Article

Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106

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"[T]he witness may have 'told the truth, but used it like a lie.'"[1]

INTRODUCTION

In recent years, there have been many calls and suggestions for a more equitable criminal justice system.[2] Although sometimes overlooked in that dialogue, the fair operation of the Federal Rules of Evidence is a crucial component in ensuring such an equitable system. Unfortunately, there are certain rules—and rule applications—that can lead to unfair results. For example, assume that a law enforcement witness in a homicide prosecution testifies that the accused defendant orally confessed to buying the firearm used to commit the murder—but conveniently fails to explain that the defendant, in his statement,

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1. 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 107.1 (4th ed. 2019) (quoting EURIPIDES, THE BACCHAE OF EURIPIDES 67 (Donald Sutherland trans., 1968)).

2. *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (permitting a court to order a reduced sentence for a crime committed before the Fair Sentencing Act of 2010 as if the act had been in place at the time of sentencing).

also emphasized that he sold the weapon months *before* the murder.[3] The prosecution has dissected the defendant's statement in a manner that creates a misleading impression about what he actually stated. A reasonable juror hearing only that the defendant admitted buying the weapon would logically assume that he admitted owning the gun *at the crucial time of the murder*. Evidence rules that permit such a distorted and inaccurate presentation of a statement, and that deny the wronged defendant any remedy, fall far short of the equitable ideal.

And yet, the interpretation of Federal Rule of Evidence 106 in some jurisdictions permits such an unjust result. Rule 106, also known as the "rule of completeness," is premised upon notions of fundamental fairness and ostensibly permits a party to force its adversary to introduce the remainder of a written or recorded statement when the adversary has offered a portion in a selective and misleading manner.[4] In one important respect, the federal courts have applied Rule 106 uniformly. They have properly interpreted the fairness threshold for invoking the Rule narrowly, recognizing the need for completion only when the first-introduced statement creates an inaccurate and distorted inference about its true meaning and the completing statement is necessary to eliminate the distortion and to make the statement accurate as a whole.[5] So limited, Rule 106 is a critical tool necessary to achieving the underlying fairness goals of the Federal Rules of Evidence generally, as outlined in Rule 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.*"[6]

Despite these important principles, inconsistent and unfair application of Rule 106 has plagued the Rule since its adoption in 1975 and has frustrated its core purpose of demanding fair presentation of out-

3. *See* United States v. Bailey, 322 F. Supp. 3d 661, 664 (D. Md. 2017) (describing this scenario as a "classic" example of distortion).

4. FED. R. EVID. 106.

5. *See, e.g.*, United States v. Williams, 930 F.3d 44, 58, 60 (2d Cir. 2019) (explaining that the prosecution's introduction of the defendant's confession to owning a firearm did not require completion with the defendant's earlier denial of ownership; omission of the initial denial did not distort or alter the meaning of the subsequent confession); United States v. Hird, 901 F.3d 196, 217 (3d Cir. 2018) (rejecting completion where the excerpt of testimony defendant sought to admit "occurs many pages before the testimony" offered by the prosecution, was "separated by the passage of time during questioning" and was "unrelated in the overall sequence of questions"), *superseded on reh'g*, 913 F.3d 332 (2019) (quoted portion of decision unchanged).

6. FED. R. EVID. 102 (emphasis added).

of-court statements. Most significantly, a defendant like the hypothetical murder defendant described above will run headlong into a prosecutorial hearsay objection when he attempts to utilize Rule 106. The prosecution will emphasize that the government may introduce the defendant's own statements *against him* pursuant to the hearsay exemption for party opponent statements found in Federal Rule of Evidence 801(d)(2)(A). But it will argue—correctly—that the defendant may not introduce his *own* hearsay statements under that one-way exemption.[7] The prosecution can claim that the completion right found in Rule 106 does not trump the hearsay doctrine. In jurisdictions that accept this argument and sustain the prosecution's objection, the jury is left with the impression that the defendant admitted to owning the murder weapon at the time of the killing, *when he did no such thing*. Alternatively, the prosecution may object that the defendant's confession was made orally and that Rule 106 offers the defendant no recourse because it permits completion only of written or recorded statements.[8] Again, if this objection is sustained, the fact-finder is left with a distorted scrap of the truth. Due to the ubiquitous use of criminal defendants' incriminating statements by prosecutors, the risk of unfair cherry picking has the potential to arise with great frequency.

The unfair application of a rule designed to promote fairness was made possible because the original drafters of Rule 106 chose to craft a rule of completeness that only "partially" codified the common law doctrine of completeness.[9] The drafting history of Rule 106 reveals that its creators were focused primarily upon the *timing* of completion and crafted a rule creating a right to "interrupt" an adversary's trial presentation to demand completion of a partial and misleading statement "at that time."[10] This focus on timing led the drafters to include only "writings" or "recorded" statements in the text of Rule 106, on the theory that proof of unrecorded oral statements would

7. *See Bailey*, 322 F. Supp. 3d at 662 ("[T]he Government argued that anything Bailey told the agents . . . that [the government] intended to introduce during its case in chief would be admissible non-hearsay, but that anything exculpatory that Bailey told them that he intended to elicit . . . would be inadmissible hearsay."); *cf.* United States v. McDaniel, 398 F.3d 540, 545 (6th Cir. 2005) ("Rule 801(d)(2), however, 'does not extend to a party's attempt to introduce his or her own statements through the testimony of other witnesses.'").

8. *See* FED. R. EVID. 106 (applying only to "a writing or recorded statement").

9. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171–72 (1988) (stating that Rule 106 is a partial codification of the common law rule of completeness).

10. *See* FED. R. EVID. 106 advisory committee's note (noting "the inadequacy of repair work" when completion is delayed to a later point in a trial).

unnecessarily interrupt direct examination.[11] But expressly covering only writings and recordings in Rule 106 text has left completing oral statements out in the cold to be admitted through common law doctrines, other evidence rules, or *not at all*. Most importantly, Rule 106—which is a rule about the admission of out-of-court statements—makes no mention of the hearsay rule that could be held to prevent completion with otherwise inadmissible statements.

This incomplete rule of completeness has left federal courts struggling for decades with objections to oral statements and otherwise inadmissible hearsay offered to correct a misleading partial presentation of a statement. Although many federal courts admit oral statements and otherwise inadmissible hearsay statements when necessary to correct a misleading impression created by a partial presentation like the one posited above, others do not.[12] In some federal jurisdictions, therefore, the scenario presented above is a shocking reality—statements are presented in a misleading way and stand uncorrected. While that injustice could be visited on any litigant, it most often falls on criminal defendants.

Although the federal courts have been wrestling with the proper operation of Rule 106 since its adoption, they are no closer to a uniform and just interpretation of the provision than they were forty-five years ago. Accordingly, Rule 106 should be reconstructed to allow completion of oral statements and to permit completion with otherwise inadmissible hearsay whenever necessary to prevent distorted evidence from influencing the fact-finder improperly. Only then will the "rule of completeness" be truly complete.

This Article addresses the need to amend Rule 106 in four Parts. Part I describes the pre-Rules common law doctrine of completeness from which the more limited Federal Rule of Evidence 106 was crafted. Part I then traces the adoption of Rule 106 and the drafters' decision to "partially" codify the common law doctrine of completeness. Part II examines the federal cases and commentary interpreting Rule 106 since its adoption in 1975. Part II highlights the conflict and confusion surrounding Rule 106, revealing that it is high time for a change to bring fairness and uniformity to the rule of completion. Part III explores potential amendment alternatives for Rule 106 designed to address the fairness deficit currently permitted by some interpretations of the Rule and to create the uniformity across federal jurisdictions that the Federal Rules of Evidence were designed to establish.

11. *See id.* ("For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.").

12. *See, e.g.*, United States v. Adams, 722 F.3d 788, 826–27 (6th Cir. 2013).

Part IV concludes with a call to action, recommending an amendment to Rule 106 that would complete the work on a meaningful and just rule of completion—by allowing completion over a hearsay objection, and by covering oral statements specifically under the Rule.[13]

I. FEDERAL RULE OF EVIDENCE 106: THE ORIGIN STORY

American trials follow a formulaic order of proof, in which each party has an opportunity to prove her case or defense at an appointed stage of the proceeding.[14] During her turn, counsel seeks to present evidence that maximizes her client's likelihood of success. Although an adversary enjoys the right to object to evidence presented during her opponent's case and to cross-examine witnesses, she must wait her turn to present counterproof helpful to her client's position.[15]

The doctrine of completion represents one limited exception to this standard operating procedure, forbidding a party from "[telling] the truth, but us[ing] it like a lie" during her presentation of proof.[16] It prevents a party from using her right to present evidence during her case in chief in a way that would mislead the fact-finder, by allowing an adversary to interject with completing evidence whenever a party presents a partial statement in a way that distorts its true tenor.[17]

A. THE COMMON LAW DOCTRINE OF COMPLETENESS

The concept of completeness is one of fundamental fairness that courts have applied in some form since at least the seventeenth century.[18] In a leading case in 1897, *Carver v. United States*, the defendant

13. Although this Article focuses on the significant impact of Rule 106 in the context of a defendant's statements in a criminal case, this amendment would be advantageous to all litigants in civil and criminal cases alike.

14. *See* 1 WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 106-2.1 (Jack B. Weinstein & Margaret A. Berger eds., 1992) [hereinafter WEINSTEIN] ("American trial practice has traditionally given each side freedom to present the evidence favoring his side alone.").

15. FED. R. EVID. 103 (requiring a timely objection to an adversary's evidence); FED. R. EVID. 611(b) (limiting cross-examination that is outside the subject matter of the direct examination).

16. *See* BLINKA, *supra* note 1.

17. *See, e.g.*, United States v. Castro, 813 F.2d 571, 575–76 (2d Cir. 1987) (allowing completion only when necessary "to explain the [partial statement], to place [partial statements] in context, to avoid misleading the jury, or to ensure fair and impartial understanding").

18. 4 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2094 (2d ed. 1923) (describing the famous seventeenth century English trial of Algernon Sidney for sedition and illustrating the importance of completeness).

was convicted for murder after he shot his mistress.[19] The Supreme Court reversed his conviction due to a number of errors, including refusal to allow the defendant's witnesses to testify to what was said between the defendant and his mistress at the scene of the crime—after government witnesses were permitted to testify to a part of the same conversation. In finding error, the Court noted:

> If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. . . . [*W*]*here the whole or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary, or contradict it.*[20]

New York's Field Code marked the first attempt to codify the broad common law completeness doctrine in 1850, as follows:

> 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.[21]

This version of the principle of completeness was quite expansive, encompassing the partial presentation of "acts," as well as utterances, and suggesting that a party may not make partial presentations at all. This broad formulation of the completion doctrine suggests that "the whole on the same subject" may be inquired into by an adversary whenever a part of a statement or event is presented.[22]

Later, Dean Wigmore would characterize the doctrine more narrowly as one of "verbal completeness" requiring that the whole of a "verbal utterance" on a single topic or transaction be taken together.[23] Wigmore justified the exclusion of acts and occurrences from the doctrine of completeness on the grounds that, *inter alia*, acts are rarely so "inseparably united" that presentation of a single act or occurrence

19. Carver v. United States, 164 U.S. 694, 694–95 (1897).

20. *Id.* at 696–97 (emphasis added); *see also* Stevenson v. United States, 86 F. 106, 111 (5th Cir. 1898) (citing 1 BISH. CR. PROC. § 1241; *Carver*, 164 U.S. at 696) (explaining that it is "elementary" that "[w]here one part of a conversation is introduced, the other party is entitled to all that relates to the same subject, and all that may be necessary to fully understand the portion given"); Jackson v. State, 60 Ga. App. 142 (1939) (same).

21. 21A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5071 (2d ed. 2020) (quoting N.Y. COMM'RS ON PRAC. & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK § 1687, at 704–05 (1850)).

22. *Id.* (e.g., "when a letter is read, the answer may be given").

23. 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2094, at 594–95 (revised by James H. Chadbourn, 1978). For an in-depth study of the "complexity and confusion" surrounding the common law doctrine of completeness, see Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825, 829–60 (1995).

would mislead the fact-finder without presentation of others.[24] In contrast, Wigmore emphasized that verbal utterances are "attempts to express ideas in words" and that words may easily be distorted by presenting them in a piecemeal fashion out of context.[25] Wigmore cautioned that only remainders that concern the "same subject matter" and that explain the initially admitted utterance should be admitted for purposes of completion.[26]

Prior to the enactment of the Federal Rules of Evidence (Evidence Rules or Rules), courts permitted completion of both written and oral utterances, although they acknowledged the practical difficulties inherent in determining the "whole" of an oral utterance.[27] With respect to written utterances, checking for verbal precision and context was made relatively easy due to a written record of the precise utterances made.[28] In light of the challenges inherent in requiring verbal precision and entirety for oral utterances, courts typically accepted completion of oral statements when needed to provide the true "substance or effect" of a conversation.[29] Wigmore concluded that disputes about the accuracy of a witness's recollection of an oral statement constituted questions of credibility for the jury.[30]

With respect to the timing of completion, Wigmore articulated two categories of completion: "compulsory" and "optional."[31] Compulsory completeness represented the root of the modern interruption rule and required the *proponent* of an utterance to present the completing portion of a statement during her initial presentation.[32] Optional completeness on the other hand did not mandate completion by

24. 7 WIGMORE, *supra* note 23, § 2094, at 594.

25. *Id.* at 595.

26. 4 WIGMORE, *supra* note 18, § 2113, at 508–09; *see also* 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1:42, at 285 (4th ed. 2013) (noting that completion required a fact-specific inquiry and that courts considered factors such as "the nature of the part of a statement that is first offered, the nature of the balance, who offers the statement, what it is offered to prove, and the issues in suit" (citing 7 WIGMORE, EVIDENCE § 2094 (3d ed. 1940))).

27. *See* WEINSTEIN, *supra* note 14, at 106-4 to -5.

28. 7 WIGMORE, *supra* note 23, §§ 2102, 2104.

29. *Id.* § 2097, at 608–09 ("The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this substance as best he can from the impression left upon his memory. He may give his 'understanding' or 'impression' as to the net meaning of the words heard.").

30. *Id.* (quoting Bathrick v. Detroit Post & Trib. Co., 16 N.W. 172, 175 (Mich. 1883)).

31. *Id.* § 2095, at 607.

32. *Id.* (explaining that compulsory completeness means that a proponent of an utterance "can offer no part unless he offers the whole").

the original proponent of a statement, but rather permitted the *opponent* of the initial statement to present the completing remainder herself, either on cross-examination of the witness who testified to the partial statement, or later during her own case.[33] Although there was some conflict in the cases concerning the proper timing of completion, optional completion of both written and oral statements by an opponent during cross-examination or her own case was commonly allowed.[34] In contrast, courts were more reluctant to require "interruption" of a proponent's case to complete partially presented statements, particularly oral statements.[35] Wigmore defended this reluctance, noting that the "whole" of an oral conversation is less distinct than the entirety of a written document, and that multiple witnesses might be required to convey the entirety of an oral conversation—making compulsory completion during the proponent's case in chief a more difficult enterprise.[36]

Common-law courts also grappled with the issue of completing statements that were otherwise inadmissible. For example, in *Rosenberg v. Wittenborn*, the plaintiff in an accident case elicited from a police officer the defendant's damning admissions at the scene of the accident that his light was "red" when he entered the intersection and that he was going approximately "30 miles per hour."[37] When the defense sought to ask the officer on cross about the defendant's simultaneous explanation that he went through the red light *because his brakes failed*, the plaintiff raised a hearsay objection.[38] The California Court of Appeal found that completion with otherwise inadmissible hearsay was necessary to provide a fair depiction of the defendant's statements at the scene of the accident:

> Considerations of fair play demanded that the portion of the conversation placed in evidence by plaintiffs be supplemented by the qualifying and

33. *Id.* § 2113, at 653–54.

34. *Id.* § 2099, at 618 (noting the "copious rulings allowing the opponent afterwards to put in the remainder" of an oral utterance and "the absence of rulings requiring the proponent to put in the whole at first"); *id.* § 2113, at 653 ("[T]here is and could be no difference of opinion as to the *opponent's right*, if a part only has been put in, himself to *put in the remainder*. Indeed, it is the very fact of this later opportunity and right which . . . has frequent bearing upon the question whether it is worthwhile to require it from the proponent in the first instance.").

35. *Id.* § 2099, at 618 (explaining that judges only required a proponent to admit a remainder during its own presentation in special circumstances, such as when presenting former testimony).

36. *Id.* at 619.

37. Rosenberg v. Wittenborn, 3 Cal. Rptr. 459, 462 (Dist. Ct. App. 1960).

38. *Id.*

> enlightening portions of the conversation which gave it a very different complexion than that which the plaintiffs' segregated passages bore.[39]

Wigmore recognized that remainders such as this one ordinarily would constitute inadmissible hearsay if offered to prove the truth of the completing statement and suggested that the remainder should be used only to give "context" to the portion of the statement already admitted and should *not* be used as substantive evidence.[40] But most common-law courts disagreed with this "context only" approach to the evidentiary value of a completing remainder.[41] Courts frequently permitted completion with an otherwise inadmissible hearsay statement without limiting the purpose for which the completing remainder was admitted. Some courts went so far as to characterize the right to complete as supplying an "independent exception to the rule against hearsay."[42]

39. *Id.* at 463; *see also* Rokus v. City of Bridgeport, 463 A.2d 252, 256 (Conn. 1983) (explaining that the trial court erred in excluding on hearsay grounds defendant's completing statement that he "did not see" the plaintiff *because* the plaintiff "ran in front of [the] truck" just before the accident).

40. 7 WIGMORE, *supra* note 23, § 2100, at 626 ("[T]he complementary and exculpatory part of the confession is put in, not as testimony, but merely as qualifying the effect of the confessing portions . . . ."). Some have suggested that Wigmore ultimately expressed some doubt on this non-hearsay theory of admissibility. *See* Nance, *supra* note 23, at 842–43, 843 n.57.

41. *See* 7 WIGMORE, *supra* note 23, § 2113, at 660 ("[I]t is not uncommon for courts to treat the remaining utterance, thus put in, as having a legitimate assertive and testimonial value of its own—as if, having once got in, it could be used for any purpose whatever."); Simmons v. State, 105 So. 2d 691, 694 (Ala. Ct. App. 1958) ("[Completeness] makes admissible self-serving statements which otherwise would be inadmissible."); Storer v. Gowen, 18 Me. 174, 176–77 (1841) (arguing that completing remainders "are equally evidence to the jury" as prior admitted statements); Michael A. Hardin, *This Space Intentionally Left Blank: What to Do When Hearsay and Rule 106 Completeness Collide*, 82 FORDHAM L. REV. 1283, 1299 (2013) (noting that the "context only" approach "has never been universally accepted" (citing *Simmons*, 105 So. 2d at 694)); WRIGHT ET AL., *supra* note 21, § 5072.1 ("[T]he major purpose of the common law completeness doctrine was to provide an exception to those rules that prevented the opponent from showing how the proponent had misled the jury.").

42. *Rokus*, 463 A.2d at 256; *see also* Stevenson v. United States, 86 F. 106, 110–11 (5th Cir. 1898) ("[W]hen the United States proved the conversations and declarations the accused was entitled to have the full conversation or conversations given in evidence."); CAL. L. REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE: ARTICLE VIII. HEARSAY EVIDENCE 599 (1962) ("To the extent that this section makes hearsay admissible, we may regard the section as a special exception to the hearsay rule."); Nance, *supra* note 23, at 839–40 (explaining that courts routinely permitted the presentation of otherwise inadmissible evidence—most commonly hearsay evidence—if it was necessary to offer a complete picture of the fragmented evidence already introduced).

With respect to confessions of a criminal defendant—the most common context in which completeness issues arise today—pre-Rules courts generally demanded admission of an entire confession when the prosecution sought to use some portions. In *United States v. Wenzel*,[43] the Fourth Circuit Court of Appeals described the rule regarding completion of a defendant's confession as follows:

> When a confession is admissible, the whole of what the accused said upon the subject at the time of making the confession is admissible and should be taken together; and if the prosecution fails to prove the whole statement, the accused is entitled to put in evidence all that was said to and by him at the time which bears upon the subject of controversy including any exculpatory or self-serving declarations connected therewith.[44]

In sum, at common law, parties were permitted to complete both written and oral statements first presented in fragmented form by their adversaries. While the courts employed numerous linguistic formulas to describe the circumstances in which completion was required, courts generally permitted completion to prevent a misleading impression that would be created by taking the first fragment out of context.[45] Courts were cautious about allowing an opponent to interrupt his adversary's case to require the presentation of a remainder, particularly with oral statements.[46] More commonly, courts permitted an opponent to engage in "optional" completeness during cross-examination of his adversary's witnesses or during his own case.[47] Finally, the majority of common law courts allowed the completion right to "trump" other evidentiary restrictions and permitted admission of completing remainders that would have been inadmissible had the proponent not introduced a partial, misleading statement.[48]

B. THE INCOMPLETE RULE OF COMPLETENESS: FEDERAL RULE OF EVIDENCE 106

When the Federal Rules of Evidence were enacted, the doctrine of completeness was addressed in Rule 106.[49] Ironically, the Rule

43. United States v. Wenzel, 311 F.2d 164 (4th Cir. 1962).

44. *Id.* at 168 (quoting 20 AM. JUR. § 488, at 425 (1939)).

45. 7 WIGMORE, *supra* note 23, § 2113, at 653.

46. *Id.* § 2099, at 618.

47. *Id.* § 2113, at 653–54.

48. Nance, *supra* note 23, at 839–40.

49. As originally proposed, the rule of completeness was Rule 107. *See* REVISED DRAFT OF PROPOSED RULES OF EVIDENCE, 51 F.R.D. 315, 329 (1971). It was renumbered Rule 106 after a proposed rule allowing a trial judge to comment on the evidence was deleted by Congress. WRIGHT ET AL., *supra* note 21, § 5071.

ultimately adopted to address the need for a fair and complete presentation of a thought or idea codified the common law conception of "completion" only partially or incompletely—an incomplete statement of the rule of completeness.[50] In its current form, Rule 106 reads:

> 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.[51]

The principal advancement of the codification was the creation of a right to interrupt a proponent's preferred presentation of his case to require him to introduce completing information "at that time."[52] The Advisory Committee on Evidence Rules (Advisory Committee or Committee) noted that the provision was based upon two considerations: (1) "the misleading impression created by taking matters out of context," and (2) "the inadequacy of repair work when delayed to a later point in the trial."[53] Requiring immediate completion addresses multiple concerns, such as a jury's genuine inability to reconsider a tainted view of the case created by an earlier partial presentation, as well as the inherent benefits of considering related information holistically rather than piecemeal.[54]

Unlike the common law rule, Rule 106 was limited to "writing[s]" and "recorded statement[s]," thus omitting oral unrecorded statements from its coverage. Although the earliest draft of the completeness rule included a right to complete "conversations," the final draft of Rule 106 omitted oral statements for "practical reasons."[55] In justification of the exclusion, the Reporter for the Advisory Committee suggested that oral statements were deleted because "the general outline of a conversation is less definite than documentary evidence and exploration of what in fairness ought to be considered with respect to a

50. *See* FED. R. EVID. 106 advisory committee's note (providing that the rule is "an expression of the rule of completeness").

51. FED. R. EVID. 106. The rule was gender-neutralized in 1987 and restyled in 2011, but it has not been substantively altered since its adoption. *See* FED. R. EVID. 106 advisory committee's notes to 1987 and 2011 amendments.

52. FED. R. EVID. 106.

53. FED. R. EVID. 106 advisory committee's note.

54. *See* WRIGHT ET AL., *supra* note 21, § 5072.1; Nance, *supra* note 23, at 868 ("Not only do we worry that the misimpression *cannot* be corrected by delayed response, but also we see no good reason to impose the additional burden on the trier of fact necessary to make the connection.").

55. FED. R. EVID. 106 advisory committee's note ("For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations."). For the language of the original draft of the completeness Rule 1-10, see WRIGHT ET AL., *supra* note 21, § 5071.

conversation is likely to involve a more discursive and time-consuming inquiry."[56] The Advisory Committee's note to Rule 106 cautioned that "[t]he 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," signaling that common law protections applicable to incomplete oral statements survived the codification.[57]

In defining the elusive circumstances in which completion is required, the Advisory Committee rejected an expansive "relevance" standard and chose the language of "fairness" from the many common law descriptors used to limit completion.[58] The Committee selected the "fairness" standard because it mirrored the language of Federal Rule of Civil Procedure 32, which already permitted completion of selected portions of depositions used at trial.[59] During the drafting process, the Department of Justice (DOJ) objected to the "fairness" standard, complaining that it was "vague," failed to provide "necessary guidance," and could "be utilized to usurp the function of cross-examination by permitting one party to disrupt the orderly presentation of evidence by the other by moving into evidence, under a claim of fairness, other documents which properly should be admitted only in its own case."[60] The DOJ proposed language for Rule 106 that would have permitted contemporaneous completion only with portions of the "same document" on the "same subject matter."[61] The Advisory Committee, the Judicial Conference, and the Supreme Court all rejected the DOJ's proposal and proceeded with the "fairness" limit on the completion right.[62]

56. WRIGHT ET AL., *supra* note 21, § 5071; *see also* United States v. Bailey, 322 F. Supp. 3d 661, 670 (D. Md. 2017) (noting that the "practical reasons" for excluding oral conversations from Rule 106 "undoubtedly include the need to avoid 'he said, she said' disputes about the content of an unrecorded or unwritten statement").

57. FED. R. EVID. 106 advisory committee's note.

58. WRIGHT ET AL., *supra* note 21, § 5071 (noting that earliest draft of completeness rule was an expansive one that utilized a relevance standard).

59. *See* FED. R. EVID. 106 advisory committee's note ("[Rule 106] is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.").

60. WEINSTEIN, *supra* note 14, at 106-7 n.12; *see also* WRIGHT ET AL., *supra* note 21, § 5071 (detailing a letter from Deputy Attorney General Richard Kleindienst to Chief Justice Warren Burger).

61. Apparently, "several powerful Senators" threatened "that failure to accede to the [Justice] Department's demands might endanger the Supreme Court's rulemaking power." WRIGHT ET AL., *supra* note 21, § 5071; *see* Daniel J. Capra & Liesa L. Richter, *Poetry in Motion: The Federal Rules of Evidence and Forward Progress as an Imperative*, 99 B.U. L. REV. 1873, 1910 (2019) (describing DOJ efforts to influence rulemaking proposals through threats of congressional involvement).

62. FED. R. EVID. 106.

Rule 106 was mysteriously silent as to the admissibility of completing remainders that would otherwise constitute inadmissible hearsay. Here too, the DOJ attempted to limit completing evidence to that which would be "otherwise admissible," thereby allowing the hearsay prohibition to defeat completion.[63] The DOJ formally sought this modification in a letter to the Chairman of the Senate Judiciary Committee, but the Committee made no change to the Rule, leaving Rule 106 textually ambiguous on this crucial point.[64]

* * *

In sum, Federal Rule of Evidence 106 codified only what was recognized as "compulsory" or immediate completion of written and recorded statements at common law. The Rule omitted oral statements from the interruption rule, making compulsory completion of oral statements unavailable, but emphasized in Advisory Committee notes that optional completion of oral statements by an opponent would still be permissible. Importantly, the language of Rule 106 maintained silence with respect to the use of otherwise inadmissible evidence to complete.

II. A NEVER-ENDING STORY: CONFLICT IN THE FEDERAL COURTS REGARDING RULE 106

Since the enactment of Rule 106, the federal cases interpreting it have revealed a conflicting narrative. On the one hand, the federal courts have presented a united front in taking a uniformly restrictive view of the "fairness" standard justifying completion under the Rule.[65]

63. WRIGHT ET AL., *supra* note 21, § 5071 (explaining that the DOJ sought to add language to the rule requiring a completing remainder to be "otherwise admissible" or for which a proper foundation is laid).

64. *Id.* § 5078.1.

65. *See, e.g.*, United States v. Williams, 930 F.3d 44, 61 (2d Cir. 2019) (holding that completion was not required because the defendant's initial exculpatory statements did not make his subsequent confession misleading); United States v. Hird, 901 F.3d 196, 217 (3d Cir. 2018) (holding that portions of the defendant's grand jury testimony were not admissible to complete other excerpts presented by the government because they were "unrelated in the overall sequence of questions and to the answers" already presented); United States v. Dotson, 715 F.3d 576, 583 (6th Cir. 2013) (holding that the defendant's statements that he had a rough upbringing, had been sexually abused as a child, and was concerned that the victim knew he was exploiting her were not admissible to complete his contemporaneous admission to making videos and photos of a minor victim in a child pornography and exploitation case); United States v. Branch, 91 F.3d 699, 731 (5th Cir. 1996) (holding that the defendant's statement denying that he fired a weapon at a Waco compound was not admissible to complete his admission to donning battle dress and picking up guns when he saw ATF agents approaching; the prosecution was for using *or carrying* a firearm during a crime of violence).

Only when the portion of a statement initially introduced creates a distorted and misleading impression about the statement itself have federal courts honored calls for completeness.[66] The D.C. Circuit Court of Appeals accurately captured the tenor of Rule 106 precedent when it stated that "[i]n almost all cases we think Rule 106 will be invoked rarely and for a limited purpose."[67] This narrow interpretation of the trigger for the completion right is entirely appropriate and should not be altered.

With respect to almost every other interpretive issue arising under Rule 106, however, the federal cases are marked by conflict, confusion, and mixed messages. Most importantly, Rule 106 is plagued by questions concerning: (1) the admissibility of completing statements that are hearsay, and (2) the admissibility of completing oral statements not covered by the Rule.

A. THE COMPLICATED RELATIONSHIP BETWEEN COMPLETENESS AND THE HEARSAY RULE

The federal courts have grappled with the problem of completing statements that are otherwise inadmissible due to the ban on hearsay evidence. Some circuits permit the admission of otherwise inadmissible hearsay through the doctrine of completion when it is necessary to prevent a distorted impression created by a previously admitted portion of the same statement. Other circuits reject completion with otherwise inadmissible hearsay altogether, allowing a distorted view of the evidence to go uncorrected. Still others permit the admission of a completing statement over a hearsay objection, but only for its "non-hearsay value" in providing context for the original partial statement and not for the truth of the remainder. Adding to the confusion, there

66. *See, e.g.*, United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993) (holding that, in a felon firearm possession case, prosecution's presentation of a portion of the defendant's statement admitting knowledge of marijuana found near a weapon misleadingly suggested knowledge of the nearby firearm; the defendant's simultaneous denial of knowledge of the gun was required to complete); United States v. Castro-Cabrera, 534 F. Supp. 2d 1156, 1159 (C.D. Cal. 2008) (admitting only the defendant's second answer to question about his citizenship in which he stated, "I guess Mexico until my mother files a petition" misrepresented the tenor of his testimony because he stated "[h]opefully United States through my mother" immediately prior to making the admitted statement).

67. United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986); *see also* United States v. Bailey, 322 F. Supp. 3d 661, 668 (D. Md. 2017) ("Rule 106 should never come into play unless misleading evidence has been introduced that requires clarification or explanation—otherwise there is no unfairness that needs correction.").

are some federal circuits within which a trial judge can find support for more than one of these approaches.[68]

1. Completion as a Trump Card

Many federal courts have held that the "fairness" standard incorporated in Rule 106 requires the admission of otherwise inadmissible hearsay when it is necessary to prevent a distorted impression of a previously admitted partial statement. The well-reasoned opinion of the D.C. Circuit Court of Appeals in *United States v. Sutton* reflects this view.[69]

In *Sutton*, a defendant was convicted in connection with a conspiracy to bribe federal officials.[70] At trial, the government introduced select portions of recorded conversations between the defendant and an alleged coconspirator. According to the D.C. Circuit, the portions of the conversations introduced by the government incriminated the defendant because they created the impression that he was afraid that certain individuals would reveal his role in the conspiracy: "In short, the government's evidence tended to show Sucher's consciousness of guilt."[71] The defendant claimed that the statements presented by the government did not suggest his criminal intent when viewed alongside other statements he made in the same recording which were omitted from the government's presentation. The defendant sought to have these statements admitted through Rule 106 to demonstrate that the true tenor of his recorded conversations suggested *not* that he was guilty, but rather that he was afraid of falsehoods that certain individuals might tell the government. The trial court sustained the government's hearsay objection when the defendant attempted to admit his own completing statements and the defendant appealed.[72]

The D.C. Circuit provided five important reasons for allowing the admission of otherwise inadmissible hearsay in the name of completeness. First, the court pointed to the placement of Rule 106 within the Evidence Rules scheme:

> The structure of the Federal Rules of Evidence indicates that Rule 106 is concerned with more than merely the order of proof. Rule 106 is found not in

68. *Compare* United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988) (finding a completing statement was properly admitted under Rule 106 over a hearsay objection), *with* United States v. Hassan, 742 F.3d 104, 135 (4th Cir. 2014) (holding that defendant's web postings were not admissible under Rule 106 because they were hearsay).

69. *Sutton*, 801 F.2d 1346.

70. *Id.*

71. *Id.* at 1367.

72. *Id.* at 1346.

> Rule 611, which governs the "Mode and Order of Interrogation and Presentation," but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules.[73]

Second, the court highlighted Rule 106's omission of the proviso commonly found in evidentiary provisions intended to be limited by other exclusionary principles: "[E]xcept as otherwise provided by these rules."[74] Had the drafters intended to limit the admission of hearsay through Rule 106, the court reasoned, they would have included this familiar clause. Third, the court referenced the DOJ's efforts to defeat the admissibility of hearsay by proposing the addition of this exact proviso—and the ultimate rejection of this DOJ request.[75] Fourth, the court noted that Rule 106 was patterned after the California rule of completeness, and that the California rule was known to allow for admissibility of hearsay.[76] Fifth and most importantly, the *Sutton* court concluded as a matter of policy that Rule 106 can fulfill its promise of "fairness" only if it permits the admission of some hearsay that would have been inadmissible but for the need to complete: "A contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court."[77]

The Seventh Circuit in *United States v. Haddad* echoed the sentiments of the *Sutton* court in holding that a defendant's exculpatory statements should have been admitted in the name of completeness.[78] In that case, the defendant was charged with being a felon knowingly in possession of "one Intratec TEC–9, 9 millimeter, semi-automatic pistol" after it was found in his apartment during the execution of a search warrant.[79] During the execution of the search warrant, the defendant admitted to a local police officer that the marijuana found near the pistol belonged to him, but denied any knowledge of the gun. At trial, the officer testified about the defendant's admission to possessing the nearby marijuana, to show that the defendant knew the gun was there if he knew the nearby drugs were there. The trial court sustained a prosecution hearsay objection when the defense sought to ask about the remainder of the statement expressly disavowing knowledge of the pistol.

73. *Id.* at 1368.
74. *Id.*
75. *Id.* at 1368 n.17.
76. *Id.*
77. *Id.* at 1368.
78. United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993).
79. *Id.* at 1254.

The defense argued that the exculpatory statement was "part and parcel" of the statement introduced by the prosecution, and the Seventh Circuit agreed. The court held that completion was required, over a hearsay objection, because the remainder was necessary to dispel a misleading inference created by the government's portion of the statement:

> The defendant in effect said "Yes, I knew of the marijuana but I had no knowledge of the gun." The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence.[80]

Other circuit courts have similarly interpreted Rule 106 to act as a trump card in the face of a hearsay objection. In *United States v. Bucci*, the First Circuit stated that "case law unambiguously establishes that the rule of completeness may be invoked to facilitate the introduction of otherwise inadmissible evidence."[81] And in *United States v. Gravely*, the Fourth Circuit rejected a defense hearsay objection when the *government* sought to complete with portions of the grand jury testimony of a witness.[82] The court reasoned:

> The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed.R.Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness to be considered contemporaneously. The rule simply speaks to the obvious notion that parties should not be able to lift selected portions out of context.[83]

Thus, several circuits have held, consistent with the common law approach to completeness, that otherwise inadmissible hearsay may be admitted through Rule 106 if necessary to prevent distortion of a statement and to ensure fairness.

2. The Hearsay Rule as a Barrier to Fairness

There is a clear split of authority regarding Rule 106, however, as several circuit opinions have refused to permit completing evidence over a hearsay objection. The Sixth Circuit opinion in *United States v. Adams* represents a classic example of the unfairness perpetuated by

80. *Id.* at 1259.

81. United States v. Bucci, 525 F.3d 116, 133 (1st Cir. 2008); *see also* United States v. Harry, 816 F.3d 1268, 1279–80 (10th Cir. 2016) (noting that the fairness principle of Rule 106 "can override the rule excluding hearsay" but finding that fairness did not require completion in the instant case).

82. United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988).

83. *Id.* (citing United States v. Sutton, 801 F.2d 1346, 1366–69 (D.C. Cir. 1986)).

this interpretation of Rule 106.[84] In that case, a state court judge was accused of conspiring to buy votes and of helping appoint corrupt members of the Clay County Board of Elections.[85] At trial, the government presented portions of a phone recording in which a cooperating witness, a Ms. White, told the judge about questions she had been asked during her grand jury testimony. White told the judge that she had been asked whether he had appointed her as an election officer. The judge responded, "[d]id I appoint you? ([l]augh)," and White said "[y]eah," and the judge then said, "I don't really have any authority to appoint anybody."[86] The last statement was redacted from the government's presentation, leaving the jury with the impression that the defendant had adopted the accusation that he had appointed White. When the defendant sought to complete the government's presentation under Rule 106 with his contemporaneous statement that he didn't have authority to make the appointment, the trial court excluded it as hearsay.

Remarkably, the Sixth Circuit found that the government *had* presented the evidence unfairly but held that nothing could be done about it:

> Defendants claim that "by severely cropping the transcripts, the government significantly altered the meaning of what [defendants] actually said." *Although we agree that these examples highlight the government's unfair presentation of the evidence, this court's bar against admitting hearsay under Rule 106 leaves defendants without redress.*[87]

Troubled by this result, the *Adams* panel stated that "should this court sitting *en banc* address whether Rule 106 requires that the other evidence be otherwise admissible, it might consider" all the authorities that have criticized the rule that allows the government to admit a misleading portion and then object on hearsay grounds to a necessary completion.[88]

84. United States v. Adams, 722 F.3d 788 (6th Cir. 2013).

85. *Id.* at 798.

86. *Id.* at 827.

87. *Id.* at 827 (emphasis added) (citation omitted); *see also* United States v. Wandahsega, 924 F.3d 868, 883 (6th Cir. 2019) ("[Rule 106] does not transform inadmissible hearsay into admissible evidence."); United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982) ("The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded.").

88. *Adams*, 722 F.3d at 826 n.31. The authorities cited by the *Adams* court were: STEPHEN A. SALTZBURG, MICHAEL A. MARTIN & DANIEL J. CAPRA., 1-106 FEDERAL RULES OF EVIDENCE MANUAL § 106.02; CHARLES ALAN WRIGHT, ARTHUR R. MILLER & KENNETH W. GRAHAM, JR., 21A FEDERAL PRACTICE AND PROCEDURE § 5078.1 (2d ed. 2012); Nance, *supra* note 23; United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

Similarly, in *United States v. Hassan,* the defendant was charged with several offenses arising from terrorism activities.[89] At trial, the prosecution admitted a "training video" posted online by the defendant depicting him performing a series of physical fitness workouts and accompanied by an Arabic phrase, an image of an assault rifle, and references to "strong Muslim[s]."[90] The trial court refused to require completion with comments the defendant posted suggesting that he did "not support terrorists."[91] On appeal, the Fourth Circuit affirmed, noting that Rule 106 "does not 'render admissible the . . . evidence which is otherwise inadmissible under the hearsay rules.'"[92] The refusal to permit completion with otherwise inadmissible hearsay not only conflicts with other circuits that permit the completion right to trump a hearsay objection, it is also in apparent conflict with the *Gravely* opinion discussed above—also in the Fourth Circuit—which allowed the *prosecution* to complete with otherwise inadmissible grand jury testimony.[93]

3. A Fairness Half-Measure

Finally, some courts have addressed otherwise inadmissible remainders by drawing upon the time-honored hearsay tenet that statements are not hearsay at all when they are not offered for the truth of the matters they assert.[94] This approach posits that a completing

89. United States v. Hassan, 742 F.3d 104 (4th Cir. 2014).

90. *Id.* at 134.

91. *Id.*

92. *Id.* (quoting United States v. Lentz, 524 F.3d 501, 526 (4th Cir. 2008)). The court also expressed doubt that the jury was misled or confused by the exclusion of the exculpatory posts. *Id.* at 135; *see also* United States v. Hayat, 710 F.3d 875, 896 (9th Cir. 2013) ("Rule 106 'does not compel admission of otherwise inadmissible hearsay evidence.'" (quoting United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996), *as amended* (Oct. 21, 1996))); United States v. Vargas, 689 F.3d 867, 876 (7th Cir. 2012) ("[A] party cannot use the doctrine of completeness to circumvent Rule 803's exclusion of hearsay testimony."); *Collicott*, 92 F.3d at 983 ("Because Zaidi's out-of-court statements to Kehl do not fall within an exception to the hearsay rule, they are inadmissible, regardless of Rule 106."); U.S. Football League v. Nat'l Football League, 842 F.2d 1335, 1375–76 (2d Cir. 1988) ("The doctrine of completeness, Fed. R. Evid. 106, does not compel admission of otherwise inadmissible hearsay evidence."); United States v. Cisneros, 2018 WL 3702497, at 11 (C.D. Cal. July 30, 2018) ("If the Court admitted defendant's exculpatory statements at trial, he 'would have been able to place his exculpatory statements "before the jury without subjecting [himself] to cross-examination, precisely what the hearsay rule forbids."'" (quoting United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000))).

93. *See* United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988).

94. FED. R. EVID. 801(c)(2) (defining hearsay as a statement that "a party offers in evidence to prove the truth of the matter asserted").

statement need not be admitted for its truth to dispel any misconception created by the initial selective presentation of the statement. Under this view, the completing remainder may be admitted over a hearsay objection, but only for its non-hearsay value in providing "context" for the misleading portion.

This "context" approach can be traced to Wigmore's interpretation of completion at common law. Although he expressed a minority view on this point, Wigmore suggested that completing statements should not be admitted for their truth: "[T]he complementary and exculpatory part of the confession is put in, not as testimony, but merely as qualifying the effect of the confessing portions."[95] Some support for the admission of completing remainders for their non-hearsay value in showing context may also be found in dicta in the Supreme Court's decision in *Beech Aircraft Corp. v. Rainey*—the only Supreme Court opinion to address the completion principle since the adoption of Rule 106.[96]

In *Beech Aircraft*, the husband of a deceased navy pilot sued the manufacturer of an aircraft that crashed during training exercises, killing his wife and a student pilot. At trial, the husband's theory was that a fuel flow malfunction caused the plane to lose engine power, leading to the fatal crash. The husband did not testify during his own case, but he was called as an adverse witness by the defense. During its hostile direct, the defense asked the husband—who was also a navy pilot—about a report he had sent to the navy commander investigating the crash shortly after the accident. Although the full report contained detailed analysis of the accident demonstrating a power failure as the primary cause of the crash, the defense asked the husband only about two statements in the report suggesting that his wife attempted to cancel the ill-fated training flight due to the fatigue of her student pilot and acknowledging that the plane violated its flight pattern shortly before the crash. The husband's counsel sought to ask him on cross-examination whether the same report also concluded that power failure caused the crash. The defense promptly objected to the admission of other parts of the husband's report—not on hearsay grounds but as inadmissible "opinion"—and the trial court sustained the objection and prevented the husband's counsel from demonstrating the true tenor of the report.

On appeal, the Eleventh Circuit held that the trial court had abused its discretion, finding that Rule 106 permitted the husband to

95. 7 WIGMORE, *supra* note 23, § 2100, at 626; *see also supra* note 41.

96. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171 (1988).

offer completing information about the report "which would have put in context the admissions elicited from him on direct."[97] Although the parties briefed the application of Rule 106 in the Supreme Court, the Court expressly declined to rule on the scope and meaning of that provision. Instead, the Court held that "general rules of relevancy" provided a "ready resolution" of the case.[98] The Court noted that, when one party creates a distorted impression by presenting a portion of a document, the material required to dispel the distortion is relevant and admissible through Rules 401 and 402.[99] The Supreme Court agreed that the trial judge had erred when he refused to allow the husband's counsel to inquire about the conclusion of the report, finding that the jury was given a "distorted and prejudicial" view of the report that suggested that the husband found the accident to have been caused by pilot error and developed the theory of power failure later solely for purposes of litigation.[100]

In dicta in a footnote, the *Beech Aircraft* Court addressed the hearsay concern raised by the admission of completing out-of-court statements.[101] The Court stated that, had the defense raised a hearsay objection to the completing portion of the husband's report (which it did not), that objection would not have defeated admissibility, because the husband's statement about power failure in his report was "not offered 'to prove the truth of the matter asserted.'"[102] Instead, it was offered "simply to prove what [the husband] had said about the accident . . . and to contribute to a fuller understanding of the material the defense had already placed in evidence."[103] Thus, while the *Beech Aircraft* opinion suggested a non-hearsay resolution of the issue of completing out-of-court statements, it did so only in dicta discussing a hypothetical trial objection that was never raised and in an opinion that declined to apply or interpret Rule 106.

A recent opinion by the Second Circuit echoes *Beech Aircraft* in suggesting a "context only" non-hearsay approach to completing out-of-court statements, but again only in dicta. In *United States v. Williams*, the defendant was convicted of being a felon in possession of a firearm after officers found a loaded firearm in the console of a rental

97. *Id.* at 153–54.
98. *Id.* at 172.
99. *See* FED. R. EVID. 401, 402.
100. *Beech Aircraft*, 488 U.S. at 170.
101. *Id.* at 173 n.18.
102. *Id.* (quoting FED. R. EVID. 801(c)).
103. *Id.*

car he was driving.[104] When confronted with the fact that officers had found a weapon, the defendant initially denied knowledge of the gun and claimed to have been returning the rental car. Later, he admitted to officers that the firearm belonged to him and signed a sworn statement in which he confessed to possessing it. At trial, only the confession was admitted despite the defendant's efforts to offer his earlier exculpatory statement under the doctrine of completion.

On appeal, the Second Circuit acknowledged a defendant's right to offer completing statements necessary to correct a misimpression created by the misleading use of a statement, but held that the defendant's initial self-serving exculpatory statement in no way explained or modified his subsequent confession: "[T]he rule of completeness does not *require* the admission of self-serving exculpatory statements in all circumstances, and the mere fact that a suspect denies guilt before admitting it, does not—without more—mandate the admission of his self-serving denial."[105] The court went on to explain that "when the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced."[106] But this hearsay discussion was dictum because the court found that the defendant's confession was not misleading, and that his exculpatory denial was therefore unnecessary to complete.

Unlike *Williams*, other federal opinions obliquely note that hearsay may be admitted under the doctrine of completion to place admitted statements "in context," without expressly explaining whether the completing statements may be offered for their truth or only for their non-hearsay value.[107] Courts that allow admission to show context

104. United States v. Williams, 930 F.3d 44 (2d Cir. 2019).

105. *Id.* at 61 (citations omitted).

106. *Id.* at 60; s*ee also* 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."); WEINSTEIN, *supra* note 14, at 106-20 to -21 ("[I]t can be argued that if the other act or writing is merely used to make the one given in evidence understood, it is not hearsay because it is not 'offered in evidence to prove the truth of the matter asserted.'" (quoting FED. R. EVID. 801(c))).

107. *See, e.g.*, United States v. Johnson, 507 F.3d 793, 796 (2d Cir. 2007) ("[E]ven though a statement may be hearsay, an 'omitted portion of [the] statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial

might be suggesting the non-hearsay solution discussed by *Williams* because "context" is classic non-hearsay vocabulary.[108] But it seems more likely that the courts referring to "context" in the Rule 106 arena are simply describing their rationale for allowing completion in the first place. Completion is *allowed* under Rule 106 only when necessary to provide proper context for a previously admitted statement. Whether the completing statement is *then* admissible for its truth presents a separate question. Therefore, it seems probable that most federal courts are not staking out any position on the use to which completing statements may be put when they employ "context" language. Such language is better understood as shorthand to express that the Rule 106 standard is satisfied and not as a limitation on the use of the completing statement for its truth.

* * *

The federal cases, therefore, offer three distinct views of the interaction between the hearsay rule and the doctrine of completion. Some hold that otherwise inadmissible hearsay may be offered for its truth under Rule 106 if necessary to prevent distortion in the partial presentation of a statement. Others exclude completing out-of-court statements in the face of a hearsay objection, even when needed to dispel distortion created by a previous selective presentation. This approach leaves misleading partial statements uncorrected. Still, other federal courts permit the admission of completing out-of-court statements, but only for their non-hearsay contextual value. And there are courts that appear not to have confronted how the completing statement may be used after it is admitted.

B. THE PATCHWORK APPROACH TO COMPLETING ORAL STATEMENTS

The interface between the hearsay rule and completion is not the only interpretive conundrum created by the partial codification of completeness in Rule 106. Federal courts have also struggled with trial requests to complete selectively presented oral statements—statements omitted from Rule 106's coverage of "writing[s] or recorded statement[s]" for "practical reasons."[109] As they have with

understanding of the admitted portion.'" (quoting United States v. Castro, 813 F.2d 571, 575–76 (2d Cir. 1987), *cert. denied*, 484 U.S. 844 (1987))).

108. *See, e.g.*, United States v. Barragan, 871 F.3d 689, 705 (9th Cir. 2017) ("[T]he informant's statements on the tapes were not hearsay because, as the court instructed the jury, they were offered only for context, not for 'the truth of the matter asserted.'" (quoting FED. R. EVID. 801(c)(2))).

109. FED. R. EVID. 106 & advisory committee's note.

respect to the hearsay issue, federal courts have adopted various approaches to the completion of oral statements.

1. The Common Law Lives

A few federal courts have found a right to complete misleadingly presented oral statements in the common law that remains in the gaps left by the Federal Rules of Evidence.[110] For example, in *United States v. Sanjar*, the defendant sought to cross-examine a government agent who had testified on direct about oral statements the defendant had made to him.[111] In seeking to bring out additional statements he had made to the agent during cross, the defendant relied upon Rule 106, arguing that it controlled because the agent had later recorded his oral statements in a summary.

The Fifth Circuit noted that Rule 106, by its terms, applies only to written and recorded statements and found that it did not govern in a circumstance where the agent was not asked about and did not rely upon his summary in answering questions about the defendant's statements.[112] But the court found that "[t]he common law rule of completeness, which is just a corollary of the principle that relevant evidence is generally admissible, does provide a right to cross examine" regarding incomplete oral statements.[113] The Fifth Circuit's reliance on the common law to find a right to complete oral statements can be traced to the Supreme Court's decision in *Beech Aircraft*.[114] Taking a page from the Supreme Court's book on completion, courts like the *Sanjar* court have ventured outside the rule book and have utilized the same "common law" general principles of relevancy to resolve the issue of oral statements left unaddressed by Rule 106.[115]

110. *See* United States v. Abel, 469 U.S. 45, 51–52 (1984) (stating that the common law retains some relevance in interpreting the Federal Rules of Evidence).

111. United States v. Sanjar, 876 F.3d 725, 739 (5th Cir. 2017), *cert. denied sub nom*, Main v. United States, 138 S. Ct. 1577 (2018).

112. *Id.* This analysis reveals yet another interpretive difficulty in applying Rule 106—the problem of classifying a statement originally made orally, but later recorded in some fashion. By leaving oral statements out of Rule 106, the drafters of the original provision have forced courts to draw the sometimes-awkward distinction between "oral" and "recorded" statements.

113. *Id.* Ultimately, the court found common law completion inapplicable to defendant's circumstance because the defendant's oral assertions of innocence were "'not necessary to qualify, explain, or place into context' the limited statements the agent testified about on direct." *Id.* (quoting United States v. Self, 414 F. App'x 611, 615 (5th Cir. 2011)).

114. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171 (1988).

115. *See* United States v. Bailey, 322 F. Supp. 3d 661, 670 (D. Md. 2017) ("Rule 106 only *partially* codifies the common law doctrine of completeness, and for situations

2. Completing Oral Statements Under Rule 611(a)

The majority of federal courts have avoided resorting to the lingering common law and have instead found authority for the completion of oral statements in Federal Rule of Evidence 611(a).[116] Rule 611(a) provides as follows:

> CONTROL BY THE COURT; PURPOSES. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
>
> make those procedures effective for determining the truth;
>
> avoid wasting time; and
>
> protect witnesses from harassment or undue embarrassment.[117]

Although a trial lawyer might not intuitively recognize a right to completion in a rule designed to control the "mode and order" of examining witnesses, federal courts have connected the right to complete oral statements with the determination of "truth."

The leading case on unrecorded statements and completeness under Rule 611(a) is *United States v. Castro*.[118] Two co-defendants were jointly tried on cocaine-related charges. The government proffered one defendant's oral statement to an arresting officer that cocaine would be found in a certain bag in the house where he was apprehended. The defendant simultaneously told the officer that the cocaine belonged to another man who ended up being his co-defendant.[119] The defendant argued that presenting only his first statement pointing the officer to the drugs would create an inference that he had confessed ownership of the drugs—an inference expressly denied by his contemporaneous statement attributing ownership to another. He argued that fairness required admission of his simultaneous statement regarding ownership.[120] The trial court refused to admit the defendant's statement implicating his co-defendant in their joint trial and, instead permitting the defense to clarify generally during cross-

beyond the reach of Rule 106, the common law still applies."). *But see* United States v. Oloyede, 933 F.3d 302 (4th Cir. 2019) (expressing doubt that the common law of completion survived the enactment of Rule 106).

116. WEINSTEIN, *supra* note 14, at 106-4 (noting that Rule 611(a) "provides equivalent control over testimonial proof").

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

118. United States v. Castro, 813 F.2d 571, 576 (2d Cir. 1987) (balancing the court's principles of common sense and fairness with protection of society's interest in the truth).

119. *Id.* at 574.

120. *Id.* at 575.

examination of the officer that the defendant had *not* admitted ownership of the drugs.[121]

The defendant appealed the exclusion of the remainder of his statement.[122] The Second Circuit found Rule 106 inapplicable to the defendant's oral assertions, but turned to Rule 611(a) to find authority for the completion of oral statements not covered by Rule 106.[123] The court explained that Rule 611(a) gives trial judges not only the power to control proceedings to ensure fairness, but an *obligation* to do so.[124] Accordingly, the court concluded that

> whether we operate under Rule 106's embodiment of the rule of completeness, or under the more general provision of Rule 611(a), we remain guided by the overarching principle that it is the trial court's responsibility to exercise common sense and a sense of fairness to protect the rights of the parties . . . .[125]

Like the court in *Castro*, the majority of federal circuits have found authority to require the completion of oral statements that is missing from Rule 106 in Rule 611(a).[126]

121. *Id.* The Supreme Court's holding in *Bruton v. United States* prevented admission of defendant's testimonial statement incriminating his co-defendant in their joint trial. Bruton v. United States, 391 U.S. 123, 123, 137 (1968).

122. *Castro*, 813 F.2d at 572.

123. *Id.* at 575–76.

124. *Id.* at 576.

125. *Id*. (finding that the trial judge did not abuse his discretion in denying completion because he permitted the defendant to tell the jury that he had denied ownership of the drugs); *see also* United States v. Williams, 930 F.3d 44, 59 (2d Cir. 2019) ("[I]n this Circuit, the completeness principle applies to oral statements through Rule 611(a) . . . .").

126. *See, e.g.*, United States v. Tarantino, 846 F.2d 1384, 1409–13 (D.C. Cir. 1988) (holding unrecorded statements of a government witness were properly admitted to complete); United States v. Verdugo, 617 F.3d 565, 579 (1st Cir. 2010) ("[T]he district court retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements . . . ." (citing United States v. Lopez-Medina, 596 F.3d 716, 734 (10th Cir. 2010))); United States v. Holden, 557 F.3d 698, 705 (6th Cir. 2009) ("The common law version of the rule was codified for written statements in Fed. R. Evid. 106, and has since been extended to oral statements through interpretation of Fed. R. Evid. 611(a)."); United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993) (finding Rule 611(a) gives the judge the same authority regarding unrecorded statements as Rule 106 grants regarding written and recorded statements); United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987) (stating that Rule 611 supports a rule of completeness for unrecorded statements that is the same as that applied to written and recorded statements under Rule 106); *Lopez-Medina*, 596 F.3d at 734 ("[W]e have held 'the rule of completeness embodied in Rule 106 is "substantially applicable to oral testimony," as well by virtue of Fed. R. Evid. 611(a) . . . .'" (quoting United States v. Zamudio, 141 F.3d 1186 (10th Cir. 1998))); United States v. Baker, 432 F.3d 1189, 1223 (11th Cir. 2005) ("We have extended Rule 106 to oral testimony in light of Rule 611(a)'s requirement that the district court exercise 'reasonable control'

3. Completing Oral Statements Excluded

The third and most troubling approach to oral statements is found in federal cases that end their analysis of completion with a literal reading of the text of Rule 106. In such cases, courts deny completion of oral statements simply *because* Rule 106 omits them from coverage. These courts have not looked to Rule 611(a) or the common law to find a right to completion for purely oral statements.

A prime example of this approach can be found in *United States v. Gibson*.[127] In that case, the defendant complained that the trial court erred in preventing defense counsel from cross-examining a former employee about an unrecorded statement that the defendant made to him.[128] The defendant contended that the government had on direct inquired into other statements that the defendant had made to the employee, and that the defendant had a right under Rule 106 to introduce a statement that completed the misleading portion.[129] The court disagreed, grounding its analysis only in the fact that "Rule 106 applies only to written and recorded statements."[130] Further compounding the confusion surrounding the completion of oral statements, the *Gibson* case was decided in the Fifth Circuit in 2017—the same year that the Fifth Circuit opinion in *United States v. Sanjar* announced a right to complete oral statements grounded in the common law.[131]

Other cases have employed a similarly glib analysis to the completion of oral statements. Cases in the Ninth Circuit have repeatedly rejected completeness arguments with respect to oral statements based only on the fact that Rule 106 excludes them from coverage.[132] In *United States v. Wilkerson*, a panel of the Fourth Circuit similarly disposed of a defendant's completeness objection relating to oral statements by holding that "[t]he rule applies only to writings or

over witness interrogation and the presentation of evidence to make them effective vehicles for the ascertainment of truth.").

127. United States v. Gibson, 875 F.3d 179 (5th Cir. 2017).

128. *Id.* at 183.

129. *Id.* at 193–94.

130. *Id.* at 194 n.10.

131. United States v. Sanjar, 876 F.3d 725, 739 (5th Cir. 2017).

132. United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000) ("Because the officer's testimony concerned an unrecorded oral confession, the rule of completeness does not apply."); United States v. Hayat, 710 F.3d 875, 896 (9th Cir. 2013) ("[O]ur cases have applied the rule of completeness 'only to written and recorded statements.'" (quoting *Ortega*, 203 F.3d at 682)); United States v. Liera-Morales, 759 F.3d 1105, 1111 (9th Cir. 2014) ("By its terms, Rule 106 'applies only to written and recorded statements.'" (quoting *Ortega*, 203 F.3d at 682)).

recorded statements, not to conversations."[133] In *United States v. Ramirez-Perez,* the Eleventh Circuit offered a particularly perplexing analysis of the interaction between completion and oral statements.[134] In that case, the court held that Rule 106 did not apply to the defendant's confession *even though it was written and signed,* because the officer who took the confession was asked at trial only about what the defendant said, not what the defendant wrote down.[135] The court concluded that "[b]ecause the prosecutor questioned the agent only about what Maclavio said rather than about what was written in the document, Rule 106 did not apply."[136] The omission of oral statements from Rule 106 was, therefore, manipulated to defeat the right to complete a written statement covered by the Rule.

Where courts have refused to venture beyond the plain language of Rule 106 to find a completion right for oral statements in the common law or in Rule 611(a), there is an irrational and unjust distinction being drawn between selectively presented written and recorded statements and similarly situated oral statements.

* * *

As with the hearsay question arising under Rule 106, there are three approaches in the federal courts to the completion of oral statements. In a few courts, there is apparently *no* right to complete selective and misleading oral statements. Even in the circuits that permit completion of partial and distorted oral statements, judges and litigants must hunt through cases to find the right to complete in the ephemeral haze of common law remaining following the enactment of the Federal Rules of Evidence, or in the vague promise of procedures that are "effective for determining the truth" in Rule 611(a).

III. COMPLETING CONSTRUCTION OF THE RULE OF COMPLETENESS

Conflict and confusion have surrounded Rule 106 since the enactment of the Federal Rules of Evidence. Federal cases from the 1980s

133. United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996). The court went on to find that the rule of completeness, "*if it applied to oral conversations*," would not have applied to the case "where there was no partially introduced conversation that needed clarification or explanation." *Id.* (emphasis added); *see also* United States v. Oloyede, 933 F.3d 302, 313–14 (4th Cir. 2019) ("While we doubt that a residual common law rule of completeness [that would admit oral statements] survives Rule 106's codification, we hold that any such common law rule cannot be used to justify the admission of inadmissible hearsay.").

134. United States v. Ramirez-Perez, 166 F.3d 1106, 1111–14 (11th Cir. 1999).

135. *Id.* at 1113.

136. *Id.*

reflect the same disagreements over the admissibility of hearsay and oral statements under Rule 106 that are found in recent precedent.[137] Commentators have continuously lamented the ambiguity inherent in Rule 106's partial codification of the doctrine of completeness.[138] The federal circuits have had forty-five years to coalesce around a uniform and clear approach to Rule 106 and to completeness more broadly. Instead, the circuit split has become calcified and shows no signs of being resolved through a precedential consensus. Even in the Sixth Circuit where a three-judge panel called for *en banc* reconsideration of the prohibition on the admission of hearsay through Rule 106, no action has been taken.[139] The U.S. Supreme Court appears unlikely to weigh in to correct the uncertainty surrounding Rule 106. The Court has considered Rule 106 on only one occasion in *Beech Aircraft Corp. v. Rainey* in 1988.[140] Although the parties presented the Court with a question arising under Rule 106, the Court declined to offer any interpretation of the Rule, instead resolving the issue on common law grounds.[141]

An important animating principle behind the Federal Rules of Evidence is uniformity in the administration of justice throughout the federal court system.[142] And one of the most important functions of a

137. *Compare* United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988) (finding that completing statement was properly admitted under Rule 106 over a hearsay objection), *and* United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986) (concluding that Rule 106 admits otherwise inadmissible hearsay), *with* United States v. Sanjar, 876 F.3d 725, 739 (5th Cir. 2017) ("When offered by the government, a defendant's out-of-court statements are those of a party opponent and thus not hearsay. When offered by the defense, however, such statements are hearsay . . . ." (citation omitted)), *cert. denied sub nom.* Main v. United States, 138 S. Ct. 1577 (2018), *and* United States v. Hayat, 710 F.3d 875, 896 (9th Cir. 2013) ("Rule 106 'does not compel admission of otherwise inadmissible hearsay evidence.'" (quoting United States v. Collicott, 92 F.2d 973, 983 (9th Cir. 1996))).

138. *See generally* Nance, *supra* note 23; James P. Gillespie, *Federal Rule of Evidence 106: A Proposal to Return to the Common Law Doctrine of Completeness*, 62 NOTRE DAME L. REV. 382 (1987) (exploring the possibility for expansion of Rule 106); Hardin, *supra* note 41; Harold F. Baker, *Completing the Rule of Completeness: Amending Rule 106 of the Federal Rules of Evidence*, 51 CREIGHTON L. REV. 281 (2018) (highlighting circuit split regarding Rule 106).

139. United States v. Adams, 722 F.3d 788 (6th Cir. 2013).

140. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171–72 (1988) (declining to analyze the doctrine of completeness in Rule 106).

141. *Id.* at 175 (holding the District Court abused its discretion when Rainey's cross-examination was restricted); *see* 7 WIGMORE, *supra* note 23, § 2100 at 626 (noting that speech does not have to be believed); *see also supra* note 95 and accompanying text (questioning the court's illogical reluctance to admit remainders).

142. *See* Edward J. Imwinkelried, *The Golden Anniversary of the "Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal*

rules advisory committee is to monitor circuit splits and to propose amendments to restore uniformity.[143] The Advisory Committee on Evidence Rules evaluated the possibility of amending Rule 106 in 2002.[144] In the face of competing priorities[145] and relying on the federal courts to manage the issue, the Advisory Committee exercised restraint and declined to propose an amendment to Rule 106.[146] The federal courts have had almost two additional decades to develop a coherent blueprint for the operation of Rule 106, but the dysfunctional and disparate precedent persists.

Federal judges and litigants collectively expend considerable resources litigating the issues surrounding Rule 106 on a routine basis and would benefit greatly from a clarifying amendment. In 2017, one district court judge observed that completion issues are "recurring in nature," and that there is "a scarcity of helpful decisional authority" to "guide courts and counsel" in resolving the "sometimes complicated issues" raised by the doctrine of completeness.[147] The court went on to lament the uncertain and complex state of the law: "although there is no shortage of case law and treatise analysis on this subject, the law is far from settled, and courts and commentators have reached starkly different results by applying a variety of approaches, resulting in an

Courts": Mission Accomplished?, 57 WAYNE L. REV. 1367, 1368–69 (2011) (discussing the history of the development of the Federal Rules of Evidence).

143. Capra & Richter, *supra* note 61, at 1886–87 (emphasizing the importance of rulemaking initiatives that resolve circuit splits); *see also* Edward 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 (1992) (emphasizing the importance of an Evidence Rules Advisory Committee to propose amendments to resolve conflicts in the courts).

144. ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF APRIL 25, 2003, at 9; *see also* United States v. Bailey, 322 F. Supp. 3d 661, 665 n.3 (D. Md. 2017) ("In 2002–03, the Advisory Committee considered whether to amend Rule 106 to extend its scope to oral statements and acts, and whether to amend the rule to state that evidence that met the fairness requirement of Rule 106 was admissible even if it would be inadmissible if offered on its own.").

145. In 2003, many concerns and conflicts within the operation of the Federal Rules presented more pressing priorities. Successful amendments have been adopted to deal with these critical issues, moving the underinclusive nature of Rule 106 and its conflicting and sometimes unfair application by the federal courts to the top of the list. *See* Capra & Richter, *supra* note 61, at 1892 (describing amendments to the Federal Rules of Evidence since the reconstitution of the Advisory Committee).

146. *See* WRIGHT ET AL., *supra* note 21, § 5071 ("The Committee voted unanimously not to amend Rule 106 on the ground that the costs exceeded the benefits because 'any problems under the current rule were being well-handled by the courts.'" (quoting ADVISORY COMM. ON EVIDENCE RULES, *supra* note 144)).

147. United States v. Bailey, 322 F. Supp. 3d 661, 663 (D. Md. 2017).

evidentiary landscape that is unclear."[148] Other federal judges have commented on the frequency with which issues of completeness arise in the heat of criminal trials, thus depriving judges and litigants of the time for study and reflection afforded by motions *in limine*.[149] Although they arise with great frequency in criminal cases, completeness concerns come up in civil litigation as well.[150] In all of these cases, trial judges require clear rule text that resolves the most commonly occurring completeness issues.[151]

Notably, several states have adopted evidence rules governing completion that deviate from Rule 106 and offer more clarity to judges and litigants.[152] Although the Federal Rules of Evidence were designed as a model for the states to utilize in developing evidence doctrine, completion represents an area in which the federal system could benefit from the experience of the state courts.[153]

In sum, it is clear that Rule 106 is a workhorse evidence provision that is in need of remodeling.[154] To construct a more complete and

148. *Id.*

149. *See* ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING OF OCTOBER 25, 2019, at 9 (commenting on the frequency with which completion issues arise during trial).

150. *See, e.g.*, Phoenix Assocs. III v. Stone, 60 F.3d 95, 101 (2d Cir. 1995) (finding the accountant's work papers were necessary to complete presentation of financial statements because the financial statements on their own were misleading); Brewer v. Jeep Corp., 724 F.2d 653, 657 (8th Cir. 1983) ("The appellant was free to introduce the film containing the jeep rollovers but only upon the condition that the written study explaining these graphic scenes also be offered. The trial court's order required only that the complete report be admitted, the mundane as well as the sensational. In this the trial court was fair and its exercise of discretion was not an abuse.").

151. *See* Imwinkelried, *supra* note 142, at 1368–69 (discussing importance of having a set of rules lawyers can carry into court to resolve quickly common evidence issues).

152. *See* CAL. EVID. CODE § 356 (Deering 2020); CONN. CODE EVID (2018). Sec. 1-5; GA. CODE ANN. § 24-8-822 (2020); IOWA R. EVID. 5.106 (2016); MONT. R. EVID. 106 (2019); NEB. REV. STAT. ANN. § 27-106 (2020); N.H. R. EVID. 106 (2016); OR. REV. STAT. ANN. § 40.040 (2019); TEX. R. EVID. 106–07 (2020); WIS. STAT. § 901.07 (2019).

153. Symposium, *Association of American Law Schools Annual Meeting, Evidence Section Program: The Politics of [Evidence] Rulemaking*, 53 HASTINGS L.J. 733, 765 (2002) (noting the comments of Professor Christopher B. Mueller encouraging the federal Advisory Committee on Evidence Rules to attend to the insights offered by state evidence rules).

154. Of course, Congress retains concurrent authority to enact rules of practice and procedure and could, in theory, step in to regulate completion. But this potential for a fix is both unlikely and ill-advised. *See* Capra & Richter, *supra* note 61, at 1904 (explaining that Congress rarely enacts evidence provisions independently and that direct enactment by Congress is inferior to the rulemaking process). One might also argue that unfairness resulting from a criminal defendant's inability to rebut a misleading presentation with completing hearsay could be rectified by the Constitution. But federal

functional rule of completeness, however, rule-makers must determine the optimal approach to otherwise inadmissible hearsay and to oral completing statements.

A. ADDRESSING THE HEARSAY ELEPHANT IN THE ROOM

Rule 106 should be amended to resolve, once and for all, the dilemma of otherwise inadmissible hearsay needed to correct an unfair and incomplete presentation of a statement. The decision of Rule 106's original drafters to maintain silence on this critical issue has generated much of the confusion surrounding the Rule. An amendment that allows a party to complete with otherwise inadmissible hearsay when the fairness standard is satisfied—and to rely upon the completing statement for its truth—is most consistent with the intent behind the original Rule and with the purpose of the Evidence Rules more broadly.[155]

1. Otherwise Inadmissible Hearsay: To Admit or Not To Admit, That Is the (First) Question

An amendment to Rule 106 should specifically provide that a statement, necessary to complete a statement presented in a misleading manner, is admissible despite the fact that it is hearsay. That solution to the hearsay problem is the only one that is consistent with the fundamental purpose of the completeness doctrine and with the intent of the original drafters of Rule 106.

Allowing a hearsay objection to defeat completion authorized under Rule 106's narrow fairness standard permits a misleading presentation of evidence to go unrebutted and leaves the fact-finder with a distorted view of the evidence. The *Adams* opinion from the Sixth Circuit illustrates the deleterious impact of the exclusion alternative. In that case, the court recognized that the prosecution's selective presentation of the defendant's statements left jurors with the impression that the defendant admitted unlawfully hand-picking corrupt people

courts have denied constitutional challenges based upon the admission of a defendant's inculpatory statements without completing evidence of exculpatory statements. *See* Gacy v. Welborn, 994 F.2d 305, 316 (7th Cir. 1993) ("Beyond explicit rules such as the privilege against self-incrimination and the confrontation clause, none of which applies here, the Constitution has little to say about rules of evidence. The hearsay rule and its exception for admissions of a party opponent are venerable doctrines; no serious constitutional challenge can be raised to them." (citation omitted)). And, of course, the constitutional right to an effective defense has no applicability where the unfair portion is offered *by the criminal defendant*, or by a party in a civil case. In those situations, the remedy against unfairness must come from the Evidence Rules or not at all.

155. FED. R. EVID. 102.

to serve on an election board when he had instead *denied doing any such thing*.[156] Nonetheless, the court upheld the trial court's exclusion of the defendant's completing statements based upon controlling Sixth Circuit precedent preventing the presentation of the defendant's otherwise inadmissible hearsay statements through Rule 106.[157] Therefore, the defendant's conviction was based, in part, on a misleading presentation of his own statements.

An interpretation of Rule 106 that permits a selective and misleading presentation of a statement to go unrebutted is a clear perversion of its fundamental promise of "fairness."[158] Indeed, such an interpretation defies the fundamental purpose of the Rules in their entirety. Federal Rule of Evidence 102 makes clear that the Rules are to be construed "to administer every proceeding fairly" and "to the end of ascertaining the truth and securing a just determination."[159] Amending Rule 106 in a manner that allows litigants to present evidence unfairly and out of context cannot be squared with Rule 102's clear mandate.

a. Legislative History Supports the Admission of Hearsay

The legislative history of Rule 106 supports its use as a tool for overcoming a hearsay objection. As discussed above, the DOJ fought for an express limitation on Rule 106 that would prevent completion with hearsay before the Advisory Committee and Congress.[160] Both rejected the DOJ's call to exclude completing statements that would be otherwise inadmissible.[161] Although it is theoretically possible that Congress rejected this limitation because it thought proposed Rule 106 *already* prevented the admission of otherwise inadmissible evidence, noted commentators have characterized this possibility as "unlikely" because:

> One would suppose that if the [Judiciary] Committee—[within which] the Justice Department did not want for friends—thought that all it would take to make the Department happy was to make the Rule say what the Senators intended it should mean, then the Department's proposed amendment would

156. United States v. Adams, 722 F.3d 788, 826–27 (6th Cir. 2013).

157. *Id.* at 827.

158. FED. R. EVID. 106; *see also* United States v. Bailey, 322 F. Supp. 3d 661, 675 (D. Md. 2017) ("One can hardly claim the moral high ground through a willingness to accept an unfair result in the name of evidentiary purity.").

159. FED. R. EVID. 102.

160. *See* WRIGHT ET AL., *supra* note 21.

161. *Id.*

> have been adopted or some statement of Congressional intent placed in the Committee Report.[162]

This legislative history demonstrates that completion was never intended to be foreclosed by a hearsay objection.

And this makes eminent sense. Requiring completing evidence to be "otherwise admissible" would reduce the doctrine of completion to a timing advantage beneficial only to litigants already capable of self-help.[163] Parties possessing the independent evidentiary authority to admit certain out-of-court statements would be able to present them *earlier* in the case. The litigants who need protection from a distorted presentation of the evidence the most—those who cannot independently admit the completing evidence—would remain exposed to selective and unfair presentations. Excluding completing statements that are not "otherwise admissible" makes the completion right a dead letter in any circumstance where the parties possess asymmetrical rights to admit an out-of-court statement under existing hearsay rules. Completion concerns most commonly arise in those circumstances where the risk of abuse is most serious: when the government seeks to present a criminal defendant's incriminating statements without including exculpatory portions.[164] Due to the one-way admissibility of party-opponent statements under Federal Rule of Evidence 801(d)(2)(A), there is always an asymmetrical right in favor of the

162. *See id.* § 5078.1, at n.32.

163. In his influential work on the rule of completion, Professor Dale Nance also argued that completion must have been intended to trump exclusionary rules because rebuttal or optional completion during an opponent's case in chief was routinely recognized as a distinct doctrine. According to Professor Nance, if completion did *not* trump exclusionary rules, there would be no purpose for recognizing completion as a distinct doctrine in the rebuttal context because the basic rules of relevance would authorize admission of an otherwise admissible omitted remainder during an opponent's case in chief *without the need for any special doctrine.* The only reason to recognize a special doctrine to allow this rebuttal completion *is* to overcome exclusionary rules that could otherwise block the admissibility of this relevant evidence. Dale A. Nance, *Verbal Completeness and Exclusionary Rules Under the Federal Rules of Evidence*, 75 TEX. L. REV. 51 (1996).

164. *See, e.g.*, United States v. Terry, 702 F.2d 299, 314 (2d Cir. 1983) ("Rule 106 does not render admissible evidence that is otherwise inadmissible."); United States v. Coplan, 703 F.3d 46 (2d Cir. 2012); United States v. Nixon, 779 F.2d 126 (2d Cir. 1985); United States v. Hassan, 742 F.3d 104, 134–35 (4th Cir. 2014) (finding defendant's web postings were not admissible under Rule 106 because they were hearsay); United States v. Lentz, 524 F.3d 501 (4th Cir. 2008); United States v. Oloyede, 933 F.3d 302 (4th Cir. 2019); United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982); United States v. Adams, 722 F.3d 788 (6th Cir. 2013); United States v. Vargas, 689 F.3d 867, 876–77 (7th Cir. 2012); United States v. Hayat, 710 F.3d 875, 896 (9th Cir. 2013) ("Rule 106 'does not compel admission of otherwise inadmissible hearsay evidence.'" (quoting United States v. Collicott, 92 F.2d 973, 983 (9th Cir. 1996))).

government in such cases.[165] A defendant may not admit his own out-of-court statements under that exception.[166] Therefore, if a completing statement must be "otherwise admissible," completion will almost always be unavailable when the prosecution unfairly distorts a defendant's own statements.[167]

b. Placement of the Rule

It might be argued that the *placement* of Rule 106 in Article 1 of the Evidence Rules indicates that the drafters did not consider it to operate as a hearsay exception—if they had, the argument goes, they would have placed it with the hearsay rule and its exceptions in Article 8. But this argument is easily dismissed. Rule 802, which is the operative rule against hearsay,[168] provides that hearsay is inadmissible "unless any of the following provides otherwise:

- a federal statute;
- *these rules*; or
- other rules prescribed by the Supreme Court."[169]

The reference is to *these* rules, meaning *all* of the Evidence Rules. If the drafters had wanted to limit hearsay exceptions to those in Article 8, Rule 802 would have referred to "the rules in this article" rather than "these rules." Notably, courts have found rules outside of Article

165. FED. R. EVID. 801(d)(2)(A).

166. *See* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 4 FEDERAL RULES OF EVIDENCE MANUAL § 801.02 (2020) ("The touchstone of admissibility is that the statement is beneficial to, and offered by, the speaker's opponent at the time of trial. It follows that a party can never admit a statement *in her favor* under [Rule 801(d)(2)]; the statement must be offered by a party-opponent.").

167. Such asymmetry is not limited to party opponent statements that favor the government in criminal cases. Similar issues can arise when a defendant offers a partial statement against the government under the former testimony or declarations against interest exceptions and a completing remainder is not independently admissible against the defendant under those exceptions. *See, e.g.*, United States v. Woolbright, 831 F.2d 1390, 1395–97 (8th Cir. 1987) (determining that a woman's statement that a bag where drugs were found was hers was admissible against government under the declarations against interest exception, but the woman's statement that she and the defendant were "on their honeymoon" was not); State v. Selalla, 744 N.W.2d 802, 818 (S.D. 2008); United States v. Maccini, 721 F.2d 840, 845 (1st Cir. 1983) (permitting a prosecutor to have additional portions of a witness's grand jury testimony read after defense counsel introduced a misleading portion of that testimony); United States v. Mosquera, 886 F.3d 1032, 1049 (11th Cir. 2018) (affirming the district court's application of Rule 106 to allow the government to admit additional portions of a witness interview after the defendant selectively admitted portions of the interview).

168. Rule 801 defines hearsay; Rule 802 is the source of exclusion of hearsay. FED. R. EVID. 802 ("The Rule Against Hearsay").

169. *Id.* (emphasis added).

8, including Federal Rule of Civil Procedure 32(a)(4), to be grounds for admitting hearsay.[170] If a hearsay exception can be found outside the Evidence Rules, there is no reason why an exception cannot be found within those rules but outside of Article 8.

Moreover, as stated by the D.C. Circuit in *United States v. Sutton*,[171] the placement of Rule 106 is actually a point *in favor* of finding a hearsay exception. While other evidentiary provisions qualify admissibility by reference to other rules, Rule 106 contains no proviso that it applies "except as otherwise provided by these rules."[172] Therefore, the fundamental fairness purpose of Rule 106 and a clear-eyed reading of its legislative history demonstrate that Rule 106 should permit otherwise inadmissible completing statements to be admitted for their truth.

c. Subsequent Correction as an Alternative to Completion

Notwithstanding the compelling reasons to admit the otherwise inadmissible when necessary for completeness, some courts have suggested that Rule 106 *need not* operate as a vehicle for admitting otherwise inadmissible hearsay due to an adversary's ability to correct the record later in the trial.[173] With respect to the completing, exculpatory hearsay statements of criminal defendants, for example, courts have suggested that defendants may offer statements excluded during the prosecution's case by taking the stand during the defense case and relating their own completing exculpatory statements.[174] Under this

170. *See* FED. R. CIV. P. 32(a)(4)(B). Civil Rule 32(a)(4)(B) allows admission of hearsay from a deposition even though the declarant is not unavailable under the terms of the Evidence Rules. In effect the Civil Rule creates an independent hearsay exception. And courts have upheld that exception, referring to Rule 802's list of sources for an exception outside of Article 8. *See, e.g.*, Fletcher v. Tomlinson, 895 F.3d 1010, 1020 (8th Cir. 2018). The *Fletcher* court noted that Rule 32 authorizes admissibility of deposition hearsay even though it is not admissible under the Article 8 exceptions, as well as that "[d]ecisions from around the country have concluded that Rule 32(a)(4)(B) operates as an independent exception to the hearsay rule." *Id.*

171. United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

172. *Compare* FED. R. EVID. 106, *with* FED. R. EVID. 402, *and* FED. R. EVID. 501.

173. *See, e.g.*, United States v. Sanjar, 876 F.3d 725, 739 (5th Cir. 2017) ("When offered by the government, a defendant's out-of-court statements are those of a party opponent and thus not hearsay. FED. R. EVID. 801(d)(2). When offered by the defense, however, such statements are hearsay (the defendant may, of course, reiterate the out-of-court statements on the stand if he chooses to testify)."), *cert. denied sub nom.* Main v. United States, 138 S. Ct. 1577 (2018).

174. *See, e.g.*, United States v. Holifield, No. 05-920, 2010 U.S. Dist. LEXIS 147815, at *3 (C.D. Cal. May 25, 2010) ("The court Orders that Defendant Jordan may not introduce any exculpatory statements, not previously introduced by the Government, that constitute inadmissible hearsay" and that if the defendant wants to admit such

view, a defendant could correct the record by taking the stand and subjecting himself to cross-examination, rendering admission through Rule 106 unnecessary.

This "testimony" remedy for a misleading presentation by the prosecution in a criminal case is flawed for many reasons. First, the entire premise of Rule 106 is that contemporaneous completion is crucial because repair work may be inadequate "when delayed to a point later in the trial."[175] By the time a defendant has the opportunity to take the stand and rebut a distorted presentation of his own statement, the jury's misapprehension of the evidence may be intractable. Furthermore, a defendant's testimony is automatically impeached by bias when he takes the stand in his own defense.[176] A jury may justifiably suspect a defendant's own delayed testimony that he made self-serving statements along with the inculpatory statements selectively presented by the prosecution, thus allowing the prosecution to retain the benefit of the misleading presentation. The defendant's testimony pales in comparison to requiring a *government* witness to recount the defendant's completing exculpatory statements, made at or near the time of the statement already introduced.

In addition, the testimony alternative comes with a prohibitive cost: the defendant must sacrifice his Fifth Amendment right to refuse to testify and subject himself to cross-examination—including impeachment with prior convictions—just to correct a misleading impression purposely created by the government.[177] Finally, and

statements "he must do so by taking the stand and testifying himself" because "Federal Rule of Evidence 106 does not influence the admissibility of such hearsay statements.").

175. FED. R. EVID. 106 advisory committee's note.

176. *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, 299 (2008) ("Jurors . . . are well aware that even otherwise honest defendants have a strong incentive to shade their trial testimony in favor of acquittal.").

177. *See* United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981) ("[T]he 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.'" (alteration in original) (quoting 1 WEINSTEIN'S EVIDENCE ¶ 106[01], at 106.7 (1979))); 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."); *see also* WEINSTEIN, *supra* note 14, at 106-09 ("[T]he defendant's right against self-incrimination may be jeopardized if he is required to take the stand in order to introduce the omitted exculpatory portions of the confession."); Baker, *supra* note 138, at 304 ("Is it not the case that allowing the jury to hear misleading evidence—that cannot be completed without the defendant testifying—creates 'overwhelming pressure' [on the defendant to testify]?").

perhaps most ironically, the very hearsay objection that prevented the defendant from inquiring about his own completing statement during the government's initial presentation should still operate to prevent the defendant from recounting the statement himself during his direct examination.[178] If it is hearsay when offered to complete during the prosecution's case, that same out-of-court statement is hearsay when the defendant wishes to testify to it later in the trial.[179]

d. The Floodgates Argument

Others may argue that Rule 106 should not provide a basis for admitting the otherwise inadmissible due to the risk that it will become a gateway for a deluge of inadmissible evidence.[180] But admitting hearsay under Rule 106 will not open the floodgates to allow the unrestricted flow of previously inadmissible hearsay evidence into the trial process. Rule 106 contains important threshold requirements that operate as substantial limits on the consequences of any amendment. As explored above, Rule 106 authorizes completion of statements only when "fairness" requires it.[181] Although they are divided with respect to all other completeness concerns, the federal courts have uniformly interpreted this fairness standard narrowly to permit completion only when the original partial presentation of a statement is misleading and creates a distorted impression of the statement that was made.[182] As one federal judge recently framed the issue, "proper application of the 'fairness' requirement" will prevent any abuse of Rule 106 "because judges should restrict application of Rule 106 to those situations where misleading information actually was introduced . . . and allow only such correcting evidence as is necessary to counteract it."[183] Therefore, fear that Rule 106 will permit the free flow of a large volume of inadmissible evidence into the trial process is misplaced and overblown.

178. *See* FED. R. EVID. 801(c) ("'Hearsay' means a statement that . . . the declarant does not make while testifying at the current trial or hearing . . . .").

179. *See* WRIGHT ET AL., *supra* note 21, § 5072, at 386 ("[T]he first problem with the adversary solution is that the prosecution may be able to prevent the defendant from offering the rest of his confession by objecting that it is hearsay; a party's own out-of-court statement only comes in as an admission when it is offered by an adversary.").

180. *See supra* note 60.

181. FED. R. EVID. 106.

182. *See supra* note 65.

183. United States v. Bailey, 322 F. Supp. 3d 661, 668 (D. Md. 2017).

e. The Forfeiture Analysis

Admitting an otherwise inadmissible remainder for its truth represents no injustice to the proponent who admitted the partial statement. By using the right that it enjoys under the Rules—not as a shield to prevent the admission of potentially unreliable evidence, but as a sword to manufacture a misleading impression of the evidence—the proponent should forfeit the right to object to a completing remainder.

It is hardly radical to conclude that a misleading presentation forfeits the right to object to otherwise inadmissible evidence needed to correct the misimpression. In *People v. Vines*, the California Supreme Court held that the rule of completeness extinguishes a criminal defendant's *Sixth Amendment confrontation rights*.[184] In *Vines*, the defendant sought to admit part of a testimonial statement made to police by his accomplice implicating a third party in the robbery at issue. The trial court held that the prosecution would be permitted to admit the remainder of the accomplice's testimonial statement in which he implicated *the defendant* in the shooting that occurred during the robbery to dispel the improper inference that the accomplice had placed full responsibility on the third party.[185] The California Supreme Court affirmed:

> [L]ike forfeiture by wrongdoing, [California's rule of completeness] is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood . . . . As *Crawford* forbids only the admissibility of evidence under statutes purporting to substitute another method for [the] confrontation clause test of reliability, evidence admissible under section 356 does not offend *Crawford*.[186]

184. People v. Vines, 251 P.3d 943, 968–69 (Cal. 2011), *modified* Aug. 10, 2011, *overruled by* People v. Hardy, 418 P.3d 309 (Cal. 2018) (overruling based on other grounds); *see also* Crawford v. Washington, 541 U.S. 36, 36 (2004) (prohibiting admission of "testimonial" hearsay statements against a criminal defendant pursuant to the Sixth Amendment confrontation clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant).

185. *Vines*, 251 P.3d at 968 ("Defendant wanted to rely on a part of Proby's statement to imply that Blackie was the shooter, which was contrary to what Proby actually said elsewhere in his statement.").

186. *Id.* at 968–69 (quoting People v. Parrish, 152 Cal. App. 4th 263, 272–73 (2007)) (citing Crawford v. Washington, 541 U.S. 36 (2004)); *see also* People v. Reid, 971 N.E.2d 353, 357 (N.Y. 2012) ("If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury 'by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense' . . . . To avoid such unfairness and

Federal courts have similarly found a defendant's confrontation rights forfeited due to a misleading partial presentation of testimonial statements by the defense.[187]

If a criminal defendant may lose his constitutional right to confront his accusers through a misleading partial presentation of a testimonial hearsay statement, the government should also forfeit a mere hearsay objection to a completing remainder when it selectively and unfairly introduces a criminal defendant's statement.

Outside of Rule 106, the Federal Rules of Evidence specifically contemplate a party's forfeiture of an objection due to the misleading presentation or disclosure of certain evidence. Rule 502(a) codifies the doctrine of subject matter waiver of privilege that can cause a privilege-holder to lose the protection of privilege with respect to all material on the same subject as previously disclosed material.[188] Rule 502(a) provides that a waiver of privilege extends to additional undisclosed matter when the original waiver was "intentional," when the disclosed and undisclosed information concern the "same subject matter," and when "they ought in fairness to be considered together."[189] The "fairness" standard in Rule 502(a) was modeled after Rule 106 and was intended to require an onerous subject matter waiver of privilege when a selective waiver of a portion of privileged information creates a misleading or distorted view of the entirety of

to preserve the truth-seeking goals of our courts, we hold that the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission." (quoting People v. Ko, 789 N.Y.S.2d 43 (App. Div. 2005))); People v. Parrish, 152 Cal. App. 4th 263, 272 (2007) (holding that the prosecution was properly permitted to introduce other portions of an interview implicating defendant to complete exculpatory portions admitted by defendant); State v. Selalla, 744 N.W.2d 802, 818 (S.D. 2008) (explaining that allowing a defendant to rely upon the confrontation clause to exclude completing testimonial statements offered by the prosecution would "set up unfair outcomes arising out of not-so-hypothetical scenarios such as that of the declarant who confesses to the police that he murdered two people, but then subsequently, during the same interview, says that the defendant forced him to do it").

187. *See* United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010) (completing testimonial hearsay was admissible; defendant forfeited his Sixth Amendment confrontation right by introducing portion of testimonial hearsay by confidential informant—a party who introduces a misleading portion opens the door to a fair completion); Nguyen v. Macomber, No. 15-CV-00228, 2017 WL 2652874, at *6 (N.D. Cal. June 19, 2017) ("The confrontation clause, however, does not preclude the prosecution from introducing evidence that completes a statement previously introduced by the defendant.").

188. FED. R. EVID. 502(a).

189. *Id.*

privileged information on the same subject.[190] If a selective disclosure of a single piece of privileged information can cost a litigant her attorney-client privilege with respect to *all* other privileged information on the same subject, the selective and distorted presentation of part of a hearsay statement should also cost the proponent her hearsay objection to the completing remainder.

f. The "Unreliable" Remainder and Completion as a "Hearsay Exception"

Some might criticize this forfeiture approach as unfair to the original proponent of the partial statement by arguing that it transforms Rule 106 into a free-standing hearsay exception capable of admitting wholly unreliable hearsay.[191] Even if it expressly permits the admission of completing hearsay for its truth, Rule 106 still will not operate like traditional hearsay exceptions. As all acquainted with the Rules of Evidence know, a lawyer may offer an out-of-court statement through a traditional hearsay exception only by locating an exception with admissibility requirements that align with the statement. If a proffered statement satisfies the requirements of a hearsay exception, the statement is admissible at the proponent's election and no action by the opponent is necessary to trigger or fulfill the exception.[192] In sum, the proponent of a hearsay statement typically possesses a unilateral right to admit it through an applicable hearsay exception.[193]

By contrast, litigants will not possess any unilateral right to admit otherwise inadmissible hearsay through Rule 106. Because the Rule must be triggered by the selective and misleading presentation of a statement, the proponent of that initial statement possesses exclusive control over the admissibility of a completing remainder. If that proponent prefers to exclude the otherwise inadmissible completing hearsay, she retains the unilateral authority to keep it out of evidence

190. *See* FED. R. EVID. 502(a) advisory committee's note ("[T]hus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner."); *see also* Capra & Richter, *supra* note 61, at 1914–15 (discussing adoption of Rule 502(a) and the borrowing of the fairness standard from Rule 106).

191. *See* United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982) ("The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded."). *But see* Nance, *supra* note 23, at 866 (noting that the completeness doctrine allows an opponent to piggy-back on the inclusionary authority used by the proponent in admitting the initial portion of the statement).

192. *See, e.g.*, FED. R. EVID. 803(2) (allowing any party to admit out-of-court statements for their truth if they relate to a startling event and were made while the declarant remained under the stress of excitement caused by the event).

193. Subject to objections on grounds other than hearsay of course.

by modifying (or foregoing) her own presentation. Her adversary, therefore, may not utilize Rule 106 to admit hearsay at her election, but remains limited by the trial strategy of her opponent.[194]

It might also be argued that Rule 106 will foster *unfairness* in the trial process if it allows "unreliable" completing remainders to be admitted for their truth. But this argument misses the point of completion as a palliative for a disingenuous presentation. In the typical case, the original proponent of a partial statement presents that statement for its truth. That is precisely what the government does in admitting the inculpatory statements of a criminal defendant. But when the government presents such a statement in an incomplete and misleading fashion, it peddles a half-truth to the fact-finder. The completing remainder must be admitted for its truth, not because it is itself reliable, but because it is indispensable to a fact-finder searching for the whole truth and nothing but the truth. Furthermore, the statements of a criminal defendant are admissible against him pursuant to Rule 801(d)(2)(A) in the first place, *not* because they are reliable, but because adversarial fairness requires a person to answer for his own utterances.[195] If the original party-opponent statement offered by the government need not be reliable to be admitted for its truth, a statement necessary to offer an accurate representation of that statement need not be either.

Allowing the admission of a completing remainder for its truth does not mean that the original proponent—usually the prosecution—must *accept* the truth of the completing remainder.[196] In the

194. One hearsay exception that does operate similarly is Rule 804(b)(6)—depriving an opponent of a hearsay objection if she acted wrongfully to create the unavailability of a declarant with the intent to prevent trial testimony. FED. R. EVID. 804(b)(6). Prescribing a punishment that fits the crime, Rule 804(b)(6) allows *all* relevant hearsay statements made by such an unavailable declarant to be admitted against the wrongdoer. *Id.* Rule 106 would provide a more limited, but proportional, remedy by denying a hearsay objection to a party that proffers a misleading statement that can be completed with hearsay. *See* FED. R. EVID. 801(d)(1)(B) (allowing the admission of prior consistent statements for their truth only if the opponent impeaches the declarant in accordance with the exception).

195. *See* FED. R. EVID. 801(d)(2) advisory committee's note ("Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility as evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission." (citations omitted)).

196. *See* Johnson v. Powers, 40 Vt. 611, 612 (1868) ("It is therefore a rule of evidence that the whole declaration or admission of the party made at one time, shall be taken together, but the jury are at liberty to believe a portion and disbelieve the other, as they are of all evidence."); *see also* 7 WIGMORE, *supra* note 23, § 2100, at 626 ("[I]t is a favorite cautionary addition that the exculpatory part *need not be believed*.").

example offered in the Introduction, should the defendant admit his completing statement claiming to have sold the gun prior to the murder, the prosecution would remain free to argue the falsity of the defendant's self-serving claim. Permitting a defendant to admit the completing remainder of his statement on the same footing as the prosecution's initial proffer simply means that the defendant may *argue* the truth of the completing statement (much as the prosecution will argue the truth of his damaging admission). The prosecution remains free to challenge the truth of the completing remainder, arguing that the defendant's initial admission of culpability rings true, but that the self-serving remainder should be rejected by the jury.[197]

* * *

For all of these reasons, an amendment to Rule 106 should reject the exclusion of completing statements that satisfy the fairness standard simply because they are hearsay and should expressly permit completion with statements that would otherwise be inadmissible.

2. The Truth of the Matter—the Context Alternative

Determining that Rule 106 should authorize completion with otherwise inadmissible statements does not fully resolve the hearsay issue that has plagued the federal courts for so long. Although most federal courts have not squarely addressed the *use* to which completing statements may be put once admitted, a few courts and commentators have suggested that completing statements may sufficiently serve their fairness purpose if they are admitted for their limited nonhearsay value in placing admitted statements in context.[198] Under this view, a completing statement could be *admitted*, but could not be relied upon for its truth. An amendment to Rule 106 that authorizes the admission of otherwise inadmissible hearsay should also offer guidance about the use to which such statements may be put once they are admitted. An optimal amendment to Rule 106 would go further than a context-only approach and would truly level the playing field by admitting completing statements for the same purpose as the

197. *See* FLA. STAT. ANN. § 90.108 commentary on a 1978 amendment ("This amendment added a final sentence to Section 90.108 to make clear that a party, who is required to introduce writings or recorded statements under the section, will not be bound by the evidence so introduced.").

198. *See, e.g.*, United States v. Williams, 930 F.3d 44, 60 (2d Cir. 2019) ("[W]hen the omitted portion of a statement is *properly* introduced to correct a misleading impression or place in context that portion already admitted, it is *for this very reason* admissible for a valid, *nonhearsay* purpose: to explain and ensure the fair understanding of the evidence that has already been introduced.").

statements they complete, even if that means admitting otherwise inadmissible hearsay statements for their truth.[199]

a. Admitting Completing Statements for Their Truth Is Consistent with the Underlying Purpose and Original Intent of Rule 106

Admitting completing statements on the same basis and for the same purpose as the partially admitted statements they complete is most consistent with the underlying fairness rationale for Rule 106. A litigant creates her adversary's right to complete by selectively presenting a portion of a statement in a manner that misleads the jury as to its true import.[200] Only by permitting the completing party to rely upon the admitted remainder to the same extent as the initial misleading portion is fairness restored. Limiting the completing statement to its non-hearsay value in demonstrating "context" leaves the party who presented the partial statement in a distorted fashion with a trial advantage. The proponent who manipulated the evidence unfairly may argue the "truth" of the distorted partial statement, while the wronged adversary is left with the weak and confusing response that the jury should consider the completing portion of the statement, not as proof of a fact, but only to place the initial assertions of "fact" in context. This allows the proponent who misleadingly presented evidence to retain the benefit of the distorted statement. A rule that is premised upon fairness in presentation cannot countenance such a fairness half-measure.

There is strong evidence that Rule 106 was intended by the drafters to allow completing statements to be presented for their truth. Although Dean Wigmore argued in favor of limited non-hearsay use of completing statements, the majority of courts at common law disagreed with him and allowed completing statements to be admitted for their truth.[201] In the face of this common law history, the drafters of

199. There is an argument to be made that Rule 106 should overcome objections other than hearsay to properly completing evidence. *See* Nance, *supra* note 23, at 879–80 ("[T]he trumping function is important in any context where the exclusionary rules are *asymmetric*, that is, where the rules make certain evidence admissible if offered by one party, but inadmissible if offered by an opponent."). This Article focuses on the hearsay problem because the hearsay prohibition is commonly used to thwart completion; no other exclusionary rule has been raised in the reported cases on Rule 106.

200. *See, e.g.*, United States v. Velasco, 953 F.2d 1467, 1475 (7th Cir. 1992) ("Once relevance has been established, the trial court then must address the second half of the test, and should do so by asking (1) does it explain the admitted evidence, (2) does it place the admitted evidence in context, (3) will admitting it avoid misleading the trier of fact, and (4) will admitting it insure a fair and impartial understanding of all the evidence.").

201. *See supra* note 42.

Rule 106 maintained textual silence on the hearsay issue while citing in Committee notes to the California completeness provision, which allows hearsay to be admitted for its truth when necessary to complete.[202] Had the drafters intended to alter the majority approach to completing hearsay and to limit the use to which completing statements could be put, they would have done so explicitly.

In *Tome v. United States*, the Supreme Court adopted similar reasoning with respect to Rule 801(d)(1)(B) governing prior consistent statements. In that case, the Court found a pre-Rules common law timing limitation on the admissibility of prior consistent statements offered to rehabilitate impeached testifying witnesses.[203] The Court found that a majority of courts required a prior consistent statement to have been made *before* any motive to fabricate with which the witness was charged at trial. Where the drafters of Rule 801(d)(1)(B) were silent with respect to any timing requirement, the Court found the common law pre-motive limitation baked into the Rule.[204] Applying the same reasoning to Rule 106 suggests that the drafters expected the common law majority approach that permitted completing hearsay to be offered for its truth to continue under the Rule.

b. A "Context" Only Approach: Wasteful Complexity and Needless Disruption

The alternative of admitting a completing statement for its nonhearsay value in showing context only is suboptimal for several reasons. Limiting the use of completing statements would require them to be accompanied by limiting instructions cautioning the jury against full use of the evidence. Limiting instructions are notoriously confusing for jurors to comprehend and follow.[205] Requiring completing remainders to be accompanied by limiting instructions in every case will lead to confusion at least and fairness defeating rejection of the remainder at worst.

The difficulty the jury will likely encounter with a "context" solution can be illustrated with the hypothetical in which the defendant

202. *See* FED. R. EVID. 106 advisory committee's note (citing CAL. EVID. CODE § 356 (Deering 2020)); *see also* Rosenberg v. Wittenborn, 3 Cal. Rptr. 459, 464 (Dist. Ct. App. 1960) (explaining that qualifying statements as hearsay provides no basis for excluding them under the California completeness rule).

203. Tome v. United States, 513 U.S. 150, 161–63 (1995).

204. *Id.*

205. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 447 (2013) ("[I]f we cannot come up with an explanation for the [limiting] instruction that will make sense to jurors . . . it may be a good time to reexamine the rule that the instruction attempts to implement.").

stated: "I bought the gun, but I sold it two months before the murder."[206] In that circumstance, the government could present the portion of the statement that admits "I bought the gun" and could argue that the defendant's possession of the gun before the murder has been proved by his own statement. Based on that presentation alone, the jury could reasonably infer that, because the defendant bought the gun, he still had it at the time of the crime. Even if he is thereafter permitted to offer the remainder of his statement about selling the gun, the defendant would *not* be able to argue that the evidence indicates that he no longer had the gun. A limiting instruction would alert the jury that it could consider the defendant's completing statement about the sale of the gun only for "context." To properly adhere to that instruction, a jury should simply decline to draw the inference it would otherwise have drawn from the government's partial and misleading presentation. The jury should not assume the defendant *had* the gun at the time of the murder because the completing statement eliminates that inference. And the jury may not assume that the defendant *sold* the gun before the murder if the completing statement is not admissible for its truth. Accordingly, after hearing both portions of the statement, the jury should assume that the statement provides *no* evidence one way or the other about the defendant's possession of the gun at the time of the crime. It is highly doubtful that a lay jury will perform the mental gymnastics required for this completion "solution."

Instead, it appears likely that jurors will give effect to the portion of the statement misleadingly presented by the prosecution because the government can and will argue the truth of that statement. Jurors may interpret a perplexing instruction to limit their use of the defendant's completing statement to "context" as code, cautioning them to *disbelieve* it. Befuddled by the limiting instruction, jurors may simply ignore the completing portion altogether. Such a jury would be left with the inference that the defendant had the gun at the time of the murder. Thus, a defendant who may not argue the truth of his contemporaneous completing statement may lose any benefit from Rule 106.[207]

206. United States v. Bailey, 322 F. Supp. 3d 661, 664 (D. Md. 2017) (describing this scenario).

207. JOHN H. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE 322 (1935) (acknowledging that the nonhearsay theory rests on a distinction that is "an artificial doctrine tending to a quibble"); *see also* Nance, *supra* note 23, at 874 ("While the remainder becomes admissible only by virtue of the proponent's presentation of the incomplete part, the net effect of the whole ought not to be limited in a way that it would not have been if offered by the proponent in the first instance. Thus, the use of the

Furthermore, amendments to the Evidence Rules should not add unnecessary complexity to the trial process. A context-only approach to completing statements is contrary to the recent trend in evidence rulemaking, which evinces an intent to eliminate perplexing and needless limiting instructions. For example, Federal Rule of Evidence 801(d)(1)(B) was amended in 2014 to make certain prior consistent statements—previously admissible only for the limited purpose of rehabilitating an impeached witness—admissible for their truth.[208] One of the principal benefits of this amendment was to eliminate the need for confusing limiting instructions cautioning jurors to utilize an admitted prior consistent statement only for its non-hearsay rehabilitative purpose.[209] An amendment to Rule 106 should not run counter to this objective by requiring an incomprehensible limiting instruction not currently given in the completion context.[210]

The fact that limiting instructions are not an existing feature of federal completion doctrine reveals another defect with a "context only" amendment to Rule 106. Such an amendment would anoint a distinctly minority view of completion as the uniform federal rule. The majority of federal courts admit completing statements that would otherwise be hearsay under the current version of Rule 106 without limiting the use to which they may be put.[211] Other federal courts exclude such statements altogether.[212] Only one circuit has expressly provided that completing statements should be admitted for their "non-hearsay" value and even then only in dicta.[213] Amending Rule 106 to limit completing statements to their non-hearsay value in all

remainder is not rightly limited to nullifying the effect of the incomplete part. The net probative effect of the whole utterance may favor the opponent.").

208. FED. R. EVID. 801(d)(1)(B) advisory committee's note to the 2014 amendment.

209. *See* Liesa L. Richter, *Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 801(d)(1)(B)*, 46 CONN. L. REV. 937, 942 (2014) (describing the goal of the amendment "to eliminate the disparate treatment of similarly-situated prior consistent statements at trial, as well as the need for confusing limiting instructions that may befuddle a lay jury").

210. *See* BLINKA, *supra* note 1, § 107.2 ("The better practice . . . is to introduce the remaining parts on the same footing as those originally offered. Simply put, the additional evidence 'which ought in fairness to be considered' is also admissible under the rule of completeness. Juries, like all people (even lawyers), are ill-equipped to draw tortured distinctions between statements offered for their 'truth' and those admitted solely to provide 'context.' . . . [T]he trial judge should admit only those statements 'which are necessary to provide context and prevent distortion.' This standard suffices without resort to a meaningless limiting instruction.").

211. *See supra* notes 69–83 and accompanying text.

212. *See supra* notes 84–92 and accompanying text.

213. United States v. Williams, 930 F.3d 44, 64 (2d Cir. 2019).

instances would significantly disrupt the settled operation of Rule 106 in almost all federal circuits. The optimal resolution of a circuit split is typically found in the majority approach to a contested provision, both because a majority of the federal judges that have considered the issue have favored one approach and because a majority resolution causes the least disruption to existing practice.[214] To adopt a limited context-only amendment to Rule 106 would be to enshrine an untested minority view in rule text.

The most sensible amendment to Rule 106 would permit a completing statement to be used for the *same* purpose as the original partially presented statement. Most commonly, the original statement is presented for its truth under a hearsay exception.[215] If, however, the original partial statement was offered only for its non-hearsay value—perhaps in showing the effect of the statement on some party to the litigation who heard the statement—then limiting the completing statement to the same non-hearsay use would be both fair and workable.[216] It would be fair because it would maintain a level playing field for both parties who would both be limited to the non-hearsay purpose. Because the original statement would force the jury to comprehend the limited purpose of the statement in creating some effect on the party, a similar limitation on the completing portion of the statement would not add confusion or complexity. In these narrow circumstances, a non-hearsay limitation on a completing remainder would be appropriate and would be required even by an amendment authorizing use of a completing statement on the same basis as the original statement. But an amendment to Rule 106 should not extend a non-hearsay limit to all completing statements.

Finally, an amendment to Rule 106 providing that completing statements may be admitted for their non-hearsay value would be an ineffectual exercise of rulemaking authority. Rule 802 of the Federal Rules excludes hearsay evidence, but Rule 801(c) defines hearsay as

214. *See* Capra & Richter, *supra* note 61, at 1891 (explaining that a "drafter should ordinarily give greater weight to the majority rule on an issue").

215. *See, e.g.*, United States v. Sanjar, 876 F.3d 725, 739 (5th Cir. 2017) ("When offered by the government, a defendant's out-of-court statements are those of a party opponent and thus not hearsay."), *cert. denied sub nom.* Main v. United States, 138 S. Ct. 1577 (2018).

216. *See, e.g.*, United States v. Sweiss, 800 F.2d 684, 690–91 (7th Cir. 1986) (permitting the defense to offer a recording of a prior conversation between the defendant and an informant showing that the *informant* told the defendant about the charged plot after the government admitted a recording of a conversation between the defendant and the same informant suggesting that the defendant knew in advance of the conversation about the plot).

an out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement."[217] Accordingly, a completing statement that is offered only for its non-hearsay value in showing context for the previously admitted partial statement is not hearsay under current rules and is thus, *already admissible under existing Rule 106*. No amendment to the Rules is necessary to make out-of-court statements admissible when they are not offered for their truth. An amendment that does nothing more than echo the operation of existing rules would not represent effective rulemaking.

* * *

Therefore, an ideal amendment to Rule 106 would resolve the longstanding circuit split with respect to otherwise inadmissible hearsay in favor of admissibility. Further, to fulfill the fairness goals of Rule 106 and the Federal Rules of Evidence more broadly, an amendment should allow the admission of such completing statements for the same purpose as the statements they complete. If the partial statement was introduced for its truth, the completing statement necessary to prevent distortion of the evidence should also be admissible for its truth.

B. BRINGING ORAL STATEMENTS UNDER THE TENT

Any amendment to Rule 106 should also address the longstanding conflict with respect to incomplete oral statements. Because Rule 106 applies by its terms only to written and recorded statements, it offers no remedy for partially presented oral statements. But selectively presented oral statements raise the same fairness concerns that partial written and recorded statements do.[218] Courts have been left to the common law of evidence and to the nebulous authority of the trial judge to control the "mode and order of examining witnesses and presenting evidence" under Rule 611 to address completeness concerns surrounding oral statements. Most troubling are the courts that have denied completeness protection to oral statements entirely because of their omission from Rule 106. Amending Rule 106 to resolve the hearsay question affords rule-makers an opportunity to craft a more concise and accessible approach to oral statements as well.

217. FED. R. EVID. 801(c)(2).

218. WEINSTEIN, *supra* note 14, at 106-15 ("Both considerations normally are particularly important, when words, whether written or oral, are the object of proof."); *see also* United States v. Bailey, 322 F. Supp. 3d 661, 664 (D. Md. 2017) ("A blanket rule of prohibition [on the completion of oral statements] is unwarranted, and invites abuse.").

1. Leaving Well Enough Alone?

In contrast to the drafting history of Rule 106 with respect to the hearsay issue, the legislative history clearly reflects the original drafters' decision to omit oral statements from the Rule. In light of that unequivocal intention to exclude oral statements from the protection of Rule 106 and to codify completion only partially, a case could be made for leaving oral statements out of any amendment to the Rule. An amended provision could address the most troubling hearsay question and allow courts to continue relying upon Rule 611(a) and the common law to resolve completeness concerns attending the partial presentation of oral statements.

But there are several drawbacks to the current state of affairs for incomplete oral statements. Leaving the completion right for such statements out in the ether of the common law or in the penumbra of Rule 611(a) creates a trap for the unwary litigator. The Federal Rules of Evidence were designed as a concise set of standards that lawyers could carry into court and consult in the heat of trial to resolve evidentiary questions as they arise.[219] Unlike issues such as the admissibility of expert opinion testimony under Rule 702 or other acts evidence under Rule 404(b) that are commonly argued *in limine*, completion issues frequently arise during trial in response to the evidentiary presentation of an adversary. In such a setting, trial judges and lawyers alike need to be able to consult the rulebook to determine whether completion is authorized.

Without any completion protection applicable to oral statements expressly defined in the Evidence Rules, lawyers—and even judges—may not think to consider the remaining common law of evidence. As the Reporter for the Advisory Committee which drafted the original Rules noted:

> In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided . . . ." In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.[220]

Lawyers may be even less likely to consider the possibility of a completion right lingering outside the Evidence Rules in the common law *because* the Rules contain Rule 106, a provision that codifies a completion right for written and recorded statements. In other areas where the common law has been found to persist—such as in the

219. Imwinkelried, *supra* note 142, at 1368–69.

220. Edward Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978).

regulation of impeachment for bias—the Rules are silent.[221] In contrast, the "partial" codification of completion in Rule 106 may ambush lawyers who take the Rule's exclusion of oral statements at face value when arguing for completion on the fly in the heat of trial without the opportunity for research or in-depth review of Advisory Committee notes.

Even with the opportunity for study and reflection, courts may be reluctant to embrace a common law solution in the face of an evidence rule on point. In the recent case of *United States v. Oloyede*,[222] for example, the defendant specifically relied on the common law rule of completeness to argue that an exculpatory portion of his oral statement should have been admitted. Notwithstanding the Supreme Court's recognition of common law completion rights in *Beech Aircraft*, the Fourth Circuit expressed "doubt that a common law rule of completeness survives Rule 106's codification."[223] The court further held that "any such common law rule cannot be used to justify the admission of inadmissible hearsay."[224]

Nor is the Rule 611(a) solution any more obvious than the common law one. Rule 611(a) does not refer to completeness, and it is not immediately evident that a lawyer can use that provision for relief when the rule specifically on point does not provide protection. Both lawyers and judges may be unaware that there is authority for completing oral statements outside Rule 106. Indeed, such unawareness may explain the federal cases that simply deny completion of oral statements because they are excluded from Rule 106 without any discussion of Rule 611(a) or the common law.[225] And even for courts and litigants aware of completion rights outside of Rule 106, bringing oral

221. *See* United States v. Abel, 469 U.S. 45, 51–52 (1984) (finding that common law impeachment for bias continues under the Federal Rules of Evidence through Rule 402 which makes all relevant evidence admissible unless otherwise excluded despite omission of bias rule).

222. United States v. Oloyede, 933 F.3d 302, 313 (4th Cir. 2019).

223. *Id.*

224. *Id.*

225. *See, e.g.*, United States v. Gibson, 875 F.3d 179, 194 n.10 (5th Cir. 2017) (rejecting a completeness argument because Rule 106 applies only to written and recorded statements); United States v. Hayat, 710 F.3d 875, 895 (9th Cir. 2013) ("Our cases have applied the rule of completeness 'only to written and recorded statements.'" (quoting United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000))); United States v. Ramirez-Perez, 166 F.3d 1106, 1113 (11th Cir. 1999) ("Because the prosecutor questioned the agent only about what Maclavio said rather than about what was written in the document, Rule 106 did not apply."); United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) (finding no relief from a misleading presentation because the completing statement was unrecorded and omitted from Rule 106).

statements within Rule 106's orbit has the advantage of resolving all completion issues through a single concise provision rather than according to a confusing patchwork of rules and common law.

Further, if Rule 106 is amended to allow completion over a hearsay objection, leaving oral statements out of Rule 106 becomes even more problematic. Omitting oral statements from an amended Rule 106 would leave the hearsay issue unresolved with respect to oral statements.[226] Although courts might look to an amended Rule 106 for guidance with respect to the hearsay issue in the context of oral statements still governed by Rule 611(a) and the common law, they might just as easily reject completing oral statements on hearsay grounds *because* the amendment declined to extend its new hearsay protection to them. Adding oral statements to an amended Rule 106 that eliminates a hearsay objection to completing statements would create necessary parallel treatment of written, recorded and oral completing statements.

2. Oral Statements and "Practical Concerns"

Amending Rule 106 to cover oral statements will provide immediate completeness protection for misleadingly presented oral statements in those jurisdictions that have denied the completion right based solely on the omission of oral statements from Rule 106. Gathering the completion rights applicable to all statements, in whatever form they are made, under a single user-friendly provision will also aid judges and litigants in all jurisdictions and "promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[227] Still, an amendment to Rule 106 that brings oral statements within its protection must account for the "practical" concerns that led the original drafters to shy away from them.

Although the Advisory Committee's explanation for its choice to omit oral statements from Rule 106 is cryptic to say the least, two primary concerns may have animated the decision. One possibility is that rule-makers were apprehensive about time-consuming disputes about the *content* of unrecorded oral statements—disputes that are less likely to occur when a statement is committed to writing or otherwise recorded.[228] Another related possibility is that the drafters had

226. *See Oloyede*, 933 F.3d at 314 (holding that the common law completion right could not overcome hearsay doctrine).

227. FED. R. EVID. 102.

228. *See* United States v. Bailey, 322 F. Supp. 3d 661, 670 (D. Md. 2017) ("[T]he 'practical reasons' why oral conversations are excluded from Rule 106 undoubtedly

it most prominently in mind to enact a rule that would mandate *contemporaneous* completion and reverse the common law reluctance to allow a party to interrupt his adversary's case to offer completing evidence.[229] The drafters of Rule 106 may have foreseen obstacles to the interruption of an opponent's case to offer completing oral statements and may have feared that the inclusion of oral statements would undermine the goal of mandating immediate completion. For example, a litigant might need to complete an oral conversation by calling a different witness who was also present and could testify to the remainder of the conversation. It could be unduly disruptive to interrupt the opponent's case to present a witness. In contrast, immediate completion of a written or recorded statement may easily be accomplished by requiring the original proponent to present a designated additional portion of the written or recorded statement.

But neither of these concerns should stand in the way of amending Rule 106 to include oral statements. First, it is not at all clear that difficulties of proof were at the heart of the Advisory Committee's decision to reject completion of oral conversations. That same Committee proposed a rule on prior inconsistent statements that allowed oral, unrecorded statements to be admissible for their truth.[230] There was no concern expressed about the potential difficulty in proving such statements, and it could be expected that a witness being impeached with a prior oral statement might deny having made it. In fact, the problems raised by unrecorded statements offered to complete—were they ever made, or are they being misreported—are problems raised by *every unrecorded statement reported in a court*.[231] There is no sound reason for treating *completing* unrecorded statements differently from any other unrecorded statement routinely admitted under the Federal Rules of Evidence.

More importantly, the experience of the many jurisdictions that have permitted the completion of partial oral statements reveals no time-consuming costly disputes over the content of incomplete oral statements. As outlined above, several federal circuits currently permit the completion of misleading partial oral statements under the

include the need to avoid 'he said, she said' disputes about the content of an unrecorded or unwritten statement . . . .").

229. *See* FED. R. EVID. 106 advisory committee's note (highlighting the "inadequacy of repair work when delayed to a point later in the trial").

230. *See* RICHARD D. FRIEDMAN & JOSHUA DEAHL, FEDERAL RULES OF EVIDENCE: TEXT AND HISTORY 326 (2015) (analyzing the Advisory Committee's Revised Definitive Draft of Rule 801(d)(1)(A)).

231. *See, e.g.*, FED. R. EVID. 801(d)(2)(A) (admitting all statements allegedly made by a party opponent, whether recorded or unrecorded).

authority of the common law or Rule 611(a).[232] None of the reported federal cases discuss a dispute between the parties about the content of an unrecorded statement. This is, of course, not dispositive as to the existence of such disputes because it is possible that some may not be reported. Still, it demonstrates that there is no significant problem attending completion with oral unrecorded statements in those federal jurisdictions that already allow it.[233]

Finally, to the extent that a dispute did arise concerning the content or existence of an oral statement, the difficulty of proof is a matter that could be handled on a case-by-case basis under Rule 403.[234] The fairness rationale of Rule 106 should apply to completing unrecorded statements, unless the court finds that the probative value of the completion is substantially outweighed by the difficulties and uncertainties of proving what was said in a given case.

The impracticality of contemporaneous completion or interruption with unrecorded statements likewise should not stand in the way of amending Rule 106 to include such statements. The existing language of Rule 106 requires immediate completion of written and recorded statements "at that time."[235] Although some courts have read that language literally and have required completion to be contemporaneous, others have applied Rule 106 more flexibly and have allowed an opponent to offer completing evidence at a later time.[236] With respect to unrecorded oral statements not currently covered by Rule 106, the courts that permit completion under the common law or under Rule 611(a) allow needed flexibility as to timing.[237] And the Advisory Committee notes to Rule 106 expressly provide that "[t]he rule

232. *See supra* notes 108–18.

233. *See Bailey*, 322 F. Supp. 3d at 670 ("Moreover, if the content of some oral statements are disputed and difficult to prove, others are not—because they have been summarized (for example, in a FBI agent's form 302 summary of the defendant's confession), or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty.").

234. *See* FED. R. EVID. 403 (allowing courts to "exclude relevant evidence if its probative value is substantially outweighed" by dangers, such as unfair prejudice, confusion, and waste of time).

235. FED. R. EVID. 106.

236. *Compare* United States v. Larranaga, 787 F.2d 489 (10th Cir. 1986) (holding that the defendant lost his one opportunity to introduce completing hearsay because he waited until redirect to demand completion), *with* United States v. Holden, 557 F.3d 698, 706 (6th Cir. 2009) (holding that that the judge has "discretion to determine whether and when the curative evidence should be admitted").

237. *See* Beech Aircraft v. Rainey, 488 U.S. 153, 171 (1988) (holding that it was an error to exclude the completing information when it was offered later on cross-examination).

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."[238]

Therefore, an amended Rule 106 could extend the completion right to misleading oral statements by eliminating the rigid timing requirement in the existing provision. An amended provision could preserve the important right to interruption in the circumstances where it can be enforced effectively while vesting the trial judge with discretion to delay completion to a later time when an opponent prefers a delay or when the impracticality of completing oral statements requires one. In fact, this is the typical approach to the timing of completion in the federal courts today. Memorializing it in rule text that can be applied consistently across circuits is not only feasible, but advisable.

Notably, several states have advanced beyond Federal Rule 106 and have extended their evidentiary provisions regarding completion to oral statements without complication or controversy.[239] Although the Wisconsin rule of completeness originally mirrored Federal Rule 106,[240] it was amended in 2017 to bring oral statements expressly

238. FED. R. EVID. 106 advisory committee's note.

239. *See* CAL. CODE EVID. § 356 (Deering 2020) ("Where 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 an adverse party . . . ."); CONN. CODE EVID. § 1-5 (2018) ("When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible . . . ."); GA. CODE ANN. § 24-8-822 (2020) ("When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence."); IOWA R. EVID. 5.106 (2016) ("If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction . . . of any other part . . . ."); MONT. R. EVID. 106 (2019) ("When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party . . . an adverse party may inquire into or introduce any other part of such item of evidence or series thereof."); NEB. REV. STAT. ANN. § 27-106 (2020) ("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."); N.H. R. EVID. 106 (2016) ("A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced [given it's related to the same subject matter and adds context]."); OR. REV. STAT. ANN. § 40.040 (2019) ("When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, where otherwise admissible, may at that time be inquired into be the other . . . ."); TEX. R. EVID. 107 (2020) ("An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent.").

240. *See* State v. Eugenio, 579 N.W.2d 642, 649 n.6 (Wis. 1998) (noting that the then-existing version of the Wisconsin rule of completeness was "identical" to Federal Rule 106).

within its reach.[241] This was done to align the rule text with the Wisconsin cases, which have long permitted the admission of completing oral statements.[242] In *State v. Eugenio*,[243] the Wisconsin Supreme Court acknowledged that the fairness rationale supporting completion of written and recorded statements applies equally when oral statements are presented to the fact-finder out of context.[244] Similarly, the New Hampshire rule of completeness was amended in 2017 to add a right to complete "unrecorded statements or conversations."[245] According to the commentary to the rule, the amendment was designed to bring the New Hampshire evidence rule into line with the common law of New Hampshire that permits the completion of oral statements.[246]

The reported cases in the state jurisdictions that have embraced the completion of purely oral statements reveal no messy trial disputes regarding the content of oral statements.[247] Further, these state jurisdictions have handled the timing issues that attend the completion of oral statements with ease, allowing completion during cross-examination of a witness or during the completing party's case rather than requiring interruption of the proponent's presentation in all

241. WIS. STAT. ANN. § 901.07 (West 2019) ("When any part of a writing or statement, *whether recorded or unrecorded*, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion." (emphasis added)).

242. *See* State v. Sharp, 511 N.W.2d 316, 322 (Wis. App. 1993) (explaining that the rule of completeness was recognized in the common law of Wisconsin since at least 1872 and that the common law of completion was not limited to written statements, but encompassed conversations).

243. *Eugenio*, 579 N.W.2d at 409.

244. *Id.* (quoting 7 DANIEL D. BLINKA, WISCONSIN EVIDENCE § 107.1, at 32 (1991)).

245. N.H. R. EVID. 106(b) ("A party has a right to introduce the remainder of an unrecorded statement or conversation that his or her opponent introduced so far as it relates: (1) to the same subject matter; and (2) tends to explain or shed light on the meaning of the part already received.").

246. *See* N.H. R. EVID. 106 commentary ("The addition of (b), not included in Federal Rule of Evidence 106, codifies New Hampshire case law as set forth in State v. Lopez, 156 N.H. 416, 421 (2007)."); *see also* State v. Warren, 732 A.2d 1017, 1020 (N.H. 1999) ("The defendant argues that while Rule 106 permits a party in certain circumstances to require an opponent to introduce simultaneously with a writing or recorded statement other related writings or recorded statements, the completeness doctrine applies to any verbal utterance. We agree.").

247. *See, e.g.*, *Warren*, 732 A.2d at 1020 (finding that defendant's oral exculpatory statements served to place his expression of remorse for killing in context and were part of the same conversation and that these oral statements should have been admitted under the doctrine of completeness).

circumstances.[248] Although the Federal Rules of Evidence were designed as models for state practice, the states can serve as real-world laboratories to test alterations and advancements in evidentiary practice.[249] Where several states have already extended their rules of completeness to cover unrecorded oral statements without any adverse consequences, Federal Rule of Evidence 106 may safely follow suit.

IV. THE OPTIMAL AMENDMENT TO COMPLETE THE RULE OF COMPLETENESS

As surprisingly complicated as the issues surrounding the doctrine of completeness may be, an amendment that would resolve those issues would be relatively simple to draft.[250] Updated rule text would need to address only three things:

First, it would need to clarify that a completing statement may be admitted on the same basis as the originally introduced portion of the statement and that completion necessary for fairness defeats a hearsay objection.

Second, an amendment would need to expand the scope of Rule 106 to cover incomplete unrecorded oral statements.

Finally, an amendment should preserve an adversary's right to contemporaneous completion in appropriate circumstances, while expressly granting flexibility to permit delayed completion when necessary.

An amended Rule 106 could be drafted as follows:

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Statements

a) Introducing the Statement. If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction of or may introduce ~~require the introduction, at that time, of~~ any other part—or any other ~~writing or recorded~~ statement—that

248. *See, e.g.*, CONN. CODE EVID. Sec. 1-5(b) commentary ("Unlike subsection (a), subsection (b) does not involve the contemporaneous introduction of evidence. Rather, it recognizes the right of a party to subsequently introduce another part or the remainder of a statement previously introduced in part by the opposing party under the conditions prescribed in the rule.").

249. *See supra* note 152.

250. Many thanks to Ed Cheng and Brooke Bowerman for helpful feedback on an earlier draft of our proposed amendment language. We modified our proposed language slightly based upon their sage observations. *See* Edward K. Cheng & Brooke Bowerman, *Completing the Quantum of Evidence*, 105 MINN. L. REV. HEADNOTES (forthcoming 2021).

in fairness ought to be considered together with the initially introduced statement. ~~at the same time~~ The adverse party may do so even if the completing statement is otherwise inadmissible under the rule against hearsay.

b) Timing the Introduction. The completing statement should be admitted at the same time as the initial statement. But the court may, in its discretion, allow completion at a later time.

An Advisory Committee note to an amended rule should emphasize the fairness-forfeiture justification for allowing a completing remainder to be admitted on the same basis as the originally introduced statement and highlight the inequities in the precedent that has prevented completion on hearsay grounds. The note should make clear that some remainders *may* create a fair and accurate picture of a previously introduced statement if they are introduced only for their nonhearsay value in showing context. For example, if the original partial statement was introduced only to show its *effect* on some party to the case, a remainder may need to be introduced only for a similar nonhearsay purpose to give an accurate picture of the impact of the statement. But to the extent that the original statement was presented for its truth, a completing remainder required by fairness should be available for the same purpose.

The Advisory Committee note should also explain that the amendment brings oral statements within the protection of the Rule to collect completion rights under a single user-friendly rule and to avoid the need to consult Rule 611(a) or the common law. The note should point out that the completion of oral statements is already permitted in the majority of federal jurisdictions and that the addition of oral statements to Rule 106 does not alter the standards applicable to the completion of oral statements.

The Advisory Committee note should also instruct judges and lawyers as to the timing requirements of an amended Rule 106. It would need to emphasize the importance of immediate interruption with a completing remainder that has been the cornerstone of Rule 106 since its adoption. The retention of the right to contemporaneous completion in most circumstances is necessary to avoid a delay that might hamper an adversary's ability to avoid a misleading impression. Still, the note should signal that trial judges possess the discretion to permit or require delayed completion to avoid inefficient disruption or other problems of proof.

Finally, despite all the alterations to Rule 106 that such an amendment would bring, it would not and should not alter the

longstanding and narrow fairness standard that opens the door to completion in the first place. A Committee note should reiterate that fairness requires completion under the amended provision only when the initial presentation creates a misleading impression and distorts the true import of the statement—it is the misleading nature of the original presentation that justifies the forfeiture basis for completion. All of the revisions to Rule 106 would address the proper operation of completeness only after that narrow standard has been triggered.

CONCLUSION

Rule 106, as originally enacted, represented a "partial" codification of the common law doctrine of completion. It was designed primarily to address a timing concern and to allow interruption of an adversary's case to offer completing evidence. Accordingly, Rule 106 left thorny issues, such as the interaction between completion and the hearsay rule and the completion of oral statements, to the common law. Although a minimalist approach to evidence rulemaking is often preferable to preserve flexibility in the proof process, the lesson of the last forty-five years is that the "partial codification" of completion has caused serious confusion and sometimes genuine injustice. Remaining silent about the hearsay issue has caused courts like the Sixth Circuit to conclude that completing evidence must be "otherwise admissible," which appears to be at odds with the common law and with the drafters' intent and defeats the fundamental fairness purpose of the Rule. "Partial codification" has led to a court finding that the completion right is lost if not advanced contemporaneously, a holding that appears to be inconsistent with the intent of the drafters to *create* a right to interrupt, but not to eliminate a completion opportunity if not sought immediately. Finally, leaving "oral" statements out of the "partial codification" has led to some courts finding *no completion right* for oral statements and to others using the common law and Rule 611(a) to fill in the gaps, thus creating a fragmented rule of completion and a trap for the unwary.

The amendment to Rule 106 proposed in this Article would create a much fuller codification of completion than the partial one initially attempted. Indeed, it should mean that there is no common law of completeness remaining. That move is needed to resolve the ambiguities and inaccuracies the partial codification has engendered. An incomplete rule of completeness has proven to be an evidentiary irony that has hampered the just and efficient operation of the trial process. This nagging and important issue is addressed by amending Rule 106

to provide a meaningful remedy for a misleading presentation of a statement.