this situation as “The Rule 403 blackjack”).

202. See discussion *infra* Part IV.B.

203. Gillespie, *supra* note 20.

204. *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986) (emphasis added); see EMERGING PROBLEMS, *supra* note 9, at 22.

205. *LeFevour*, 798 F.2d at 981.

206. *Id.* at 979.

officer.<sup>207</sup> LeFevour moved to admit an excluded portion of the recording wherein the officer told the FBI agents who had wired him that “he had ‘put on his best scare act’ with LeFevour.”<sup>208</sup> However, the trial judge ruled the additional evidence “inadmissible because it would confuse the jury and was not relevant to impeaching [the officer’s] testimony.”<sup>209</sup>

The Seventh Circuit affirmed.<sup>210</sup> Although both conversations were on the same tape, there was no misleading impression created by the admitted conversation because the government’s purpose admitting the tape recording into evidence was to show that LeFevour knew the identity of a witness’s lawyer; such a statement was “complete in itself.”<sup>211</sup>

This portion of Judge Posner’s opinion may safely be characterized as dicta, as the evidence in that case was unnecessary to correct a misleading impression.<sup>212</sup> However, Judge Posner offers a novel solution to the dilemma when the additional evidence permitted under Rule 106 is otherwise barred by privilege. *LeFevour* retains support in the Seventh Circuit.<sup>213</sup>

#### *B. Exclusion as an Escape Valve*

Exclusion under Rule 106 can serve as an escape valve when additional evidence that would otherwise correct a misleading impression is inadmissible due to privilege. To leave the original misleading evidence would be unjust, creating an opportunity for opposing parties to carefully select evidence with the knowledge that any opposing additional evidence most likely would be inadmissible. In essence, exclusion under Rule 106 serves as an alternative to exclusion under Rule 403.<sup>214</sup> In addition, exclusion under Rule 106 would remove the undue emphasis on admissibility in this unique situation where the danger of the original evidence is principally that it lacks the rest of the story. And exclusion under Rule 106 would offer a simpler analysis, speeding

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207. *Id.* at 980.

208. *Id.*

209. *Id.*

210. *Id.* at 985.

211. *Id.* at 981-82.

212. *Id.* at 981 (“But this is not a matter we need pursue further here, as we do not think there was any danger of a misleading impression.”); see *United States v. Pendas-Martinez*, 845 F.2d 938, 944 n.10 (11th Cir. 1988) (characterizing as dictum); *United States v. Benton*, 54 M.J. 717, 723 n.7 (A. Ct. Crim. App. 2001) (describing as a “comment”). But see *Liftee v. Boyer*, 117 P.3d 821, 833-34 (Haw. Ct. App. 2005, as amended) (referring to *LeFevour*’s ruling and describing “fairness” as the basis for admittance in these “minority” cases).

213. See *United States v. Glover*, 101 F.3d 1183, 1188 (7th Cir. 1996) (finding that neither the trial court nor the Seventh Circuit questioned defense counsel’s statement of the law that “Federal Rule of Evidence 106 required that nearly all of his prior testimony be entered as evidence in the second trial, or, alternatively, that the entire testimony *be excluded*.”) (emphases added); 1 WEINSTEIN FEDERAL EVIDENCE, *supra* note 62, at 106-17.

214. See discussion *supra* Part II.D (focusing on Rule 403).

efficiency in the decision of evidentiary issues.

### C. Rule 106 as Written

Most likely, Rule 106 must be amended to enact an exclusionary function. Under Rule 106, “[i]f 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.”<sup>215</sup> As written, Rule 106 appears to be an inclusionary—rather than an exclusionary—rule.<sup>216</sup> Professor Nance notes that Dean McCormick grouped the rule of completeness (§ 56: “The Effect of the Introduction of Part of a Writing or Conversation) with two other inclusionary rules of general applicability: Waiver of Objection (§ 55) and Curative Admissibility (§ 57: “Fighting Fire with Fire: Inadmissible Evidence as Opening the Door”).<sup>217</sup> Although McCormick also located these rules under “Chapter 6. The Procedure of Admitting *and Excluding* Evidence,”<sup>218</sup> it is difficult to stray far from the text of Rule 106, which expressly condones the introduction of additional evidence but does not mention the exclusion of the original misleading evidence.

### D. Practical Effect

An exclusionary amendment to Rule 106 would have the largest impact before the admission of excerpts of a statement. After a jury hears the evidence, exclusion by a strike is unlikely to correct a misleading impression.<sup>219</sup> However, motions in limine or objections upon the offer of excerpts could effectively invoke the exclusionary (or, in the alternative, trumping) function of Rule 106. Such invocations have worked. In *Brewer v. Jeep Corp.*,<sup>220</sup> the Eighth Circuit upheld the trial court’s refusal to admit a film dealing with jeep rollovers unless the filmmakers’ companion report was also offered into evidence.<sup>221</sup> The film had been commissioned by the defendant, and the parties agreed to admit it as an admission of a party opponent.<sup>222</sup>

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215. FED. R. EVID. 106 (emphasis added).

216. Nance, *Verbal Completeness*, *supra* note 8, at 52 (“[Rule 106’s] peculiarity lies in the fact that, unlike almost all other admissibility rules, it is *inclusionary* rather than *exclusionary*.”); *see also* Gillespie, *supra* note 20, at 385 n.34 (“Judge Posner’s analysis while appealing, especially when the remainder is considered privileged, cannot withstand close scrutiny [sic]. . . . Rule 106 is a rule of inclusion, not exclusion; thus, a court acting within its sound discretion cannot exclude evidence pursuant to Rule 106.”).

217. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE §§ 55-57, at 141-49 (3d ed. 1984).

218. *Id.* ch.6, at 122 (emphasis added).

219. *Id.* § 52, at 126-27.

220. 724 F.2d 653 (8th Cir. 1983).

221. *Id.* at 657.

222. *Id.*

## CONCLUSION

As written, Rule 106 extends to the admission of otherwise inadmissible evidence. The rule expresses the common law doctrine of completeness, which served a trumping function in cases such as the trial of Algernon Sidney. Under a textual, functional, and legislative analysis, as well as a focus on Rule 403 and Rule 801(d)(2), Rule 106's trumping function—or at least the need for its recognition—could not be more apparent. The express recognition of such a trumping function through an amendment would advantageously serve the purposes of the Rules of Evidence with minimal setbacks. Further, an amendment to exclude misleading evidence when the necessary completing evidence is inadmissible because of privilege would offer the trial judge a simple and effective alternative to Rule 403. Under both amendments, following Judge Posner's formulation in *LeFevour*,<sup>223</sup> Rule 106 would read as follows:

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—*whether otherwise admissible or not*—that in fairness ought to be considered at the same time. *In the alternative*, if the additional part or any other writing or recorded statement is inadmissible because of privilege, the original misleading evidence must be excluded too.

At trial, both parties have been crafting a story—a story of what happened and who is responsible. Rather than permit the cherry-picked admission of evidence, an amended Rule 106 would foster an atmosphere of fairness with the twin goals of “ascertaining the truth and securing a just determination”—much in line with the purpose of the Rules of Evidence.<sup>224</sup> And the jury would know the rest of the story.

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223. *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986).

224. FED. R. EVID. 102.